US Civil Procedure For International Students:

A Strategic and Comparative Perspective

2020 Edition

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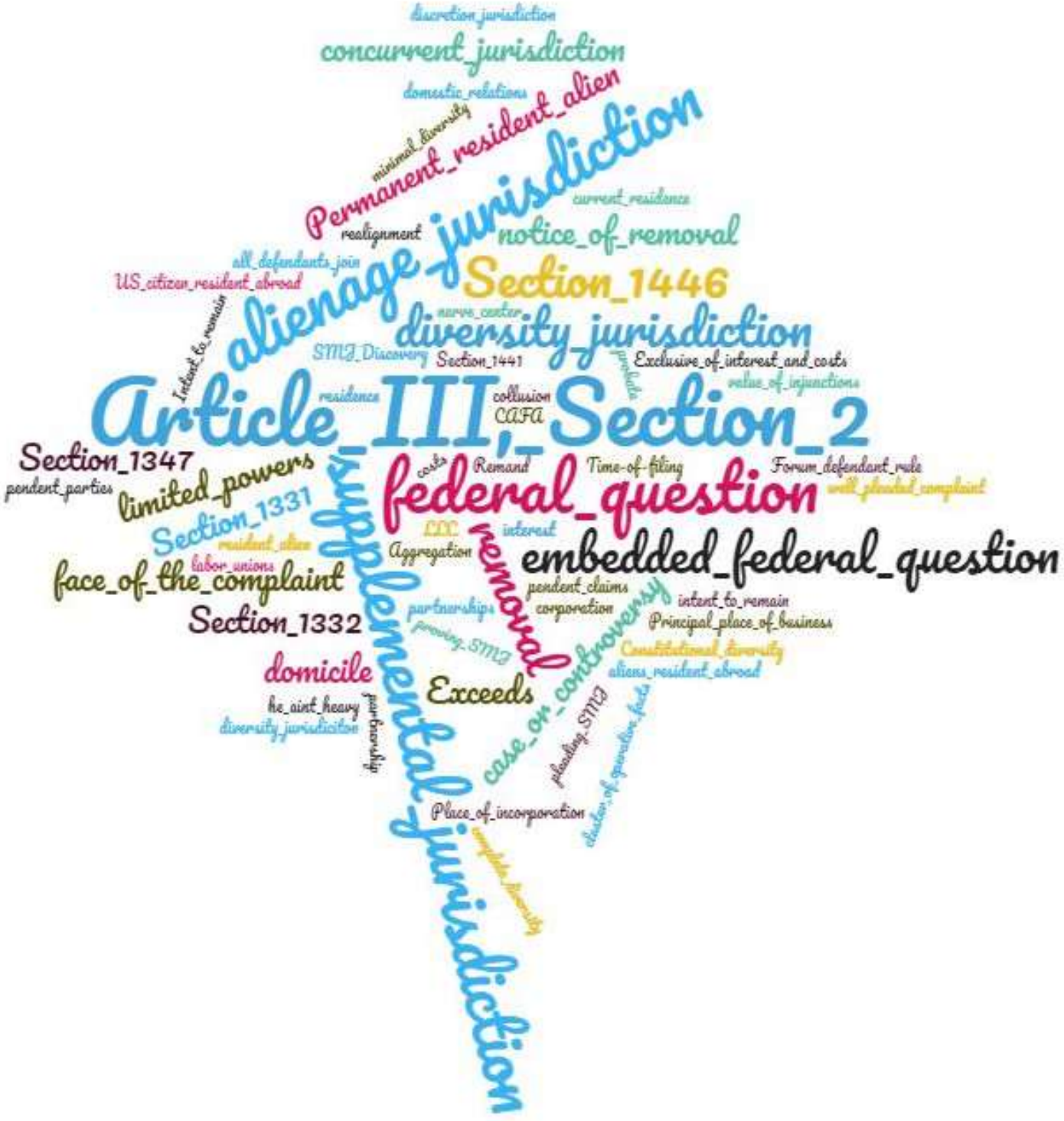
Contents

1 Quarter 3 Overview and Copyright Info

This quarter we pick up where we left off at the end of Quarter One. As before, the goal is to help you become great lawyers. We will highlight those exceptional aspects of US practice that require attention for those from other systems, and also touch periodically on the role of ethical duties in the development of US litigation.

Copyright Information

2 Subject Matter Jurisdiction



2.1 Overview - The Constitutional Basis

Federal subject matter jurisdiction involves a fundamental aspect of American constitutional governance – the federal government is a government of limited powers. Put differently, the federal government in the United States can only exercise those powers granted to it under the Constitution. While in many areas constitutional amendments such as the 14th Amendment and judicial interpretations have expanded federal power so as to make it seem almost unlimited, in the area of the judicial power limitations on federal power remain very much alive.

The U.S. Constitution sets forth the judicial function of the federal government in Article 3. Article 3, Section 2, lists the kinds of cases the federal government may entertain in its courts. No cases can be heard by federal courts that are not included in the categories identified in Article 3, Section 2.

Unlike the Constitutional limitations on judicial power that we have looked at previously (personal jurisdiction and notice), subject matter jurisdiction is not waivable by the parties. It is not possible to consent to subject matter jurisdiction when it is absent or doubtful. Put differently, the interest here is in limiting the reach of the federal government to the Constitutional scope, and it is not within the power of any litigant, even the government, to extend that power through consent. If at any stage of litigation a lack of subject matter jurisdiction is recognized, the case must be dismissed.

We will not examine every type of case that Section 2 authorizes for federal court. We will limit our review to federal question cases, and cases that involve diversity or alienage jurisdiction. In addition, we will look at supplemental jurisdiction, which is when the court can exercise jurisdiction over aspects of the case or controversy that might not on their own qualify for federal jurisdiction, and removal processes, which allow cases to be moved from state courts to federal courts in certain situations.

As we have seen before, subject matter jurisdiction involves Constitutional and statutory layers. In addition to the Constitutional grant, there must be an enabling statute which grants and sometimes limits the power of federal courts to hear cases that fall within the Article 3, Section 2 grant.

In many cases, both state courts and federal courts could entertain the same case. Put differently, federal courts and state courts often have what is called concurrent jurisdiction, where it is up to the parties to decide whether the case will proceed in federal court or state court. As you might imagine, such forum choice can have important strategic dimensions.

One term that might prove confusing in this context is 'general jurisdiction.' You remember that term from our discussion of personal jurisdiction. Here, it means something different. Just as federal courts are courts of 'limited jurisdiction,' state court systems are courts of 'general jurisdiction' in the sense that their reach is not limited by a Constitutional grant. Unless a statute or the Constitution takes a case away from a state court, the state courts have the power to resolve the case.

To further complicate things, while state court systems are courts of general jurisdiction, not every court in a state court system will be one of general jurisdiction. Some courts in the state system have a limited purpose - hearing divorce cases or traffic violations, for example. Often, the main state trial courts - sometimes called Circuit Courts or Superior Courts or Courts of Common Pleas, although to be extra confusing New York calls its trial courts Supreme Courts - are referred to as courts of general jurisdiction because they are empowered under state law to hear a full range of cases.

Don't let the terms lead you astray. Keep in mind the basic principle - federal courts are limited in their power, and can only hear certain kinds of cases. In the section that follows, we will explore that in more detail. For the most part, you will find this

complicated with lots of rules, but not hard to understand. Keep in mind that forum selection can be an important and sometimes outcome-determining tool in the litigator's toolbox, so this is worth understanding well.

2.2 Article III, Section 2

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.

2.3 Capron v. Van Noorden, 6 U.S. (2 Cranch) 126 (1804)

Feb Term 1804.

Opinion

A plaintiff may assign for error the want of jurisdiction in that court to which he has chosen to resort.

A party may take advantage of an error in his favor, if it be an error of the Court.

The Courts of the U.S. have not jurisdiction unless the record shews that the parties are citizens of different states, or that one is an alien, &c.

Error to the Circuit Court of North Carolina. The proceedings stated Van Noorden to be late of Pitt county, but did not allege Capron, the plaintiff, to be an alien, nor a citizen of any state, nor the place of his residence.

Upon the general issue, in an action of trespass on the case, a verdict was found for the defendant, Van Noorden, upon which judgment was rendered.

The writ of Error was sued out by Capron, the plaintiff below, who assigned for error, among other things, first "That the circuit court aforesaid is a court of limited jurisdiction, and that by the record aforesaid it doth not appear, as it ought to have done, that either the said George Capron, or the said Hadrianus Van Noorden was an alien at the time of the commencement of said suit, or at any other time, or that one of the said parties was at that or any other time, a citizen of the state of North Carolina where the suit was brought, and the other a citizen of another state; or that they the said George and Hadrianus were for any cause whatever, persons within the jurisdiction of the said court, and capable of suing and being sued there."

And secondly, "That by the record aforesaid it manifestly appeareth that the said Circuit Court had not any jurisdiction of the cause aforesaid, nor ought to have held plea thereof, or given judgment therein, but ought to have dismissed the same, whereas the said Court hath proceeded to final judgment therein."

Harper, for the plaintiff in error, stated the only question to be whether the plaintiff had a right to assign for error, the want of jurisdiction in that Court to which he had chosen to resort.

It is true, as a general rule, that a man cannot reverse a judgment for error in process or delay, unless he can shew that the error was to his disadvantage; but it is also a rule, that he may reverse a judgment for an error of the Court, even though it be

for his advantage. As if a verdict be found for the debt, damages, and costs; and the judgment be only for the debt and damages, the defendant may assign for error that the judgment was not also for costs, although the error is for his advantage.

Here it was the duty of the Court to see that they had jurisdiction, for the consent of parties could not give it.

It is therefore an error of the Court, and the plaintiff has a right to take advantage of it. 2 Bac.Ab.Tit. Error. (K.4.)—8 Co. 59.(a) Beecher's case.—1 Roll.Ab. 759—Moor 692.—1 Lev. 289. Bernard v. Bernard.

The defendant in error did not appear, but the citation having been duly served, the judgment was reversed.

2.4 Notes on Capron v Van Noorden

1. ***Capron v. Van Noorden.*** The antiquated language and differences in the judicial system in *Capron v. Van Noorden* can make it a bit difficult to get started with the case. The facts are quite simple, though: the plaintiff filed a case in federal court, making inadequate jurisdictional allegations; the trial court accepted the case and ruled for the defendant; the plaintiff then sought to have the suit dismissed on grounds that there was never federal subject matter jurisdiction. Even though the plaintiff contributed mightily to the situation, in the end it was the duty of the court to establish that federal subject matter jurisdiction existed. As the allegations were inadequate, there was no federal subject matter jurisdiction, and the case had to be dismissed. Because the court never had subject matter jurisdiction, the proceedings in the trial court were void and of no effect.

2. **Basic Principles.** Some very basic principles are present in *Capron v. Van Noorden.* First, a federal court must have subject matter jurisdiction or it cannot hear a case - even if the parties wish it to. Second, the basis for jurisdiction must appear in the pleadings or the record; the court cannot assume it or rely upon conclusory allegations. Third, it is the responsibility of the court to establish subject matter jurisdiction. It must, own its own, *sua sponte*, take the steps necessary to determine jurisdiction and to dismiss the case if jurisdiction is not shown. The parties can raise the issue at any time, and the court should address it on its own if the parties fail to note the problem.

2.5 Diversity and Alienage SMJ

2.5.1 28 U.S. Code § 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) citizens of a State and citizens or subjects of a foreign state, except that the district courts 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; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

(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) [Omitted for Now]

2.5.2 Determining Domicile

2.5.2.1 Mas v. Perry

AINSWORTH, Circuit Judge:

This case presents questions pertaining to federal diversity jurisdiction under 28 U.S.C. § 1332, which, pursuant to article III, section II of the Constitution, provides for original jurisdiction in federal district courts of all civil actions that are between, *inter alia,* citizens of different States or citizens of a State and citizens of foreign states and in which the amount in controversy is more than $10,000.

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 the degree of Doctor of Philosophy. 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.1 The motion was denied by the district court. Before this Court, appellant challenges the final judgment below solely on jurisdictional grounds, contending that appel-lees 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 *1399required 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, 7 U.S. (3 Cranch) 267, 2 L.Ed. 435 (1806)[…] 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. […] Jurisdiction is unaffected by subsequent changes in the citizenship of the parties. […]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 . " Stine v. Moore, 5 Cir., 1954, 213 F.2d 446, 448. 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. Mitchell v. United States, 88 U.S. (21 Wall.) 350, 22 L.Ed. 584 (1875); Sun Printing & Publishing Association v. Edwards, 194 U.S. 377, 24 S.Ct. 696, 48 L.Ed. 1027 (1904).

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, 1 J. Moore, Moore's Federal Practice ¶ 0.74 [6. — 1], at 708.51 (1972), 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, *see* Chicago & Northwestern Railway Co. v. Ohle, 117 U.S. 123, 6 S.Ct. 632, 29 L.Ed. 837 (1886); Bell v. Milsak, W.D.La., 1952, 106 F.Supp. 219— 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 *1400not 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. *See* C. Wright, Federal Courts 80 (1970). 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. *See* Linscott v. Linscott, S.D.Iowa, 1951, 98 F.Supp. 802, 804; Juneau v. Juneau, 227 La. 921, 80 So.2d 864, 867 (1954).

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. *See* Chicago & Northwestern Railway Co. v. Ohle, 117 U.S. 123, 6 S.Ct. 632, 29 L.Ed. 837 (1886). 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. *See* Hendry v. Masonite Corp., 5 Cir., 1972, 455 F.2d 955, cert. denied, 409 U. S. 1023, 93 S.Ct. 464, 34 L.Ed.2d 315. Until she acquires a new domicile, she remains a domiciliary, and thus a citizen, of Mississippi. *See* Mitchell v. United States, 88 U.S. (21 Wall.) 350, 352, 22 L.Ed. 584, 587-588 (1875); Sun Printing & Publishing Association v. Edwards, 194 U.S. 377, 383, 24 S.Ct. 696, 698, 48 L.Ed. 1027 (1904); Welsh v. American Security Co. of New York, 5 Cir., 1951, 186 F.2d 16, 17.2

Appellant also contends that Mr. Mas's claim should have been dismissed for failure to establish the requisite jurisdictional amount for diversity cases of more than $10,000. In their complaint Mr. and Mrs. Mas alleged that they had each been damaged in the amount of $100,000. As we have noted, Mr. Mas ultimately recovered $5,000.

It is well settled that the amount in controversy is determined by the amount claimed by the plaintiff in good faith. KVOS, Inc. v. Associated Press, 299 U.S. 269, 57 S.Ct. 197, 81 L. Ed. 183 (1936); 1 J. Moore, Moore's Federal Practice ¶ 0.92 [1] (1972). Federal jurisdiction is not lost because a judgment of less than the jurisdictional amount is awarded. Jones v. Landry, 5 Cir., 1967, 387 F.2d 102; C. Wright, Federal Courts 111 (1970). That Mr. Mas recovered only $5,000 is, therefore, not compelling. As the Supreme Court stated in St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 288-290, 58 S.Ct. 586, 590-591, 82 L.Ed. 845:

> [T]he sum claimed by the plaintiff controls if the claim is apparently made in good faith.
>
> It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal. The inability of the plain*1401tiff to recover an amount adequate give the court jurisdiction does not show his bad faith or oust the jurisdiction. . to
>
> . . . His good faith in choosing the federal forum is open to challenge not only by resort to the face of his complaint, but by the facts disclosed at trial, and if from either source it is clear that his claim never could have amounted to the sum necessary to give jurisdiction there is no injustice in dismissing the suit.

Having heard the evidence presented at the trial, the district court concluded that the appellees properly met the requirements of section 1332 with respect to jurisdictional amount. Upon examination of the record in this case, we are also satisfied that the requisite amount was in controversy. *See* Jones v. Landry, 5 Cir., 1967, 387 F.2d 102.

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.

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. The original complaint in this case was filed within several days of Mr. and Mrs. Mas's realization that they had been watched through the mirrors, quite some time before they moved to Park Ridge, Illinois. Because the district court's jurisdiction is not affected by actions of the parties subsequent to the commencement of the suit, […] the testimony concerning Mr. and Mrs. Mas's moves after that time is not determinative of the issue of diverse citizenship, though it is of interest insofar as it supports their lack of intent to remain permanently in Louisiana.

2.5.2.2 Sheehan v. Gustafson

John D. SHEEHAN, Sr., Appellant, v. Deil O. GUSTAFSON, Appellee.

BOWMAN, Circuit Judge.

John D. Sheehan, Sr., appeals the order of the District Court1 dismissing his action for lack of subject matter jurisdiction. We affirm.

Sheehan, a Nevada citizen, commenced an action in February 1991 against Deil 0. Gustafson alleging breach of an oral contract involving the proceeds of the sale of the Tropicana Hotel and Casino in Las Vegas, Nevada. Sheehan brought his action in federal court in Minnesota, asserting that diversity jurisdiction was proper under 28 U.S.C. § 1332(a) (1988), because Gustaf-son, according to the complaint, was a citizen of Minnesota. Gustafson moved to dismiss the complaint for lack of subject matter jurisdiction. The District Court granted that motion in July 1991, holding that Gustafson, like Sheehan, was a citizen of Nevada and thus there was no diversity of the parties. Sheehan appeals.

A district court's conclusion as to citizenship for purposes of federal diversity jurisdiction is a mixed question of law and fact (albeit primarily fact). *[…]*The findings of fact upon which the legal conclusion of citizenship is based thus are subject to review by this Court under the clearly erroneous standard. *Id.*

The statute conferring diversity jurisdiction in federal court requires that the parties be citizens of different states. 28 U.S.C. § 1332(a)(1). Section 1332(a) must be strictly construed, in view "of the constitutional limitations upon the judicial power of the federal courts, and of the Judiciary Acts in defining the authority of the federal courts when they sit, in effect, as state courts." *[…]* Thus the burden falls upon the party seeking the federal forum, if challenged, to demonstrate by a preponderance of the evidence that the parties are citizens of different states.[…] The District Court found facts that are not clearly erroneous and determined that Sheehan failed to carry his burden. We cannot say the court erred as a matter of law.

Courts look to the facts as of the date an action is filed to determine whether or not diversity of citizenship exists between the parties. *[…]*"For purposes of diversity jurisdiction, the terms 'domicile' and 'citizenship' are synonymous." *[…]*Therefore, to determine if Gustafson is a citizen of a state other than Nevada, the proper analysis is the two-part test for domicile: Gustafson's presence in the purported state of domicile and his intention to remain there indefinitely. *[…]*

The facts of this case, as found by the District Court, indicate that in February 1991 Gustafson had a presence in both Nevada and Minnesota (as well as California and Florida). Gustafson was a citizen of Minnesota until 1973 when he moved to Las Vegas, Nevada, to manage the Tropicana Hotel, which he had purchased in 1972. In 1975, he sold eighty percent of his interest in the hotel. In 1983, Gustafson was convicted in federal court in Minnesota of misappropriation of bank funds and was incarcerated from 1984 to 1987.

The facts found by the District Court that are evidence of Minnesota domicile as *1216of February 1991 include Gustafson's bank and investment accounts in the state; ownership of property in Minnesota by a corporation controlled by Gustafson, including a condominium whose address Gustafson uses as his own in his monthly reports to his probation officer; Gustafson's use of corporate vehicles when in the state; location of Gustafson's secretary and office in Minneapolis, where he regularly checks for messages and mail; location of Gustafson's physician, dentist, and attorney in the state; and his use of Minnesota addresses and bank accounts for some of his Nevada businesses.

The facts found supporting Nevada domicile include Gustafson's holding a Nevada driver's license since 1973 and the registration of his personal vehicles in the state; Gustafson's filing of Minnesota tax returns as a non-resident since 1974, with a Nevada permanent address shown; Gustafson's voter registration in Nevada since 1973; his current valid passport showing a Nevada address; Gustafson's last will (dated July 2,1989) containing a statement that he is domiciled in Clark County, Nevada; use of his parents' home address in Boulder, Nevada, as Gustafson's permanent address since the mid-1980's; and current (as of 1991) construction of a new home on his ranch in Ely, Nevada.2

The facts demonstrate Gustafson's presence and intent to remain in Nevada, that is, domicile in Nevada. Sheehan did not show by a preponderance of the evidence that Gustafson's domicile was in fact in Minnesota at the time suit was filed. Sheehan's evidence to show domicile in Minnesota primarily demonstrates Gustafson's business contacts and occasional presence in the state; the Nevada contacts are more indicative of intent to remain.

Finding no clearly erroneous findings of fact and no error of law, we affirm the decision of the District Court.

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. The historical dates included here demonstrate that the actions of Gustafson that connect him to Nevada were not recently undertaken to avoid diversity jurisdiction in Minnesota.

2.5.2.3 Belleville Catering Co. v. Champaign Market Place, L.L.C.

BELLEVILLE CATERING CO., et al., Plaintiffs-Appellants, v. CHAMPAIGN MARKET PLACE, L.L.C., Defendant-Appellee.

EASTERBROOK, Circuit Judge.

Once again litigants' insouciance toward the requirements of federal jurisdiction has caused a waste of time and money. […]

Invoking the diversity jurisdiction, see 28 U.S.C. § 1332, the complaint alleged that the corporate plaintiff is incorporated in Missouri and has its principal place of business there, and that the five individual plaintiffs (guarantors of the corporate plaintiffs obligations) are citizens of Missouri. It also alleged that the defendant is a "Delaware Limited Liability Company, with its principle [sic] place of business in the State of Illinois." Defendant agreed with these allegations and filed a counterclaim. The parties agreed that a magistrate judge could preside in lieu of a district judge, see 28 U.S.C. § 636(c), and the

magistrate judge accepted these jurisdictional allegations at face value. A jury trial was held, ending in a verdict of $220,000 in defendant's favor on the counterclaim. Plaintiffs appealed; the jurisdictional statement of their appellate brief tracks the allegations of the complaint. Defendant's brief asserts that plaintiffs' jurisdictional summary is "complete and correct."

It is, however, transparently incomplete and incorrect. Counsel and the magistrate judge assumed that a limited liability company is treated like a corporation and thus is a citizen of its state of organization and its principal place of business. That is not right. Unincorporated enterprises are analogized to partnerships, which take the citizenship of every general and limited partner. See *Carden v. Arkoma Associates,* 494 U.S. 185, 110 S.Ct. 1015, 108 L.Ed.2d 157 (1990). In common with other courts of appeals, we have held that limited liability companies are citizens of every state of which any member is a citizen. See *Cosgrove v. Bartolotta,* 150 F.3d 729 (7th Cir.1998). So who are Champaign Market Place LLC's members, and of what states are they citizens? Our effort to explore jurisdiction before oral argument led to an unexpected discovery: Belleville Catering, the corporate plaintiff, appeared to be incorporated in Illinois rather than Missouri!

At oral argument we directed the parties to file supplemental memoranda addressing jurisdictional details. Plaintiffs' response concedes that Belleville Catering is (and always has been) incorporated in Illinois. Counsel tells us that, because the lease between Belleville Catering and Champaign Market Place refers to Belleville Catering as "a Missouri corporation," he assumed that it must be one. That confesses a violation of Fed. *641R.Civ.P. 11. People do not draft leases with the requirements of § 1332 in mind — perhaps the lease meant only that Belleville Catering did business in Missouri — and counsel must secure jurisdictional details from original sources before making formal allegations. That would have been easy to do; the client's files doubtless contain the certificate of incorporation. Or counsel could have done what the court did: use the Internet. Both Illinois and Missouri make databases of incorporations readily available. Counsel for the defendant should have done the same, instead of agreeing with the complaint's unfounded allegation.

Both sides also must share the blame for assuming that a limited liability company is treated like a corporation. In the memorandum filed after oral argument, counsel for Champaign Market Place relate that several of its members are citizens of Illinois. Citizens of Illinois thus are on both sides of the suit, which therefore cannot proceed under § 1332. Moreover, for all we can tell, other members are citizens of Missouri. Champaign Market Place says that one of its members is another limited liability company that "is asserting confidentiality for the members of the L.L.C." It is not possible to litigate under the diversity jurisdiction with details kept confidential from the judiciary. So federal jurisdiction has not been established. The complaint should not have been filed in federal court (for Belleville Catering had to know its own state of incorporation), the answer should have pointed out a problem (for Champaign Market Place's lawyers had to ascertain the legal status of limited liability companies), and the magistrate judge should have checked all of this independently (for inquiring whether the court has jurisdiction is a federal judge's first duty in every case).

Failure to perform these tasks has the potential, realized here, to waste time (including that of the put-upon jurors) and run up legal fees. Usually parties accept the inevitable and proceed to state court once the problem becomes apparent. Perhaps the most extraordinary aspect of this proceeding, however, is the following passage in defendant's post-argument memorandum:

> Defendant-Appellee, Champaign Market Place L.L.C., prays that this Court in the exercise of its Appellate jurisdiction decide the case on the merits and affirm the judgment entered on the jury's verdict. Surely in

> the past this Court has decided a case on the merits where an examination of the issue would have shown a lack of subject matter jurisdiction in the District Court. It would be unfortunate in the extreme for Cham-paign Market Place L.L.C. to lose a judgment where Belleville Catering Company, Inc. misrepresented (albeit unintentionally) its State of incorporation in its Complaint.... [T]here was no reason for Champaign Market Place L.L.C. to question diversity of citizenship, since it is not, and never has been, a citizen of Missouri.

This passage — and there is more in the same vein — leaves us agog. Just where do appellate courts acquire authority to decide on the merits a case over which there is no federal jurisdiction? The proposition that the Seventh Circuit has done so in the past — a proposition unsupported by any citation — accuses the court of dereliction combined with usurpation. "A court lacks discretion to consider the merits of a case over which it is without jurisdiction". *Firestone Tire & Rubber Co. v. Risjord,* 449 U.S. 368, 379, 101 S.Ct. 669, 66 L.Ed.2d 571 (1981). And while counsel feel free to accuse the judges of *ultra vires* conduct, and to invite some more of it, they exculpate themselves. Lawyers for *642defendants, as well as plaintiffs, must investigate rather than assume jurisdiction; to do this, they first must learn the legal rules that determine whose citizenship matters (as defendant's lawyers failed to do). And no entity that claims confidentiality for its members' identities and citi-zenships is well situated to assert that it could believe, in good faith, that complete diversity has been established.

One more subject before we conclude. The costs of a doomed foray into federal court should fall on the lawyers who failed to do their homework, not on the hapless clients. Although we lack jurisdiction to resolve the merits, we have ample authority to govern the practice of counsel in the litigation. […] The best way for counsel to make the litigants whole is to perform, without additional fees, any further services that are necessary to bring this suit to a conclusion in state court, or via settlement. That way the clients will pay just once for the litigation. This is intended not as a sanction, but simply to ensure that clients need not pay for lawyers' time that has been wasted for reasons beyond the clients' control.

The judgment of the district court is vacated, and the proceeding is remanded with instructions to dismiss the complaint for want of subject-matter jurisdiction.

2.5.2.4 Notes on Diversity of the Parties

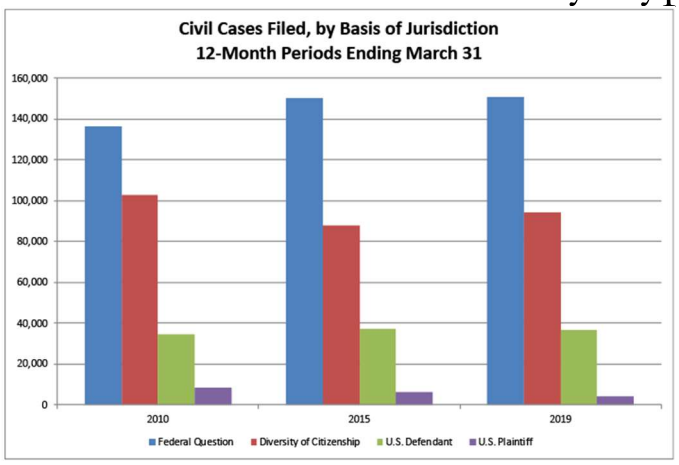
1. **Complete versus Minimal Diversity.** *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806) announced a rule of complete diversity. At the time, it was unclear whether the rule was based on the Consitution or on the predecessor statute to Section 1332. It is now clear that the case is to be read as one of statutory interpretation, with the Constitution only requiring minimal diversity. *See State Farm v. Tashire*, 386 U.S. 523 (1967). You might ask: what is complete diversity and what is minimal diversity? Complete diversity requires that no defendant be from the same state as any plaintiff. For example, NY & NJ v. PA & DE satisfies complete diversity; NY & NJ v. PA & NJ does not. Minimal diversity merely requires that some defendant be from a different state from some plaintiff. NY & NJ v. NJ does satisfy minimal diversity. Later on in the course we will discuss a part of Section 1332 we are skipping over now, the Class Action Fairness Act. This statute allows certain types of class actions to be brought in federal court where there is only minimal diversity. For garden variety diversity claims, however, full diversity is required.
2. **Determining Domicile Generally.** The test for domicile for individuals has two elements: 1) residence in a state with 2) intent to remain 'indefinitely.' Indefinitely does not mean an uncertain period of time but with a departure expected (for example, 'until I finish my degree'); it means an intent to remain perhaps permanently. Once fixed, it takes more than a change of residence to reset domicile. There must be an intention to stay indefinitely. Without that intent, domicile remains where it has been. What would have happened in *Mas* if the plaintiff had decided at any point while she was resident in Lousiana that she wanted to make Louisiana her permanent home? What would her domicile be if after the facts in this case she moved to, say, Ohio, but did not form an intent to remain indefinitely?

3. **Determining Domicile for Corporations and Unincorporated Entities.** As Judge Easterbrook reminds us, the test for determining domicile depends on the nature of the party. Individuals are treated differently from corporations, which are treated differently from partnerships, LLCs, and other unincorporated associations such as labor unions. For unincorporated associations, we look to the residence of each partner or member. As a practical matter, for some organizations such as national labor unions this makes bringing a diversity claim essentially impossible as there are likely to be members in every state. For corporations, the rule makes clear that there are possibly two domiciles, very similar to what we saw in *Daimler* - the state of incorporation and the principal place of business. In *Hertz Corp. v. Friend*, 559 U.S. 77 (2010), the Court made clear that the principal place of business is not where a corporation conducts the most business or makes the most sales, but where its 'nerve center' is. As a practical matter, in almost every case the nerve center will be the location of the corporate headquarters.
4. **Note on LLCs:** You might not have covered Limited Liability Companies (LLCs) in Business Associations, which often focuses on corporations and partnerships. LLCs are a relatively recent innovation in company structure, having originated in the latter part of the 20th century in the US. They combine some aspects of partnerships that are often attractive to investors (such as tax passthroughs so losses are deductible by investors) and aspects of corporations that are attractive as well (such as limited liability). They have become a very popular structure for smaller, privately held companies. Beyond LLCs, partnerships, and corporations, note that the variety of business organizations in the US can be bewildering. It is important to pay close attention to what the structure is. The situation gets more complicated, and beyond the scope of this course, when foreign business entities are involved. China has LLCs, for example. What would be the domicile of a Chinese LLC that has US domiciliaries and Chinese domiciliaries as members? So far as we know, no case to date has confronted that.
5. **Time for determining domicile of parties.** People and companies, including parties and potential parties to litigation, sometimes move. At what time do we assess domicile? At the time the action arose? At the time the lawsuit was filed? At the time the court is deciding the issue? The answer is simple - at the time the lawsuit is filed. Subsequent moves will not divest the court of jurisdiction. Moves that take place before filing, even if they have the effect of either creating or denying diversity, will not normally be questioned so long as the move is a real move in good faith and not a pretense. What would be the analysis if Mas had moved to Ohio, permanently and with an intention to stay, before filing suit? What would the analysis be if after the facts giving rise to the lawsuit she had decided to remain in Lousiana indefinitely.
6. **Pleading Domicile.** The party asserting a claim must plead those facts essential to establish subject matter jurisdiction. Because courts are not free to hear cases that fall outside the limited subject matter reach of the federal courts, this is not something federal judges will ignore. A litigant who makes conclusory or unclear allegations of subject matter jurisdiction may - and probably will - be allowed an opportunity to amend the complaint to make the allegations sufficient, but if the litigant fails to get the job done the case will be dismissed. This will happen even if the true, but unalleged facts, would support a finding of subject matter jurisdiction if the court knew about them. *See Sienna Ventures, LLC v. Halley Equipment Leasing*, LLC, 2018 WL 3153475 (E.D.N.Y Apr. 2, 2018) (Dismissing for lack of subject matter jurisdiction where after three tries plaintiff's jurisdictional allegations of "subject matter jurisdiction exists in this case as Sienna Ventures, LLC is a New York Limited Liability Company and its sole member is a citizen and resident of New York, and Halley Equipment Leasing, LLC is a Texas Limited Liability Company" failed to state the domiciles of all the LLC members).
7. **Proving Domicile.** As both *Mas* and *Sheehan v. Gustafson* note, domicile is a two part test - presence in a state and intent to remain. But how do we determine domicile when it is disputed? Do we just take a party's word at face value? *Sheehan v. Gustafson* makes several things clear. First, it is the burden of the claimant to establish subject matter jurisdiction. Second, we do not simply accept assertions at face value, but look to evidence such as where one votes or has a driver's license to inform the assessment. Third, while the burden is on the claimant, if the issue is disputed the court will normally allow discovery in order to establish the facts (with the costs and process of discovery something that should be taken into account before domicile is challenged). Finally, the determination is one within the discretion of the trial court, and reviewing courts will apply an abuse of discretion standard when reviewing the determination of the trial court. In some cases, and *Sheehan v. Gustafson* is an excellent example, determining residence can be far from straightforward. You will note from *Sheehan v. Gustafson* that a number of documents can be used to show domicile , from passports to driver's licenses to voter registrations, and they may not be consistent. Compare that to China, where official residency is determined by a hukou document, with important consequences that flow from the official documentation.
8. **U.S. Citizens Domiciled in No State:** Can diversity or alienage jurisdiction be asserted over someone who is a U.S. citizen but not domiciled in any state in the U.S.? In the age of globalization, this has become not uncommon, as U.S. citizens establish residency in foreign countries and for tax or other reasons have no connection with any one US state. Are they citizens of a state? Are they subjects or citizens of a foreign country? If you think about it, you will see that they are neither - still US citizens but not resident in any state.
9. **Why Diversity?** Diversity jurisdiction has long been controversial. After all, in every case a state court could also resolve the dispute, and there are those who argue (mostly not experienced trial lawyers) that prejudice against out of

state parties is a thing of the past. Maintaining diversity access has many costs. First, it complicates things procedurally. As you should have noticed over and over again in the progression of this course, battling over forum selection is something lawyers spend a lot of time engaged in, and diversity jurisdiction creates opportunities for extensive procedural battles related to such issues. It also imposes significant burdens on the federal courts. In 2019, of 286,289 total cases filed in district court that year 94,206 - or nearly 33 percent - were diversity cases. Arguments are also made that diversity cases are more time consuming than the average case, and more likely to go trial. Diversity cases also shifts determination of state law issues to the federal courts, whereas without diversity at least some of these state legal issues would be resolved within the state system whose law is involved. On the other hand, diversity jurisdiction allows national procedural tools such as multidistrict litigation to be employed on mass tort or other aggregate cases. Many lawyers and parties also passionately believe that the days of local prejudice against outsiders are not an artifact of history but remain a live concern. Then, there are those who appreciate and value the forum selection potential - they might prefer a federal jury venire, which tends to draw from a wider area than a state jury pool, or they may prefer federal judges, who tend to be highly capable. In any event, diversity jurisdiction abides, and you should not expect it to quickly or easily go away.

2.5.2.5

US Federal Court Cases By Type



2.5.2.6

Problems and Hypotheticals

See if you can work through the following problems. Answers will eventually be provided, but you will be much better prepared for the exam (and life as a lawyer who must resolve such issues with no one giving you the answer) if you make the effort to solve problems like this on your own.

Judy Moore was born and raised in the university town of Oxford, Mississippi, where both her parents were professors. At age 18 she enrolled in college in Wellesley, Massachusetts, and after graduation with a degree in economics began a graduate program in Cambridge, Massachusetts. Early on during her ten years in Massachusetts she learned that she didn't like snow, and hoped that when she graduated she could secure a teaching job in a warmer climate. Near the end of her doctoral studies, she traveled for a job interview to Athens, Georgia, where she was offered and quickly accepted a job as a university professor. She liked Athens, and hoped she could spend the rest of her life there. While in Athens, unfortunately, she was injured when a car owned by LaGlace Enterprises struck her. The car was driven by Justah Dope, a student at the University of Georgia. Dope was originally from Chattanooga, Tennessee, and planned to move to New York, New York, to pursue a career as an actor upon graduation, but he has little likelihood of actually securing a job offer there and may be forced to remain in Georgia indefinitely. LaGlace Enterprises is a limited liability company created under the laws of Mississippi and headquartered in Columbia, South Carolina. The members (owners) are Perry Miroir, a resident of Tuscaloosa, Alabama, and Edgar Espejo, a

resident of Athens, Georgia. Once back in Massachusetts, Moore consulted with a lawyer, who advised her to bring a lawsuit. The lawsuit was filed in federal district court in Georgia shortly before Moore obtained her PH.D. degree against Dope and LaGlace Enterprises. Shortly after the lawsuit was filed but before the judge could hear a motion to dismiss for lack of subject matter jurisdiction, Moore moved to Georgia to start her new job. With regard only to the diversity of the parties, please analyze the issues.

MuchoDinero, LLC, is a limited liability company created under the laws of Nevada and headquartered in Tucson, Arizona. It has members (owners) from Arizona, California, and Utah. LotsaMonie, LLC, is a limited liability company created under the laws of Washington state and headquartered in Portland, Oregon. It has members from Oregon, Washington state, and Idaho. MuchoDinero filed a suit against LotsaMonie in federal district court in Portland. The complaint alleged "subject matter jurisdiction exists in this case as MuchoDinero is a Nevada Limited Liability Company and LotsaMonie is a Washington state Limited Liability Company." After giving MuchoDinero repeated opportunities to amend its complaint, the judge dismissed the lawsuit for lack of subject matter jurisdiction. Did the judge act properly?

2.5.3 Amount-in-Controversy

2.5.3.1 JTH Tax, Inc. v. Frashier

JTH TAX, INCORPORATED, d/b/a Liberty Tax Service, Plaintiff-Appellant, v. Harry F. FRASHIER, II, Defendant-Appellee.

DIANA GRIBBON MOTZ, Circuit Judge:

JTH Tax, Inc. ("Liberty") appeals from an order dismissing its complaint for lack of subject matter jurisdiction. Liberty contends that the district court erred in holding that its complaint failed to meet the $75,000 amount in controversy requirement for diversity jurisdiction under 28 U.S.C. § 1332(a). We agree and so reverse.

I.

Liberty franchises thousands of tax preparation offices nationwide. The dispute before us arises from its relationship with Harry Frashier, one of its franchisees. In 2006, Frashier signed a franchise agreement with Liberty granting him the right to operate Liberty Tax Service franchises in a designated area of West Virginia. In return, Frashier agreed to several post-termination provisions, including a covenant not to compete and a requirement that he return all customer lists and equipment to Liberty.

Frashier operated a Liberty franchise tax office without incident until 2008. On August 26 of that year, after Liberty had filed, but then dismissed, a lawsuit alleging Frashier's breach of the agreement, Frashier offered to sell Liberty a right of first refusal* for the purchase of Frashier's franchise territory for $80,000. When the parties failed to agree on the terms of a sale, Frashier closed his franchise, which prompted Liberty to terminate its agreement with Frashier.

This dispute centers on what happened next. On January 28, 2009, Liberty filed a complaint in the Eastern District of Virginia, seeking $80,000 in damages and a permanent injunction compelling Frashier's compliance with the post-termination provisions of the franchise agreement. Specifically, Liberty claimed that Frashier breached his post-termination duties by using his former office to support a competing tax enterprise and by failing to return the requisite materials to Liberty. Frashier responded that he merely leased office equipment and furniture to a different tax venture, actions he described as consistent with the agreement. He further claimed that he now offers only free tax preparation services to the indigent.

Liberty never amended its complaint, but in its subsequent motion for summary judgment, Liberty refined its damages calculation, seeking $60,456.25 in money damages and injunctive relief. The district court *sua sponte* dismissed Liberty's complaint for failure to meet the $75,000 amount in controversy requirement for diversity jurisdiction. When Liberty timely moved for alteration of the judgment under Federal Rule of Civil Procedure 59(e), the court denied the motion.

Liberty then noted this appeal. We review de novo the judgment of the district court dismissing the complaint for lack of subject matter jurisdiction. *See Pitt Cnty. v. Hotels.com, L.P.,* 553 F.3d 308, 311 (4th Cir.2009).638

II.

In most cases, the "sum claimed by the plaintiff controls" the amount in controversy determination. *St. Paul Mercury Indem. Co. v. Red Cab Co.,* 303 U.S. 283, 288, 58 S.Ct. 586, 82 L.Ed. 845 (1938). If the plaintiff claims a sum sufficient to satisfy the statutory requirement, a federal court may dismiss only if "it is apparent, *to a legal certainty,* that the plaintiff cannot recover the amount claimed." *Id.* at 289, 58 S.Ct. 586 (emphasis added).

Defendants, seeking dismissal of diversity actions for lack of a sufficient amount in controversy, must therefore shoulder a heavy burden. They must show "the legal impossibility of recovery" to be "so certain as virtually to negative the plaintiffs good faith in asserting the claim." *Wiggins v. N. Am. Equitable Life Assurance Co.,* 644 F.2d 1014, 1017 (4th Cir.1981) (internal quotation omitted). A mere dispute over the mathematical accuracy of a plaintiffs damages calculation does not constitute such a showing. *See McDonald v. Patton,* 240 F.2d 424, 425 (4th Cir.1957) (noting that plaintiffs may secure federal jurisdiction even when "it is apparent on the face of the claim" that the claim to the requisite amount is subject to a "valid defense").

With these controlling principles in mind, we turn to the case at hand.

III.

Courts generally determine the amount in controversy by reference to the plaintiffs complaint. *See Wiggins,* 644 F.2d at 1016 ("Ordinarily the jurisdictional amount is determined by the amount of the plaintiffs original claim, provided that the claim is made in good faith."). If the complaint in good faith alleges a sufficient amount in controversy, "[ejvents occurring subsequent" to the filing of the complaint "which reduce the amount recoverable below the statutory limit do not oust jurisdiction." *St. Paul Mercury,* 303 U.S. at 289-90, 58 S.Ct. 586.

Here, Liberty's complaint — which it has not amended — alleges $80,000 in damages, a sum sufficient to exceed the $75,000 amount necessary for diversity jurisdiction. Liberty's later downward adjustment made in its motion for summary judgment (but not in any amended complaint) does not constitute a "subsequent reduction of the amount claimed" sufficient to "oust the district court's jurisdiction." *Id.* at 295, 58 S.Ct. 586; *see also Griffin v. Red Run Lodge, Inc.,* 610 F.2d 1198, 1204 (4th Cir.1979). (holding that "[o]nce jurisdiction exists, subsequent events, such as the determination that one of the aggregated claims was without merit, do not destroy" jurisdiction).

In other words, jurisdiction turns not on ' the sum contained in Liberty's summary judgment motion, but on the good faith of the allegation in its complaint of an adequate jurisdictional amount. The district court did not find, nor has Frashier even argued, that Liberty made a bad faith claim of $80,000 in its complaint. Accordingly, the complaint appears sufficient to allege an adequate jurisdictional amount.

IV.

To be sure, even a plaintiff whose complaint alleges a sufficient amount in controversy cannot secure jurisdiction "if, from the proofs, the court is satisfied to a [legal] certainty that the plaintiff never was entitled to recover that amount." *St. Paul Mercury,* 303 U.S. at 289, 58 S.Ct. 586. But even if Liberty's reassessment of its damages demonstrated to a legal certainty that it could recover only the $60,456.25 requested in its summary judg*639ment motion, dismissal for lack of jurisdiction would still constitute error here.

This is so because, like requests for money damages, requests for injunctive relief must be valued in determining whether the plaintiff has alleged a sufficient amount in controversy. *See Hunt v. Wash. State Apple Adver. Comm'n,* 432 U.S. 333, 347, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977) ("In actions seeking declaratory or injunctive relief, it is well established that the amount in controversy is measured by the value of the object of the litigation."); *Glenwood Light & Water Co. v. Mut. Light, Heat & Power Co.,* 239 U.S. 121, 125, 36 S.Ct. 30, 60 L.Ed. 174 (1915) (finding jurisdiction by looking at future value generated by injunction). Moreover, plaintiffs may aggregate smaller claims in order to reach the jurisdictional threshold. *See Shanaghan v. Cahill,* 58 F.3d 106, 109 (4th Cir.1995). Therefore, the district court should have considered not only the amount of money damages Liberty requested but also the injunctive relief it sought when determining jurisdiction.

Consideration of the requested injunctive relief compels the conclusion that Liberty's claim alleges a sufficient amount in controversy. Even if the $60,456.25 alleged in its summary judgment motion constitutes the sole money damages sought by Liberty, its requested injunctive relief need only have a good faith worth of $14,543.76, i.e. the amount necessary to yield a combined value in excess of $75,000.

We ascertain the value of an injunction for amount in controversy purposes by reference to the larger of two figures: the injunction's worth to the plaintiff or its cost to the defendant. *See Dixon v. Edwards,* 290 F.3d 699, 710 (4th Cir.2002). In this case, Liberty has demonstrated that the injunction, whether valued for the benefit it confers on Liberty or the detriment it imposes on Frashier, arguably yields a figure that exceeds the necessary jurisdictional amount.

With respect to the first, Liberty proposes two distinct ways of calculating the value of the injunction, both of which produce a figure well over $14,543.76. First, Liberty proposes adhering to its regular accounting practice of valuing franchises at 130% of the previous year's net receipts. Using such a formula, it values Frashier's former franchise, and thus the injunction forbidding his alleged improper use of that franchise, at $78,593.13. Second, it proposes a focus on the reputational value generated by the sought injunction. Under this approach, courts consider the ongoing diminution in Liberty's market credibility allegedly caused by Frashier's intransigence. *See MultiChannel TV Cable Co. v. Charlottesville Quality Cable Operating Co.,* 22 F.3d 546, 552 (4th Cir.1994) (noting that "the potential loss of goodwill also supports] a finding of irreparable harm" for the purpose of granting injunctive relief). Liberty estimates the reputational value of the injunction to be $12,817,482 — the amount it spent on advertising in fiscal year 2009.

As for cost to Frashier, Liberty calculates the amount to be a minimum of $30,000. Liberty derives that figure from Frashier's 5-year lease of his former Liberty office at $500 per month, arguing that an injunction prohibiting such a lease would cost Frashier $30,000 in lost profits.

We pass no judgment on the merits of any of these formulations. *See United States v. North Carolina,* 180 F.3d 574, 580 (4th Cir.1999) (noting that "[w]hen a factual attack on subject matter jurisdiction involves the merits of a dispute, the proper course of action ... is to find that jurisdiction exists and deal with the objection as a direct attack on the merits" (in*640ternal quotation and alteration omitted)). For our purposes, all that matters is that we cannot say *with legal certainty* that Liberty's injunction is worth less than the requisite amount. Indeed, all of Liberty's calculations employ reasoning that is at least facially plausible, and Frashier proposes no methodology of his own suggesting that the' injunction lacks the requisite value.

V.

For the foregoing reasons, the judgment of the district court is

REVERSED.

2.5.3.2 Notes on Amount In Controversy

1. Origins of Amount in Controversy. The Constitution contains no amount in controversy provision, but since the Judiciary Act of 1789 provided the first statutory grant for diversity jurisdiction there has been a threshold amount. In 1789, it was $500 (equivalent to about $14,000 in 2020 dollars). The nominal amount has increased steadily over time, as the chart following shows. As you will learn, at one time there was also an amount in controversy requirement for federal question claims, but at present there is no amount in controversy requirement for such claims. The minimum amount spares the federal courts of adjudicating certain very low-value state law claims.

2. Must Exceed. The statute states that diversity jurisdiction exists only when the claim "exceeds the sum or value of $75,000, exclusive of interest and costs." What happens to the careless plaintiff who asserts a claim for exactly $75,000? The claim must be dismissed for lack of subject matter jurisdiction, a fate that would not have happened had the claim been for $75,000.01.

3. Time for Assessing Sufficiency of Amount in Controversy. What happens if a claim is made for more than $75,000 but as the case develops it becomes clear that the plaintiff will not recover that much? As a general rule, if the original claim was in good faith, the court retains jurisdiction of the case. If there is a situation where it is clear from the outset that the claim cannot amount to more than $75,000 - say, for example, the plaintiff is suing for twelve months of $5,000 a month rent, with no penalties or other damages, and makes a conclusory allegation that the amount exceeds $75,000 - the court will do the math and find the jurisdictional allegation insufficient. On the other hand, if the original claim was for sixteen months rent at $5,000 per month, but the defendant conclusively establishes that it should not have to pay for one of the months because the apartment was uninhabitable, that development does not divest the court of jurisdiction. If you think about it, this is the way it has to be - otherwise, every time a defendant wins, the court would lose jurisdiction, making the defendant's win void. You will remember this situation came up in *Mas*.

4. Aggregation of claims by the same plaintiff against the same defendant. *JPH Tax* involved a situation where the argument was made that the claim for damages fell below the statutory threshold. The court then looked at the second claim, which in this case involves injunctive relief, and found that if the two claims were added together they would clearly be above the statutory minimum. This illustrates an aspect of diversity jurisdiction – claims by the same plaintiff can be added together to reach the statutory minimum. In this case, the claims arose from the same facts and circumstances, but for the purposes of

aggregation, there does not need to be any connection between the claims which are added so long as the claims are brought by the same plaintiff. A plaintiff can bring a contract claim and unrelated tort claim and the court will add them together without worrying about any relationship between the claims other than that they were brought by the same party. One interesting twist involves a situation where a plaintiff is asserting diversity claims worth less than $75,000 alongside an unrelated federal question claim that would bring the total to above $75,000 - can the federal question claim be included in the aggregation? The answer appears to be yes. *See generally*, 14A Charles A. Wright, et al., Federal Practice and Procedure § 3704.

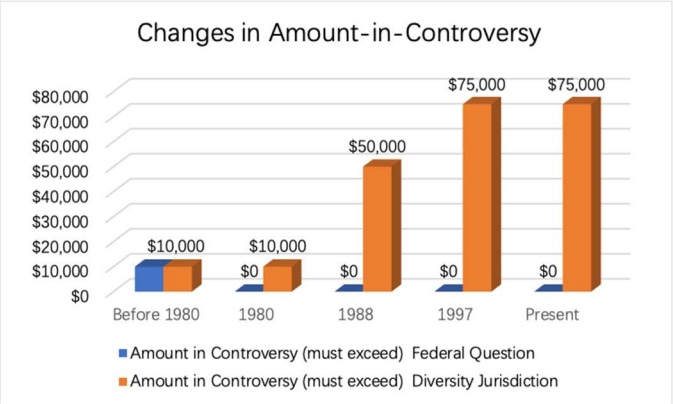
5. Valuing injunctive claims. Another aspect of *JPH Tax* involved a claim for injunctive relief. Typically, claims for injunctive relief do not involve a fixed dollar figure, unlike claims for damages. How are such claims valued for the purposes of assessing the statutory threshold? There are three possible methods. The court can look at the cost to the defendant to comply with the injunction. The court can look at the benefit to the plaintiff if the defendant complies with the injunction. Taking into account the different perspective of removal, the court can look to the value with regard to the person asserting federal jurisdiction - the defendant if the case is removed, and the plaintiff if it is initially filed in federal court. Finally, the court can look at both the defendant's and plaintiff's perspectives, choosing the one which is higher. While perhaps the most common approach is to look to the value to the plaintiff, different courts have taken different approaches to this. If this issue arises in practice, you will need to see what rule applies where the case is located. See generally Brittain Shaw, *The $75,000 Question: What Is the Value of Injunctive Relief?*, 6 Geo. Mason L. Rev. 1013 (1998); Christopher A. Pinahs, *Diversity Jurisdiction and Injunctive Relief: Using a "Moving-Party Approach" to Value the Amount in Controversy*, 95 Minn.L.Rev. 1930 (2011); 14A Charles A. Wright, et al., **Federal Practice and Procedure** § 3703.

6. Aggregation of claims by or against different parties. What happens when two plaintiffs join together to bring a lawsuit against the same defendant – can their claims be joined together in order to meet the statutory? In general, the answer is no. Each plaintiff needs to stand on their own. There is an exception when multiple plaintiffs are jointly asserting a common indivisible claim. The same logic applies when one plaintiff brings claims against two or more defendants - the claims cannot be aggregated, but one common claim that exceeds $75,000 will stand even if there are two defendants facing that claim. Some examples might help explain. Donnie Driver is careless and hits Pamela Plaintiff and her brother Paul Plaintiff as he drives through a parking lot. Each claims $40,000 in personal injury damages, arising from the same event. The claims cannot be aggregated as each plaintiff's claims and injuries are unique and separate - Paul does not feel Pamela's pain. On the other hand, imagine that Carl Claimant claims that he is the true owner of Blackacre, a relatively modest estate worth only $80,000. At present, the owners are listed as Omar Owner and his wife Olga Owner, who hold title jointly and undivided. Even though the average claim against each is only $40,000, the threshold will be met. Carl really has one claim, worth $80,000, and it is not reduced because there are two joint owners. Similarly, multiple plaintiffs can join together "to enforce a single title or right, in which they have a common or undivided interest." *Zahn v. International Paper Co.*, 414 U.S. 291, 294, 94 S. Ct. 505, 508 (1973). *See generally*, 14A Charles A. Wright, et al., Federal Practice and Procedure § 3704.

7. Exclusive of Interest and Costs. You will note that the amount in controversy is "exclusive of interest and costs." What does this mean? In some cases, post judgment interest can be awarded. For example, under some applicable laws interest runs from the time of the judgment until collection. This kind of interest is excluded. On the other hand, sometimes interest is an essential part of the claim, and is included. For example, if a plaintiff sues on a bond and claims that interest payments were

not made as scheduled, that kind of interest is not excluded. Costs are those costs awarded as part of litigation. For example, costs of service of process might be awarded to the prevailing party. Usually, in the American system, these costs are not substantial relative to the claim on the merits, and in any event they don't count toward the amount in controversy. One issue that can get technical, and so is a bit beyond our scope, is the awarding of attorney's fees to the prevailing party. In some cases a statute will include an award of attorneys' fees, and in some cases a claim for those fees can be included in the amount in controversy. For the purposes of this course, be aware, but don't worry about it.

2.5.3.3 【Picture】Changes in Amount-in-Controversy



2.5.3.4 Amount in Controversy Problems

Paula Plaintiff wishes to bring a federal lawsuit against her 'frenemy' Debbie Defendo. Plaintiff had signed a contract to do some work for Defendo, and when she was finished Defendo claimed the quality was no good and refused to pay her an of the $25,000 due under the terms of the contract. Plaintiff publicly maintains that her work was 'perfect' and that the full sum is owning, but has privately admitted that perhaps some small offset for deficiencies might be reasonable. While they were discussing the problem with the contract, Defendo physically pushed Plaintiff. Plaintiff was not physically injured but she was intimidated and scared. Her attorney has researched similar cases and feels a claim for $50,000 is the most that can be made in good faith for such an incident and intends to claim for exactly that amount in addition to the $25,000 due under the contract. Privately, he feels he would be extremely lucky to win $5,000 for an assault where there was no injury. Finally, Plaintiff has remembered that three years ago she loaned $1 to Defendo so she could buy a CocaCola from a vending machine. She intends to sue for that as well, even though it is totally unrelated. If asserted, the local statute of limitations would almost certainly bar this claim. Plaintiff wants to bring the three claims in federal court (she and Defendo are diverse). Please analyze the amount-in-controversy issues.

Ima Claimant wishes to bring a lawsuit against Ben Sued. The first claim is for $50,000, and arises from a state law claim. The second claim is completely unrelated, and arises from a federal cause of action. This claim would be for $30,000. The parties are diverse. Please analyze the amount-in-controversy issues.

Professor Evil has become quite old, and no long can ride or control his bicycle. Instead, he rides an adult tricycle around his retirement community in Florida, which he also has difficulty controlling. One day, two former students - Shiza Great and Summa Laudey - are coming to visit Evil when he comes suddenly around a corner and runs them down in the same accident

at the exact same time. Reluctantly, they bring suit against their old professor in federal court. (Both are from New York). Each sues Evil for $50,000. Please analyze the amount-in-controversy issues.

2.5.4 Alienage Jurisdiction

2.5.4.1 Introduction to Alienage Jurisdiction

Alienage jurisdiction often is lumped in with diversity jurisdiction without a detailed look at the differences, but in a transnational setting we think it is worth taking a bit more of a look. The Constitution refers to suits "between a state, or the citizens thereof, and foreign states, citizens or subjects." Section 1332(a)(2) makes the grant parallel to the clause before, which allows jurisdiction for suits between citizens of different states, by allowing suits between "citizens of a State and citizens or subjects of a foreign state."

One question that sometimes arises is what difference, if any, there between a citizen of a foreign state and a subject of a foreign state? As a practical matter, there is no difference - in either case, someone is treated as belonging to a foreign country. Historically, the difference seems to be one between monarchies and empires - such as China was in 1789, and where those living in the state are the subjects of the king or emperor - and republics, such as China is today, where the state is made of its citizens.

The alienage clause allows lawsuits between a foreign national and a citizen of a state to go forward with federal subject matter jurisdiction. For example, if a person resident in Shenzhen who is a citizen of the People's Republic of China brings a lawsuit for more than $75,000 against a resident of California, the alienage clause as implements by Section 1332 provides a basis for federal subject matter jurisdiction.

Note that nowhere in the Constitution or Section 1332 is there a provision for suits exclusively between citizens of foreign nations. Put differently, if a citizen of China wants to sue a citizen of Japan in US federal court on a *state law claim*, there will be no federal subject matter jurisdiction.

The second part of Section 1332 (a)(2) addresses the situation where a foreign national has acquired permanent residency status (but not citizenship) in the United States and is domiciled in a particular US state. This happens not infrequently in the United States, where at last count there were somewhere above 13 million foreign citizens holding permanent resident 'green cards.' In such situations, the alien is treated effectively as both an alien and a resident of a state in terms of duplications that would defeat federal jurisdiction. Some examples may help make this clear. Assume that a citizen of China has acquired permanent residency in California. This person - let's call her Zhang - wants to bring a lawsuit against a citizen of Canada. She cannot establish federal subject matter jurisdiction, because the court would treat that a suit between aliens, for which there is no provision for subject matter jurisdiction. Now, let's assume that Zhang wants to sue Evil, a resident of California. Once again, she cannot, because even though this is a lawsuit between a citizen of a foreign state and a resident of a US state, the language in section 1332 makes clear that there is no federal subject matter jurisdiction between a permanent resident alien living in California and resident of California. What if Zhang wants to sue Evil's cousin, Wicked, a US citizen who lives in New York? In that case, on these facts, there would be alienage subject matter jurisdiction.

Section 1332 (a)(3) addresses a different situation, where a diversity suit exists between citizens of different states, to which suit aliens are added. According to Wright and Miller, the language of this statute allows aliens on both sides of the case so long as the required diversity between states exists. Wright & Miller, Federal Practice and Procedure: Jurisdiction 2d § 3661

One issue remains unclear, however. What if one of the aliens is a permanent resident from the same state as one of the parties on the other side of the case? For example, imagine a Texan and a California resident alien bring a lawsuit against a Californian. Would there be subject matter jurisdiction? Section 1332(a)(2) indicates not, but Section 1332(a)(3) suggests so,

Another issue that arises, particularly with respect to China, is whether certain corporations are corporate citizens of a foreign state or branches of the foreign state itself. This issue is beyond the scope of this course, but may arise in the course of US litigation involving Chinese state-owned enterprises. Some such enterprises have asserted sovereign immunity as a defense against civil claims. If they are branches of sovereign states, that would impact the basis for federal jurisdiction. Whether a party is private or a foreign state entity also will affect issues such as venue and whether, absent a waiver, liability can be established. Addressing these issues in depth is beyond the scope of this course, but might be relevant to some practice situations some day.

2.5.4.2 Hebei Tiankai Wood & Land Constr. Ltd. v. Chen, 348 F Supp 3d 198 (EDNY 2018).

MEMORANDUM & ORDER

JACK B. WEINSTEIN, Senior United States District Judge:

I. Introduction

This litigation arises from a transnational business transaction gone wrong. In 2017, Hebei Tiankai Wood & Land Construction Co. Ltd. ("Plaintiff") and Kirin Transportation, Inc. ("Kirin") agreed that Plaintiff would become majority shareholder of Kirin. At the time of the transaction, Frank Chen ("Chen") was the sole owner of Kirin. Plaintiff alleges that Chen made false representations to induce Plaintiff to invest $300,000 in Kirin and then misused the money.

Chen moved to dismiss under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. The court ordered the motion converted to one for summary judgement.

Plaintiff is a citizen of China, while Chen and Kirin, the nominal defendant, are citizens of New York. Chen argues that Plaintiff's fraudulent inducement and breach of fiduciary duty claims are derivative, properly belonging to Kirin, so Kirin should be aligned as a plaintiff. Realignment of Kirin as plaintiff would destroy diversity, requiring the case to be dismissed.

Plaintiff argues that the "doctrine of antagonism"—applicable between Kirin and Plaintiff—applies, so that realignment is not required.

Chen disagrees. He contends that Plaintiff is Kirin's majority shareholder so that there is no antagonism between these two.

Chen's argument is not persuasive. First, even if Plaintiff has de jure control of Kirin, Chen has de facto control. Chen is alleged to have forcefully rebuffed Plaintiff's attempts to take control of Kirin, even though Plaintiff is now majority shareholder of Kirin. The caselaw is clear that a court should ensure that the parties are aligned so that there is a real collision of interests.

The real collision of interests is between Plaintiff on one side and Chen and Kirin on the other. Second, at its core, this is a dispute between nationals of the United States and of China, making it desirable to try the case in federal court if subject matter jurisdiction exists.

Kirin should remain as a named defendant. This court has jurisdiction over Plaintiff's claims. Chen's motion is denied.

II. Facts

A. Transaction

Plaintiff is a construction company based in China. […]Chinese nationals Qiuxiang Shi ("Shi") and Yingjie Li ("Li") are the sole owners, officers, and managers of Plaintiff. […] In November 2017, Shi and Li traveled to New York and were introduced to Chen, then the sole shareholder of Kirin. […] Chen is a resident of the State of New York; Kirin is a New York corporation. […]

Chen invited Shi and Li to Kirin's headquarters in Queens, New York. […] He wanted the duo to invest in Kirin. […]Plaintiff alleges that Chen represented that Kirin was a successful company looking to expand its business; he gave Shi and Li documents to "highlight the financial strength" of the company. Compl. […]It is undisputed that Chen stated that if Shi and Li invested in Kirin, Kirin would sponsor Shi for an L-1 visa.[…]Plaintiff alleges that the visa would have allowed Shi to travel to the United States to participate in the management of Kirin and monitor operations of the company. […] Chen organized meetings with law firms specializing in immigration law to demonstrate his intent to help obtain the visa if Plaintiff invested in Kirin. […]

The parties agree that Chen offered Shi and Li 51% of the shares of Kirin for $300,000 in capital investment. […] Plaintiff alleges that Chen also promised to pay Shi a substantial salary as a manager. […]On November 28, 2017, Chen gave Shi and Li a contract memorializing the agreement; in exchange for $300,000, Kirin agreed to tender 51% of Kirin's shares to Plaintiff and to file an L-1 visa petition for Shi. […]Chen signed an engagement letter with a lawyer to work with Kirin to obtain the visa. […]On the same day, Plaintiff tendered a certified check to Kirin for $300,000. […]A stock certificate in turn issued to Plaintiff was for 102 shares, a majority of those in the company. […]

B. Dispute

What had seemed like a straightforward transaction then began to unravel. In January 2018, per Plaintiff's allegations, Chen contacted Shi and Li asking for additional funds to be invested in Kirin so that Kirin could help obtain a visa for Shi. […]Allegedly, Chen represented that the funds already invested "had been used up." […]Plaintiff became suspicious and asked Kirin for documents and records, which Chen refused to produce. […]The parties agree that in April 2018, Plaintiff discovered that it was not listed as a shareholder on Kirin's 2017 tax returns.[…]

Plaintiff attempted to establish control of Kirin. Plaintiff alleges that it sent a representative to take over Kirin, but its employees (pursuant to Chen's instructions), refused the representative access to the premises and inspection of books and records. […]Alleged is that Kirin's bank refused to make account records available, and that Chen had never told Kirin's employees of Plaintiff's investment, never informed the landlord of the property where Kirin operated of Plaintiff's investment, and never made Plaintiff an authorized signatory on any of Kirin's bank accounts. […]

Chen denies these allegations. […]But, based on the record, they appear to be true. See Hr'g Tr. 4:15–19, *202 5:1–3, Dec. 19, 2018 (parties agree no evidentiary hearing was required).

In April 2018, Shi, as chair and director of Kirin, removed Chen from all positions at Kirin and named Shi chief executive officer of Kirin. Decl. Frank Chen Ex. D, ECF No. 18-5. Shi also named an interim chief executive officer of Kirin, effective immediately. […]

Chen took steps to counter these moves. On April 17, 2018, his attorney Xiangan Gong ("Gong") wrote to Plaintiff's counsel opposing the "attempted take-over of the business." […]Gong wrote:

The stock transfer agreement between the parties entered last November was never finalized: (1) Frank Chen was and still is the one who actually supervises and manages the company's daily business operation, Qiuxiang Shi had never participated into company's management or business operation; (2) the lease was signed by Frank Chen; (3) Frank Chen was the only authorized personnel for the company's bank account.

[…] In the same email, Gong wrote, "[Chen] CANNOT LEAVE THE COMPANY AND LET YOUR CLIENT OPERATE THE BUSINESS WITH HIS LEASE, SUBJECT HIM TO VIOLATION OF THE LEASE."[…] (capitalization in original).

On May 1, 2018, Gong repeated Chen's position that he properly maintained control of Kirin. […]Gong wrote,

[Chen] prefers to do a clean-cut closing then your client takes full control of the corporation and its business operation.... [Chen] cannot gives [sic] up the management right when the lease agreement and most importantly the company's TLC license was under his name. Id.

C. Motion to Realign and Dismiss

In May, Plaintiff brought three causes of action against Chen and Kirin: (1) fraudulent inducement; (2) breach of contract; and (3) breach of fiduciary duty. […]Alleged is that a demand for Kirin to institute suit against Chen would be futile. […]Chen and Kirin filed a joint answer in response to Plaintiff's complaint. […] By August, Chen had hired new counsel for himself, but he declined to hire new counsel for Kirin. […]

Chen's new attorney filed a motion to dismiss for lack of subject matter jurisdiction, arguing that Kirin should be realigned as a plaintiff, thus destroying the complete diversity of citizenship required for this court to have subject matter jurisdiction. […]

This court converted Chen's motion to dismiss to a motion for summary judgment. […] A hearing on the motion was held on December 19, 2018. […]The parties agreed that the motion could be decided without an evidentiary hearing.[…]

III. Law

A. Summary Judgment Standard of Review

At the summary judgment stage, "the judge's function is not ... to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *203 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The movant must show that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A genuine dispute of material fact exists for summary

judgment purposes when, "the evidence, viewed in the light most favorable to the nonmoving party, is such that a reasonable jury could decide in that party's favor." Chaohui Tang v. Wing Keung Enterprises, Inc., 210 F.Supp.3d 376, 388 (E.D.N.Y. 2016) (quotation marks and citation omitted).

B. Diversity Jurisdiction

3District courts have original jurisdiction of civil actions between a citizen of one state and a citizen of a foreign state when the amount in controversy exceeds $75,000. 28 U.S.C. § 1332(a). Alienage jurisdiction is a subset of diversity jurisdiction.

456"[D]iversity jurisdiction is available only when all adverse parties to a litigation are completely diverse in their citizenships." Herrick Co. v. SCS Communications, Inc., 251 F.3d 315, 321 (2d Cir. 2001). Federal diversity jurisdiction cannot be conferred by the parties' own determination of who should be plaintiffs and who should be defendants. Rather, "the federal courts are required to realign parties according to their real interests so as to produce an actual collision of interests." Lewis v. Odell, 503 F.2d 445, 447 (2d Cir. 1974); see also City of Indianapolis v. Chase Nat. Bank of City of New York, 314 U.S. 63, 69, 62 S.Ct. 15, 86 L.Ed. 47 (1941) (it is the court's duty to "look beyond the pleadings, and arrange the parties according to their sides in the dispute" (citation omitted)).

C. Antagonism Doctrine

78Generally, a shareholder has no individual cause of action for a wrong against a corporation. Abrams v. Donati, 66 N.Y.2d 951, 498 N.Y.S.2d 782, 489 N.E.2d 751, 751 (N.Y. 1985). This results in the corporation being aligned as the plaintiff in litigation brought to remedy harm to a corporation because the corporation is the real party in interest. See Liddy v. Urbanek, 707 F.2d 1222, 1224 (11th Cir. 1983).

91011When, however, "management is aligned against the stockholder and defends a course of conduct which [the stockholder] attacks," there is "antagonism" and the corporation should be aligned as a defendant. […] Fraud, breach of trust, and illegality on behalf of the management in control are strong indicators of antagonism. Id. (collecting cases); ZB Holdings, Inc. v. White, 144 F.R.D. 42, 46 (S.D.N.Y. 1992) ("[I]f the complaint in a derivative action alleges that the controlling shareholders or dominant officials of the corporation are guilty of fraud or malfeasance, then antagonism exists, and the corporation should be aligned as a defendant."). Antagonism may also exist where management is hostile to the interests of shareholders. Smith, 354 U.S. at 97, 77 S.Ct. 1112; Rogers v. Valentine, 426 F.2d 1361, 1363 (2d Cir. 1970) (upholding the district court's decision that a corporation should be aligned as a defendant when management had refused to institute suit on behalf of the corporation and demand would be futile).

12Courts should normally determine the issue of antagonism without delving into the merits of the claims. See Smith, 354 U.S. at 95, 77 S.Ct. 1112 ("the instant case is a good illustration" of why not "to delve into the merits" "for it has been over *204 eight years in the courts on this question of jurisdiction").

IV. Application of Law to Facts

A. Plaintiff's Showing of Antagonism

13It is assumed for purposes of this opinion that Plaintiff's claims are derivative and intended to remedy wrongs to the corporation. Nevertheless, Kirin remains properly aligned as a defendant because of antagonism.

First, though Plaintiff has de jure control of Kirin, Chen has de facto control. It is undisputed that Chen is managing Kirin and Plaintiff's attempts to obtain control have failed. Those attempts are alleged to have been forcefully rebuffed by Chen. At his direction, Kirin's employees denied Plaintiff access to Kirin's operating premises and books and records. Chen also denied Plaintiff access to Kirin's bank by failing to make Plaintiff a signatory on Kirin's bank account.

Chen has explicitly refused to cede control of Kirin to Plaintiff. In April 2018, Shi, chair and sole director of the corporation, "removed" Chen from all positions in Kirin and appointed a new chief executive officer of Kirin. But Chen refused to cede management of Kirin to Shi's appointee. […]

In view of Chen's actual management of Kirin and Plaintiff's alleged inability to wrest control from him despite being majority shareholder, it is highly unlikely that Chen would institute either of Plaintiff's derivative claims against Kirin. Based on the facts alleged in the complaint, such a demand would be futile. In these circumstances, antagonism exists. See Rogers, 426 F.2d at 1363 (upholding the district court's decision that a corporation should be aligned as a defendant when management had refused to institute suit on behalf of the corporation and demand would be futile).

14Second, Plaintiff alleges that Chen has engaged in fraud by wasting the investment in Kirin by Plaintiff and by engaging in other acts of malfeasance, including failing to list Plaintiff as a shareholder on Kirin's 2017 tax returns. When the dominant official of the corporation is accused of fraud, the corporation is appropriately aligned as a defendant. See ZB Holdings, 144 F.R.D. at 46 (concluding that "the requisite antagonism" existed because plaintiff alleged that the corporation's directors—the "dominant officials"—had engaged in common law fraud and misrepresentation).

Chen argues that antagonism cannot be found because Plaintiff is the majority shareholder of Kirin. Majority "control" of a corporation, however, is only one "circumstance indicating a lack of antagonism." Taylor v. Swirnow, 80 F.R.D. 79, 83 (D. Md. 1978) (concluding that the parties lacked antagonism when plaintiffs owned a majority share in the corporation, among other reasons).

The court's role is to determine where the real collision of interests lies. The pleadings show that collision between Plaintiff on one side and Chen and Kirin on the other.

B. Importance of Alienage Jurisdiction

This litigation, at its core, is a transnational business dispute between a Chinese corporation and a New York citizen. It is the transnational nature of the action—and the fact that all relevant activity took place *205 in the United States—that make it vital that the parties be able to litigate in a United States court. Reliability of the United States courts is apparent.

Alienage jurisdiction—the jurisdiction of the federal courts over suits between citizens of the United States and citizens of a foreign state—is guaranteed by the Constitution. U.S. Const. art III, § 2 ("The judicial Power shall extend ... to Controversies between ... a State, or the Citizens thereof, and foreign States, Citizens or Subjects."). The primary motivation for establishment of alienage jurisdiction in the Constitution was the difficulty British creditors had collecting from American debtors in state court prior to the Constitutional Convention. JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd., 536 U.S. 88, 94–95, 122 S.Ct. 2054, 153 L.Ed.2d 95 (2002) ("This penchant of the state courts to disrupt international relations and discourage foreign investment led directly to the alienage jurisdiction provided by Article III of the Constitution."); see also Koehler v. Bank of Bermuda (New York) Ltd., 229 F.3d 187, 188 (2d Cir. 2000) ("the fundamental

purpose of alienage jurisdiction—to void offense to foreign nations"); […]Wythe Holt, The Origins of Alienage Jurisdiction, 14 Okla. City U. L. Rev. 547, 564 (1989) ("Alienage jurisdiction, as embodied in the Constitution and as put into action in the Judiciary Act of 1789, was ... an attempted solution to a major political problem of international dimensions."). […]

15The First Congress, in its attempt to further the goals emanating from these motivations, gave the federal courts jurisdiction of cases in which "an alien is a party" to litigation. […]The Supreme Court, however, concluded that this jurisdictional grant did not include suits solely between two aliens because it exceeded the constitutional jurisdictional grant. Mossman v. Higginson, 4 U.S. 12, 14, 4 Dall. 12, 1 L.Ed. 720, (1800). "[T]he legislative power of conferring jurisdiction on the federal Courts is, in this respect, confined to suits between citizens and foreigners." Id. (emphasis omitted).

16Congress has since excepted from federal jurisdiction categories of cases involving alien litigants. Though the Constitution requires only "minimal diversity" among parties, State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523, 530–31, 87 S.Ct. 1199, 18 L.Ed.2d 270 (1967), Congress has required complete diversity to support federal jurisdiction, Herrick, 251 F.3d at 322. Complete diversity requires that aliens be on both sides of the litigation along with fully diverse domestic opposing parties. Bayerische Landesbank, New York Branch v. Aladdin Capital Mgmt. LLC, 692 F.3d 42, 49 (2d Cir. 2012) ("[W]e do not have diversity jurisdiction over cases between aliens. More specifically, 'diversity is lacking ... where the only parties are foreign entities, or where on one side there are citizens and aliens and on the opposite side there are only aliens.' " (citation omitted)). In other circuits, courts adhere to a more traditional view denying diversity jurisdiction when there are aliens on both sides of a controversy, regardless of the presence of opposing domestic *206 parties.[…]

The design of federal practice to protect both aliens and American citizens remains today. Transnational commercial interactions have become more commonplace and more complex. Litigating in state court could be burdensome, since foreign parties might be subject to the civil procedures of more than one jurisdiction. By contrast, litigating in a foreign court might subject United States parties to a system of civil procedure not yet fully developed, and in which it might not be possible to obtain personal jurisdiction over all necessary parties. It could be argued that it would be most prudent for the federal courts to have diversity jurisdiction of all cases in which an alien is a party so long as a citizen of the United States is also a party.

The court has considered the pleadings and the record and finds an antagonistic relationship requiring Kirin to remain a nominal defendant. Since Kirin is properly aligned as a defendant, there is complete diversity among the parties.

V. Conclusion

Defendant's motion to dismiss is denied. Kirin is properly aligned as a nominal defendant here. Since Plaintiff is a citizen of China and defendants are citizens of New York, there is complete diversity among the parties. The court has subject matter jurisdiction of Plaintiff's claims.

The parties are ordered to expedite discovery.

SO ORDERED.

2.5.4.3 Alienage Problems

Again, the answers will be provided but see if you can sort this out on your own.

Wendy Wu is a citizen of the People's Republic of China, but she has permanent US residency in the state of California. She enters into a contract with Xavier Xu, a US citizen resident in Massachusetts, and Yoshi Yang, a US citizen resident in California. Xu and Yang breach the contract, and Wu wishes to bring a lawsuit seeking $100,000 each from Xu and Yang in federal court. Please analyze.

Wendy Wu is a citizen of the People's Republic of China, but she has permanent US residency in the state of California. She enters into a contract with Sven Swedenborg, a Swedish resident who has permanent residence in the state of New York. Swedenborg breaches, and she wishes to bring a lawsuit for $100,000 in federal court. Please analyze.

Wendy Wu and Yoshi Yang resolve their dispute and become partners . Wu is still a Chinese citizen resident in California and Yang is still a US citizen and California resident. They enter into a contract with Otis Olafson, who promptly breaches. Olafson is a US citizen resident in Virginia. Wu and Yang both have claims against Olafson in excess of $100,000, which they wish to bring jointly in federal court. Please analyze.

Assume that before suit is filed, Yang settles with Olafson. Wu still wishes to pursue her claim in federal court. Please analyze.

2.5.5 Diversity and Alienage Jurisdiction Reviewed

2.5.5.1 Final Notes on Diversity and Alienage Jurisdiction

1. Realignment. On occasion, it can be hard to tell whether a party should be considered a plaintiff or a defendant. We saw that in *Hebei Tiankai Wood & Land Constr. Ltd. v. Chen*, where there was some discussion about where a party should be aligned. On other occasions, parties may artfully plead someone as a plaintiff or a defendant despite their real interests in order to create or deny the appearance of diversity jurisdiction. As *Hebei Tiankai Wood & Land Constr. Ltd. v. Chen* indicates, courts can and will realign parties in line with their actual interests in determining jurisdiction.

2. Collusive Joinder. Another issue that can arise is 'collusive joinder.' An example would be where one party assigns its claim to another party from a different jurisdiction so as to affect the existence of federal subject matter jurisdiction. This is addressed by 28 USC Section 1359 which provides that the federal court has no jurisdiction in cases "in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court." Some assignments, of course, are legitimate and have nothing to do with invoking jurisdiction. The leading Supreme Court case to deal with Section 1359, *Kramer v. Caribbean Mills, Inc.*, 394 U.S. 823 (1969), instructs the court to look at the totality of the circumstances in deciding whether an assignment was improper or collusive. If it is, it is disregarded for the purpose of establishing or denying federal subject matter jurisdiction (although it may be a valid assignment for other purposes).

3. Judicially Created Exceptions to Diversity and Alienage Jurisdiction. As you have seen, Congress has narrowed the reach of both diversity and alienage jurisdiction relative to what is permitted in the Constitution. As it turns out, there are also some judicially created exceptions, even though neither the Constitution nor the enabling statutes require or even hint at these exceptions. One has to do with family law or 'domestic relations' as the exception is known. This does not mean that no matters involving families can invoke diversity. What it means is that family specific litigation such as divorce, alimony, and child custody cannot be heard pursuant to diversity or alienage jurisdiction. *Ankenbrandt v. Richards*, 504 U.S. 689, 704 (1992). Another exception is probate. Probate is the process through which a person's belongings are distributed upon his or her

death through the execution of the person's will. This also has traditionally been an area of state jurisdiction that does not come into the federal courts through diversity.

4. By now you should have all the diversity and alienage issues crisply organized in your mind. Issues you will want to work through are:

- Where are the parties domiciled
  - Individuals
  - Corporations
  - LLCs, Partnerships, and other joint non-incorporated entities
  - Aliens resident abroad
  - Aliens permanently resident in the United States.
- What is the amount at controversy?
  - Single damage claims
  - Aggregrated damage claims between one plaintiff and one defendant
  - Injunctive relief
  - Claims aggregrated among multiple parties
  - Interest (prejudgment such as interest on a bond and post judgment), costs (the special case of awardable attorneys' fees), and other excludable damages
- Assessing sufficiency of jurisdiction
  - Time
  - Pleading
  - Burden of Proof
- Special Considerations
  - Realignment
  - Collusion
  - Domestic Relations
  - Probate

2.6 Federal Question Jurisdiction

2.6.1 Title 28: § 1331

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

2.6.2 Louisville & Nashville R. Co. v. Mottley, 211 U.S. 149 (1908)

LOUISVILLE AND NASHVILLE RAILROAD COMPANY

v.

MOTTLEY.

MR. JUSTICE MOODY, after making the foregoing statement, delivered the opinion of the court.

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 [152] 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. *Mansfield, &c.; Railway Company* v. *Swan,* 111 U.S. 379, 382; *[…]*

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." Act of August 13, 1888, c. 866, 25 Stat. 433, 434. 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 [153] 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 (p. 464), "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 plaintiff brought suit in the Circuit Court of the United States for the conversion of copper ore and for an injunction against its continuance. The plaintiff then alleged, for the purpose of showing jurisdiction, in substance, that the defendant would set up in defense certain laws of the United States. The cause was held to be beyond the jurisdiction of the Circuit Court, the court saying, by Mr. Justice Peckham (pp. 638, 639).

> "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.

> [154] "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. That case has been cited and approved many times since, . . ."

The interpretation of the act which we have stated was first announced in *Metcalf* v. *Watertown,* 128 U.S. 586, and has since been repeated and applied in *Colorado Central Consolidated Mining Company* v. *Turck,* 150 U.S. 138, 142; *[…]*. 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 the suit for want of jurisdiction.

2.6.3 Notes on L&N R. Co. v. Mottley: The "Face of the Complaint" Rule

1. **The Face of the Complaint or Well-Pleaded Complaint Rule**. In the *Mottley* case, federal issues were certain to be important to the outcome. The statute relied on by the railroad to cut off their free passes was a federal law; in return, the Mottleys were sure to cite to the Constitution's prohibition of taking away property, such as free passes, without due process of law. No one seemed to dispute that absent the federal law the Mottley's passes were valid and should be honored, making the state law right background to the real dispute in the case. Despite the likely centrality of federal issues to the case, the Court held that federal subject matter jurisdiction did not lie under Section 1331.

The rule the Court announced has come to be known as the "face of the complaint" or the "well-pleaded complaint" rule. Put simply, the claim for relief has to be based on a federal question. In *Mottley*, the claim for relief was based on state contract law. The federal law came in as a defense, but the court held that federal questions that come in as defenses are not enough to invoke federal question jurisdiction. You will find that the same is true for counterclaims asserted by the defendant back against the plaintiff, or for cross claims asserted between parties aligned on the same side of the case.

One way to think about the *Mottley* rule has to do with the idea of critical path. A critical path is the steps that have to be taken in order for a given result to be reached. For a case to arise under the federal question statute, resolving the federal question has to be on the critical path. If there is a path to a plaintiff's recovery that does not require decision of the federal question, it fails the face of the complaint rule. In *Mottley*, recovery could have been obtained on the state law issue alone.

2. **Constitutional Versus Statutory Standard for Sufficiency of Federal Questions.** Mottley involved an interpretation of Section 1331, not the Constitution. Interestingly, there was no federal question statute until after the Civil War, when the first version of Section 1331 was enacted, in part to give freedman and former slaves access to federal courts if their federal rights were interfered with. As was true with diversity, the Constitutional standard is broader than the statutory standard. So far as the Constitution is concerned, a case or controversy meets the federal question standard if the federal issue appears likely to arise in the case. *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824)

3. Explicit and Implied Federal Causes of Action. Not all federal (or state) statutes create a right for private litigants to bring a lawsuit. Sometimes, for example, only an administrative or regulatory agency is empowered to enforce the law. The explicit creation (by Congress) or the implication from statutory silence (by courts) of a private right of action dramatically

shifts the enforcement of the law from agencies to private litigants. While, in general, such rights of action are consistent with the US practice of ex-post regulation through litigation, the creation and existence of such rights of actions often is controversial. Implication is even more controversial than Congressional creation of private rights as it involves Courts sometimes choosing to find implied a cause of action that Congress had chosen not to create explicitly. It is in this context that *Merrell Dow* arose. Congress had not created an explicit cause of action, and the Supreme Court had chosen not to find one implied by the statute. As you read *Merrell Dow* ask yourself how the finding of a federal question embedded in a state statute has the potential to shift the debate over that regulatory balance.

4. Exceptions to the Face of the Complaint Rule and Federal Questions Embedded in State Law. In general, the face of the complaint rule is not elusive. If a federal question must be resolved for the plaintiff to recover, the face of the complaint rule is satisfied. There are, however, some exceptions. Some won't concern us - for example, in *Shoshone Mining Co. v. Rutter*, 177 U.S. 505 (1900), a federal statute created a right for miners to file patents on claims and to settle conflicting claims, but left resolution of the claim to local customs and laws. The Court held that as federal law was not necessarily involved, the case was not one which "necessarily arises under the Constitution and law of the United States."

Of more interest is the situation where a claim arises under state law which, in turn, references a federal law. In these cases, it can be argued, resolving the federal question is essential for imposing liability. At the same time, the law at base is a state law, created by a state government, and one may ask whether a state government should have the power to throw open the doors to federal courthouses. In addition, in some cases bringing such cases into federal court could federalize issues that traditionally have been resolved by state courts, potentially burdening the federal courts. We've run out of hands, but if we had one more we would note that in some cases the federal question involved is quite important, and perhaps one that deserves uniform federal resolution, rather than resolution by the various state courts. The following cases wrestle with this kind of issue.

2.6.4 Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804 (1986)

MERRELL DOW PHARMACEUTICALS INC.

v.

THOMPSON ET AL., AS NEXT FRIENDS AND GUARDIANS OF THOMPSON ET AL.

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 [806] 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."[1] 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.,* 255 U. S. 180 (1921), 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 quoting one sentence from the concluding paragraph in our recent opinion in *Franchise Tax Board* v. *Construction Laborers Vacation Trust,* 463 U. S. 1 (1983),[2] and noting "that the FDCA does not create or imply [807] 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." 766 F. 2d, at 1006.

We granted certiorari, 474 U. S. 1004 (1985), and we now affirm.

II

Article III of the Constitution gives the federal courts power to hear cases "arising under" federal statutes.[3] 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.[4] 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,* 9 Wheat. 738, 823 (1824), we have long construed the statutory grant of federal-question jurisdiction as conferring a more limited power. [808] *[…]*

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." *Franchise Tax Board,* 463 U. S., at 9-10. A defense that raises a federal question is inadequate to confer federal jurisdiction. *Louisville & Nashville R. Co.* v. *Mottley,* 211 U. S. 149 (1908). 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."

As was true in *Franchise Tax Board, supra,* the propriety of the removal in this case thus turns on whether the case falls within the original "federal question" jurisdiction of the federal courts. There is no "single, precise definition" of that concept; rather, "the phrase `arising under' masks a welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system." *Id.,* at 8.

This much, however, is clear. 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.' "[…]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." [809] *Franchise Tax Board,* 463 U. S., at 9.[5] Our actual holding in *Franchise Tax Board* demonstrates that this statement must be read with caution; the central issue presented in that case turned on the meaning of the Employee Retirement Income Security Act of 1974, […] but we nevertheless concluded that federal jurisdiction was lacking.

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.[6] This case thus poses what Justice Frankfurter called the "litigation-provoking problem," *Textile Workers* v. *Lincoln Mills,* 353 [810] U. S. 448, 470 (1957) (dissenting opinion) — the presence of a federal issue in a state-created cause of action.

In undertaking this inquiry into whether jurisdiction may lie for the presence of a federal issue in a nonfederal cause of action, it is, of course, appropriate to begin by referring to our understanding of the statute conferring federal-question jurisdiction. 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. "If the history of the interpretation of judiciary legislation teaches us anything, it teaches the duty to reject treating such statutes as a wooden set of self-sufficient words. . . . The Act of 1875 is broadly phrased, but it has been continuously construed and limited in the light of the history that produced it, the demands of reason and coherence, and the dictates of sound judicial policy which have emerged from the Act's function as a provision in the mosaic of federal judiciary legislation." *Romero* v. *International Terminal Operating Co.,* 358 U. S., at 379. In *Franchise Tax Board,* we forcefully reiterated this need for prudence and restraint in the jurisdictional inquiry: "We have always interpreted what *Skelly Oil* [*Co.* v. *Phillips Petroleum Co.,* 339 U. S. 667, 673 (1950)] called `the current of jurisdictional legislation since the Act of March 3, 1875' . . . with an eye to practicality and necessity." 463 U. S., at 20.

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. Thus, as the case comes to us, it is appropriate to assume that, under the settled framework for evaluating whether a federal cause of action lies, some combination of the following factors is present: (1) the plaintiffs are not part of the class for whose special benefit the statute was passed; (2) the indicia of legislative [811] intent reveal no congressional purpose to provide a private cause of action; (3) a federal cause of action would not further the underlying purposes of the legislative scheme; and (4) the respondents' cause of action is a subject traditionally relegated to state law.[7] In short, Congress did not intend a private federal remedy for violations of the statute that it enacted. [The 4 factors above are the factors courts use to evaluate whether a statute that does not explicitly grant a private right of action nonetheless *implies* a private right of action.]

This is the first case in which we have reviewed this type of jurisdictional claim in light of these factors. That this is so is not surprising. The development of our framework for determining whether a private cause of action exists has proceeded only in

the last 11 years, and its inception represented a significant change in our approach to congressional silence on the provision of federal remedies.[8]

The recent character of that development does not, however, diminish its importance. Indeed, the very reasons for the development of the modern implied remedy doctrine — the "increased complexity of federal legislation and the increased volume of federal litigation," as well as "the desirability of a more careful scrutiny of legislative intent," *[…]* — are precisely the kind of considerations that should inform the concern for "practicality and necessity" that *Franchise Tax Board* advised for the construction of § 1331 when jurisdiction is asserted [812] because of the presence of a federal issue in a state cause of action.

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.[9] 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.[10]

[…]
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.

[818] JUSTICE BRENNAN, with whom JUSTICE WHITE, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, dissenting.

Article III, § 2, of the Constitution provides that the federal 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." We have long recognized the great breadth of this grant of jurisdiction, holding that there is federal jurisdiction whenever a federal question is an "ingredient" of the action, *Osborn* v. *Bank of the United States,* 9 Wheat. 738, 823 (1824), and suggesting that there may even be jurisdiction simply because a case involves "potential federal questions," *[…][…]*

Title 28 U. S. C. § 1331 provides, in language that parrots the language of Article III, that the district courts shall have original jurisdiction "of all civil actions arising under the Constitution, laws, or treaties of the United States." Although this language suggests that Congress intended in § 1331 to confer upon federal courts the full breadth of permissible "federal question" jurisdiction[…], § 1331 has been construed more narrowly than its constitutional counterpart. […]. Nonetheless, given the language of the statute and its close relation to the constitutional grant of federal-question jurisdiction, limitations on federal-question jurisdiction under § 1331 must be justified by careful consideration of the reasons [819] underlying the grant of jurisdiction and the need for federal review. *Ibid.* I believe that the limitation on federal jurisdiction recognized by the Court today is inconsistent with the purposes of § 1331. Therefore, I respectfully dissent.

I

While the majority of cases covered by § 1331 may well be described by Justice Holmes' adage that "[a] suit arises under the law that creates the cause of action," *American Well Works Co.* v. *Layne & Bowler Co.,* 241 U. S. 257, 260 (1916), it is firmly settled that there may be federal-question jurisdiction even though both the right asserted and the remedy sought by the plaintiff are state created. […]. The rule as to such cases was stated in what Judge Friendly described as "[t]he path-breaking opinion" in *Smith* v. *Kansas City Title & Trust Co.,* 255 U. S. 180 (1921). […]In *Smith,* a shareholder of the defendant corporation brought suit in the federal court to enjoin the defendant from investing corporate funds in bonds issued under the authority of the Federal Farm Loan Act. The plaintiff alleged that Missouri law imposed a fiduciary duty on the corporation to invest only in bonds that were authorized by a valid law and argued that, because the Farm Loan Act was unconstitutional, the defendant could not purchase bonds issued under its authority. Although the cause of action was wholly state created, the Court held that there was original federal jurisdiction over the case:

> "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 [820] under [the statute granting federal question jurisdiction]." 255 U. S., at 199.

The continuing vitality of *Smith* is beyond challenge. We have cited it approvingly on numerous occasions, and reaffirmed its holding several times — most recently just three Terms ago by a unanimous Court in *Franchise Tax Board* v. *Construction Laborers Vacation Trust, supra,* at 9. […]. Moreover, in addition to Judge Friendly's authoritative opinion in *T. B. Harms Co.* v. *Eliscu, supra,* at 827, *Smith* has been widely cited and followed in the lower federal courts. […] Furthermore, the principle of the *Smith* case has been recognized and endorsed by most commentators as well. […].

[822] There is, to my mind, no question that there is federal jurisdiction over the respondents' fourth cause of action under the rule set forth in *Smith* and reaffirmed in *Franchise Tax* [823] *Board.* Respondents pleaded that petitioner's labeling of the drug Bendectin constituted "misbranding" in violation of §§ 201 and 502(f)(2) and (j) of the Federal Food, Drug, and Cosmetic Act (FDCA), […]and that this violation "directly and proximately caused" their injuries. […]. Respondents asserted in the complaint that this violation established petitioner's negligence *per se* and entitled them to recover damages without more. *Ibid.* No other basis for finding petitioner negligent was asserted in connection with this claim. As pleaded, then, respondents' "right to relief depend[ed] upon the construction or application of the Constitution or laws of the United States."[…]. Furthermore, although petitioner disputes its liability under the FDCA, it concedes that respondents' claim that petitioner violated the FDCA is "colorable, and rests upon a reasonable foundation." *Smith, supra,* at 199. [824] Of course, since petitioner must make this concession to prevail in this Court, it need not be accepted at face value. However, independent examination of respondents' claim substantiates the conclusion that it is neither frivolous nor meritless. As stated in the complaint, a drug is "misbranded" under the FDCA if "the labeling or advertising fails to reveal facts material . . . with respect to consequences which may result from the use of the article to which the labeling or advertising relates . . . ." 21 U. S. C. § 321(n). Obviously, the possibility that a mother's ingestion of Bendectin during pregnancy could produce malformed children is material. Petitioner's principal defense is that the Act does not govern the branding of drugs that are sold in foreign countries. It is certainly not immediately obvious whether this argument is correct. Thus, the statutory question is one which

"discloses a need for determining the meaning or application of [the FDCA]," *T. B. Harms Co.* v. *Eliscu,* 339 F. 2d, at 827, and the claim raised by the fourth cause of action is one "arising under" federal law within the meaning of § 1331.

II

The Court apparently does not disagree with any of this — except, of course, for the conclusion. According to the Court, if we assume that Congress did not intend that there be a private federal cause of action under a particular federal law (and, presumably, a *fortiori* if Congress' decision not to create a private remedy is express), we must also assume that Congress did not intend that there be federal jurisdiction over a state cause of action that is determined by that federal law. Therefore, assuming — only because the parties [825] have made a similar assumption — that there is no private cause of action under the FDCA, the Court holds that there is no federal jurisdiction over the plaintiffs' claim[…]

The Court nowhere explains the basis for this conclusion. Yet it is hardly self-evident. Why should the fact that Congress chose not to create a private federal *remedy* mean that Congress would not want there to be federal *jurisdiction* to adjudicate a state claim that imposes liability for violating the federal law? Clearly, the decision not to provide a private federal remedy should not affect federal jurisdiction unless the reasons Congress withholds a federal remedy are also reasons for withholding federal jurisdiction. Thus, it is necessary [826] to examine the reasons for Congress' decisions to grant or withhold both federal jurisdiction and private remedies, something the Court has not done. . . .

2.6.5 Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg., 545 U.S. 308 (2005)

GRABLE & SONS METAL PRODUCTS, INC.

v.

DARUE ENGINEERING & MANUFACTURING

JUSTICE SOUTER delivered the opinion of the Court.

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, § 6337(b)(1), and after that period [311] had passed, the Government gave Darue a quitclaim deed, § 6339.

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," Tr. 17 (Apr. 2, 2001), 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. On the merits, the court granted summary judgment to Darue, holding that although § 6335 by its terms required personal service, substantial compliance with the statute was enough. […]

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). The court went on to affirm the District Court's judgment on the merits. We granted certiorari on the jurisdictional question alone,[2][…] to resolve a split within the Courts of Appeals on whether *Merrell Dow Pharmaceuticals Inc.* v. *Thompson,* 478 U. S. 804 (1986), always requires [312] a federal cause of action as a condition for exercising federal-question jurisdiction.[3] 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.,* 255 U. S. 180 (1921), 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 [313] 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]." *Id.,* at 199.

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 [314] the application of § 1331. Thus, *Franchise Tax Bd.* explained that the appropriateness of a federal forum to hear an embedded issue could be evaluated only after considering the "welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system." *Id.,* at 8. 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, supra,* at 810.

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, […] 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," […]and Grable has premised its superior title claim on a failure by the IRS to give it adequate notice, as defined by federal [315] 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," *United States* v. *Rodgers,* 461 U. S. 677, 709 (1983), 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. […]

This conclusion puts us in venerable company, quiet title actions having been the subject of some of the earliest exercises of federal-question jurisdiction over state-law claims. In *Hopkins,* […] the question was federal jurisdiction over a quiet title action based on the plaintiffs' allegation that federal mining law gave them the superior claim. Just as in this case, "the facts showing the plaintiffs' title and the existence and invalidity of the instrument or record sought to be eliminated as a cloud

upon the title are essential parts of the plaintiffs' cause of action."[4] *Id.,* at [316] 490. As in this case again, "it is plain that a controversy respecting the construction and effect of the [federal] laws is involved and is sufficiently real and substantial." *Id.,* at 489. This Court therefore upheld federal jurisdiction in *Hopkins,* as well as in the similar quiet title matters of *Northern Pacific R. Co.* v. *Soderberg,* 188 U. S. 526, 528 (1903), and *Wilson Cypress Co.* v. *Del Pozo y Marcos,* 236 U. S. 635, 643-644 (1915). Consistent with those cases, the recognition of federal jurisdiction is in order here.

B
[The opinion argues that *Merrell Dow* is not overruled, but is consistent with this rule]
IV

The judgment of the Court of Appeals, upholding federal jurisdiction over Grable's quiet title action, is affirmed.

It is so ordered.

2.6.6 Notes on Embedded Federal Questions

1. The Grable Test. Grable represents an effort to balance between federalizing what have been state issues and leaving it to the states to provide guidance on federal issues of national importance. Grable sets forth a four part test:

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.

The first two legs of the test are pretty straightforward. Litigants will not be able to achieve federal jurisdiction if federal issues are simply stapled on the body of what remains a state law case, nor will they get into federal court if the federal issues are so readily resolved that there is no actual dispute over them. The 'substantial' leg is a bit more difficult. In this case, the court is looking for issues that matter not just to the litigants but to the system of justice as a whole. There are times when a federal issue is indeed essential to resolution of the case and vigorously disputed, but its resolution won't matter beyond the current litigants. Such cases are not 'substantial' under the test. Finally, the last leg of the test deals with the issue that controlled in *Merrell Dow*. If Congress has chosen to not create a private right of action, or if an area of litigation has traditionally been resolved under state law, the fourth leg of the test will counsel against opening federal courts.

2. Application of Grable. he Court has returned to Grable issues twice since Grable was issued. *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677 (2006), involved whether a claim for reimbursement that rose under a contract entered into pursuant to the Federal Employees Health Benefits Act of 1959 stated a federal question. The claim was a contract claim for reimbursement, but involved reference to the federal statute and the federal program. The Court held 5-4 that the Grable test was not satisfied. In *Gunn v. Minton*, 568 U.S. 251 (2013), the Court held unanimously that although a state legal malpractice case would involve issues with regard to whether federal patent law issues were handled correctly, the case did not satisfy the Grable standards for being in federal court as the question was not 'substantial' with regard to the impact on federal law.

Lower courts have faced the issue much more often. While often recognizing that the *Grable* exception is "exceedingly narrow" or "slim," lower courts have gone both ways on *Grable* cases. in those cases that did find a *Grable* exception, the federal issues were generally the core issues in the case and were of interest to the federal system.

2.7 Supplemental Jurisdiction

2.7.1 Historical Development of Supplemental Jurisdiction

If you look back at Article III, Section 2 you will note that it talks about a federal court having jurisdiction over a 'case or controversy.' How exactly does a 'case or controversy' relate to a legal claim? More specifically, how does a court deal with a situation where federal subject matter jurisdiction exists for one legal claim but not for a different but closely related claim arising from the same set of facts?

This is the issue that the Supreme Court faced in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). In *Gibbs*, a labor dispute arose between a union and the operators of a coal mine in the mountains of Tennessee. Gibbs, an employee of and contractor to the coal mining company, brought claims against the union. The claims included a federal law claim alleging violations of labor law, for which federal question jurisdiction existed, and state law claims alleging violation of Tennessee law, which did not have their own basis for federal jurisdiction.

The question (well, at least the question we care about) before the Court was whether it could resolve the state law claims along with the federal law claim. They all arose from the same facts, and the proof would substantially overlap. Creating a doctrine that came to be known as pendent claim jurisdiction, the Court held that since the federal claim created a case or controversy that was properly before the trial court, it could hear the state law claims as well. The claims all had to arise from a "common nucleus of operative fact" and the relationship between the federal claims and the pendent claims had to be such that ordinarily a plaintiff would expect to try them all at the same time.

The court took care to note that the doctrine was discretionary - that is, the trial could could hear the state law claims but was not obligated to. Taking into account issues such as "judicial economy, convenience and fairness to litigants" the court could decide to exercise pendent jurisdiction or not.

There was not, at this time, any federal statute creating pendent claim jurisdiction although there was, of course, a statute creating jurisdiction over the federal question claim. The extension of pendent jurisdiction to additional claims was an exercise of the Court's rulemaking power, but drew on the courts already being empowered to hear the core of the "case or controversy" with the rulemaking dealing with whether the whole case or controversy could be brought into federal court.

Note that in Gibbs the parties were the same on all claims. No additional parties were added to the case.

The issue of pendent parties came up in later cases. In *Aldinger v. Howard*, 427 U.S. 1 (1976), the Court suggested in dicta that pendent party jurisdiction might be proper unless Congress passed a contrary statute.

The next case to address pendent parties involved a case where the original basis for federal jurisdiction was based on diversity. The plaintiff then wanted to add an additional pendent party from the state as the plaintiff. *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978). Because of the requirement of complete diversity, the case could not have been brought originally with the pendent same state party as part of the original line up. The Court rejected the extension of pendent party jurisdiction in this setting, holding that it would conflict with 28 U.S.C. § 1332.

In *Finley v. United States*, 490 U.S. 545 (1989), the court faced the issue of adding a pendent party when the original claim was a federal question claim. Following a plane crash, the widow of one of the decedents brought a claim against the United States government under the Federal Tort Claims Act, a federal statute providing federal jurisdiction but only against the federal

government. She attempted to add to the same lawsuit a state law tort claim against a city government also involved in operating the same airfield. The Court, in an opinion by Justice Scalia, held that it was up to Congress, not the Court, to authorize such pendent party jurisdiction when it was not included in the FTCA. (Note how the prior dicta in *Aldinger v. Howard*, 427 U.S. 1 (1976), however clear or on point, was not controlling on a later court).

Congress responded with 28 U.S.C. § 1367. Please be clear on one thing: § 1367, and not the cases that led up to it, provides the governing law now on pendent jurisdiction, or as it has since been called, supplemental jurisdiction.

2.7.2 28 U.S. Code § 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.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(Added Pub. L. 101–650, title III, § 310(a), Dec. 1, 1990, 104 Stat. 5113.)

2.7.3 Link to www.youtube.com

https://www.youtube.com/watch?v=EYzfTdIZoP0

This video is also available on TWEN.

2.7.4 § 1367 Explained

The first thing to note is that § 1367 overrules the result in *Finley* by allowing pendent parties to be added, but otherwise carries forward the law as developed by the court before. The claim to be added must be closely related to the underlying federal claim - while the statute adopts the Constitutional standard of 'case or controversy' as a practical matter the inquiry into relatedness is pretty much the same. It must arise from the same cluster of operative facts. The doctrine remains discretionary - courts are not required to exercise supplemental jurisdiction. Parties who have one claim that has a basis for jurisdiction can add other claims against the same party.

Pendent parties may now be added. If the original claim is based *only* on diversity, and adding a new party would defeat complete diversity, § 1367(b) will prevent *a plaintiff* from adding that party, consistent with the result in *Kroger*. On the other hand, parties may be added to a diversity case if their addition does not destroy complete diversity or otherwise frustrate § 1332. Non-diverse parties may also be added outside the rather specific limitations of § 1367(b). If the original claim is a federal question claim, § 1367(b) will not apply, and the claim may be freely added subject to the discretionary takeback of § 1367(c).

In terms of practical analysis, the place to start is with the claim that provides that original basis for federal subject matter jurisdiction. In order to sear this into your memory, I want you to take a moment to listen to one of the worst pieces of American pop music ever recorded, *He Aint Heavy* by The Hollies. The song recounts what is said to be a true story. One cold, snowy night two young boys appeared at the door of an orphanage called Boys Town, with the older brother carrying the exhausted younger brother on his back. When asked if his brother was not too heavy for him to carry, the older brother is said to have replied, "He ain't heavy - he's my brother."

Think of the original claim as the big brother. The big brother has to be a claim that can walk - that is, invoke federal subject matter jurisdiction - on its own. Otherwise, it cannot carry anything.

The second claim has to be related. The older brother is not carrying some random child; he's carrying his closest relation, his brother. No claim comes in that is not related to the first claim.

Finally, entry into the orphanage is discretionary. The guardian at the door has the power to exclude the younger brother. In most cases, though, the little waif riding on big brother's back will be allowed in.

It doesn't fit into our familly analogy, but you must also keep in mind the *Kroger* issue - if the supplemental claim would have destroyed complete diversity if brought by the claimant at the outset, it cannot be added under supplemental jurisdiction.

An important thing to remember about supplemental jurisdiction is that it applies to all claims in the case, not just claims by the plaintiff. For example, imagine a lawsuit between Perry Plaintiff (NY) and Don Defendant (NJ). The original claim is for $100,000, and so full diversity is satisfied. Now, imagine that Don Defendant has a counterclaim arising from the same transaction as the original claim, but it is only for $50,000. The sum would be too low for diversity jurisdiction, and it cannot be aggregrated to Plaintiff's claim. However, supplemental jurisdiction would allow it to be be included.

Pay attention to Section 1367(b)'s takeback. Note that it only applies to claims by plaintiffs, and only to claims where the sole basis for federal subject matter jurisdiction is diversity. For our hypothetical above, further imagine that Defendant's counterclaim is not just against Plaintiff, but also against Tammy Third (NJ). Here, in addition to the amount in controversy

problem there also is no diversity. No problem - the claim is not by the original plaintiff, and since it is sufficiently related to the original claim there is a basis for supplemental jurisdiction.

Take a look at these hypotheticals and see if you can get to the correct response about whether there is supplemental jurisdiction:

Pam Plaintiff (CA) brings a state law claim against Doris Defendo (NV). The claim is for $80,000. She wishes to add a related a claim against Ima Sued (WA) for $30,000, arising from the same transaction.

Pam Plaintiff (CA) brings a federal law claim against Doris Defendo (NV). The claim is for $25,000. She wishes to add a related claim against Amy Adverse (CA), seeking $25,000.

Pam Plaintiff (CA) brings a state law claim against Doris Defendo (NV). The claim is for $80,000. She wishes to add a related claim against Amy Adverse (CA), seeking $125,000.

Pam Plaintiff (CA) brings a state law claim against Doris Defendo (NV). Defendo wishes to bring a counterclaim against Plaintiff for $25,000, arising from a different, unrelated transaction.

Pam Plaintiff (CA) brings a state law claim against Doris Defendo (NV) seeking $50,000, and includes in the same lawsuit a federal law claim for $25,000.

Pam Plaintiff (CA) brings a state law claim against Doris Defendo (NV) seeking $80,000 and includes in the same lawsuit a federal law claim for $25,000. She wishes to add to the lawsuit a state law claim against Ima Sued (CA), arising from the same facts, seeking $25,000.

Remember that the court has discretion with regard to whether supplemental jurisdiction should be extended. The following case deals with that issue.

2.7.5 Szendrey-Ramos v. First Bancorp

Carmen Gabriella SZENDREY-RAMOS, et al, Plaintiffs v. FIRST BANCORP, et al, Defendants.
United States District Court, D. Puerto Rico.

OPINION AND ORDER

SALVADOR E. CASELLAS, Senior District Judge.

Pending before the Court is Defendants' Motion to Dismiss Plaintiffs' Amended Complaint […]. Plaintiffs opposed such motion […] and Defendants replied […]. For the reasons explained below, the Court declines to exercise supplemental jurisdiction of the pendent state law claims, thus rendering resolution of certain arguments posed in the Motion to Dismiss unnecessary. As to Defendants' request for dismissal of the federal claims, it is GRANTED in part, DENIED in part.

[…]

Background

Because the Court is ruling on a motion to dismiss, we set forth the facts as they are alleged in the Amended Complaint […]. Plaintiffs are Carmen Ga-briella Szendrey-Ramos (hereinafter Plaintiff or Szendrey) and Rafael Ernesto Bonnin-Suris, Plaintiffs husband (hereinafter Bonnin). Szendrey worked at First Bank until her dismissal in October 2005. At the time of her

dismissal, Szendrey was a Senior Vice President and General Counsel for First Bank, as well as Secretary of the Board of Directors of FirstBank Puer-to Rico and First BanCorp. Both of these entities are named as Defendants in this action. Also named as Defendants are: Luis Beauchamp, who is the CEO and President of FirstBank Puerto Rico and First BanCorp., and who, at all relevant times, occupied that position or his former post of Senior Executive Vice President of the bank; Richard Reiss, who at the relevant time, was the acting Chairman of the Audit Committee of the Board of Directors of FirstBank Puerto Rico and First Ban-Corp, and is now the President of the Board of Directors of the State Insurance Fund; and Lawrence Odell, who is currently Executive Vice President and General Counsel of First Bank Puerto Rico and First BanCorp., as well as Secretary of its Board of Directors.

In March 2005, Szendrey received a report from an external law firm that included information about possible ethical and/or legal violations committed by bank officials in relation to the accounting for the bulk purchase of mortgage loans from other financial institutions. Szendrey conducted an investigation into this issue, focusing on the possibility of whether the bank officials' conduct amounted to a violation of law or the bank's Code of Ethics. Upon conclusion of such investigation, Szendrey concluded that there had been irregularities and violations of the Code of Ethics and reported such findings to outside counsel for the bank as well as bank officials. She also divulged her findings to the Board of Directors at a meeting in which she was present.

The Board of Directors delegated to Beauchamp the authority to negotiate the terms of separation of a high level official involved in the irregularities. At this point,1 it bears noting that Plaintiffs allege that, upon learning of Szendrey's investigation, Beauchamp was hostile to the idea that Szendrey would include, as part of such investigation, the bank's Ethics Code and possible violations thereto.

Szendrey expressed to the bank's management and outside counsel her opinion with regard to the afore-mentioned negotiation, raising ethical and legal concerns. Thereafter, and per Beauchamp's instructions, Szendrey was excluded from participating in the negotiation process. After such exclusion, a separation package for the bank official mentioned in the previous package was authorized, despite the concerns raised by Szendrey.

Some months later, the bank's outside accounting firm once again raised an issue regarding the bulk purchase of mortgage loans. At that point, the Board of Directors decided to review the matter. In furtherance thereof, the Audit Committee of the Board of Directors, of which Reiss was chairman, was to select a person or persons to conduct the review. Reiss selected Odell and his law firm, Martinez, Odell & Calabria, to assist in the review and/or conduct an investigation. This designation was approved by the Audit Com*84mittee and the Board itself. It bears mentioning that Plaintiff alleges that Odell and Reiss have a long standing professional association. ,

Odell conducted the review, along with a U.S. based law firm which was represented by an attorney named David Meister. Odell informed the Board that he had concluded that Szendrey had incurred in misconduct, however he made no written report of such conclusion. On September 26, 2005, Odell and Meister informed Szen-drey that they would recommend to the Board that she be placed on administrative leave. Thereafter, Szendrey appeared before the board by herself and through counsel to defend her position. After such appearances, the bank did not permit Szendrey to resume her duties as General Counsel. ,

Szendrey was terminated from her - employment on October 25, 2006. Beau-champ, who had by that time been named the bank's CEO and President, allegedly played a critical role in the decision to terminate plaintiff, as did Reiss and Odell. Szendrey's position as Secretary of the Board was temporarily filled by an attorney from the firm Martinez, Odell & Cal-abria. Szendrey's position as General Counsel remained open for some time. By February 2006, however, Odell had been appointed Executive Vice President and General Counsel of FirstBank and First BanCorp and Secretary of the Board.

At the time of her dismissal, Szendrey was offered no severance package. However, several bank officials who had been involved in the irregularities identified by Szendrey in their investigation, and who were separated from the bank in 2005 and 2006, were provided with severance packages or the opportunity to exercise outstanding stock options. Other bank officials in a similar situation remain at the bank.

After Szendrey's termination, the Securities and Exchange Commission (SEC) announced that it was conducting an investigation into certain accounting matters at the bank. In order to deal with such investigation, bank officials placed unwarranted blame on Szendrey. Szendrey was prevented from defending herself from the charges of misconduct by the bank's assertion of the attorney/client privilege. Because of the assertion of such privilege, Szendrey was unable to provide information that would have proved her complete absence of blame. As part of their strategy, bank officials filed with the SEC a Restatement of the Corporation's Financial Statements for the years 2002 through 2004 wherein they allegedly deliberately misrepresented Szendrey's participation and actions with respects to facts contained in the Restatement. Plaintiffs claim that such misrepresentations, along with certain key omissions in the Restatement, were the result of Defendants' attempt to give the false impression that Szendrey had failed in her duties.

Plaintiffs allege that Defendants' actions were taken in retaliation against Szendrey for having pointed out unethical and/or illegal actions by the bank, as she had the ethical obligation to do, in retaliation for Plaintiffs' refusal to accept a payment pursuant to a contract between Bonnin's firm and the State Insurance Fund (of which Reiss is the President of the Board), and in retaliation for Szendrey having filed a complaint before the EEOC and this Court.

At this point we eschew any attempt at a more detailed factual account. Where necessary in the later portions of this Opinion, we will refer to specific factual allegations in the complaint.

Applicable Law and Analysis

Plaintiffs' complaint includes four causes of action, only three of which need concern *85us: for gender discrimination and retaliation, in violation of Title VII and P.R. law; for wrongful discharge under Puerto Rico's Act 80 of May 30, 1976, 29 P.R. Laws Ann. § 185a and violations of the P.R. Constitution, Art. II §§ 1, 8, 16; claims for defamation and tortious interference with contracts under Puerto Rico's Art. 1802 of the Civil Code.1

Defendants moved for dismissal of the entire complaint. Their arguments, in short, are the following: (1) dismissal is warranted because in order to prove her claims, Szendrey must breach her duty to maintain the confidentiality of privileged information; (2) Plaintiffs' Title VII claim fails to plead the necessary elements thereof; (3) the Title VII claim against the individual defendants must be dismissed because Title VII does not allow for such a claim; (4) the claims under the P.R. Constitution must be dismissed as barred by the exclusive relief provided by Act 80; (5) the claim under P.R.'s Act 115 must be dismissed because the actions allegedly taken by Defendants were taken after her discharge and thus no actionable

retaliation under that law took place; (6) the claims under P.R.'s Act 69, 100, and 115 against the individual defendants fail as a matter of law; (7) Plaintiffs failed to plead all necessary elements of the tortious interference claim, thus requiring its dismissal; (8) Co-plaintiff Bonnin's claims must be dismissed for failure to plead a federal claim; and (9) in any event, if the Court dismisses the Title VII claim, the remaining claims, which are all supplemental, should also be dismissed.

Upon careful consideration of the issues presented by this case, and the law governing such issues, we decline to exercise supplemental jurisdiction over the P.R. law claims. Accordingly, these claims will be dismissed without prejudice, and Defendants' arguments for dismissal on the merits of such claims are thus moot. As for the Title VII discrimination and retaliation claims, they survive the motion to dismiss. This case thus goes forward solely under Title VII. We explain our reasoning below.

I. Supplemental Jurisdiction

28 U.S.C.A. § 1367, in part provides:

> (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.

This statute codifies the principles of pendent and ancillary jurisdiction set forth by the Supreme Court, to wit, that a "federal court's original jurisdiction over federal questions carries with it jurisdiction over state law claims that 'derive from a common nucleus of operative fact,' such that 'the relationship between [the federal] claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional case.' " *[…]*

Supplemental jurisdiction, however, is subject to exceptions, also codified at § 1367:

> *86(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.

In including these exceptions, Congress was also recognizing long-standing Supreme Court precedent that "pendent jurisdiction 'is a doctrine of discretion not of plaintiffs right,' and that district courts can decline to exercise jurisdiction over

pendent claims for a number of valid reasons." *City of Chicago,* 522 U.S. at 172[…]. The Supreme Court, in *City of Chicago,* explained that:

> Depending on a host of factors, then— including the circumstances of the particular case, the nature of the state law claims, the character of the governing state law, and the relationship between the state and federal claims — district courts may decline to exercise jurisdiction over supplemental state law claims. The statute thereby reflects the understanding that, when deciding whether to exercise supplemental jurisdiction, "a federal court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity."

[…]

The Court finds that two of § 1367(c)'s subsections are at issue here: (1) that the state law claims raise complex or novel issues and (2) that the state-law claims substantially predominate over the federal claim. We start with the latter and work our way back to the former.

Plaintiffs' complaint includes two lonesome claims under Title VII, for discrimination and retaliation thereunder. The remaining claims all arise out of P.R. law: Act 100, 29 P.R. Laws Ann. § 146 *et seq.* (for gender discrimination); Act 115, 29 P.R. Laws Ann. § 194 *et sew.* (for retaliation); Act 80, 29 P.R. Laws Ann. § 185a *et seq.* (for wrongful discharge); §§ 1, 8 and 16 of the P.R. Constitution (for violations to Plaintiffs' dignity, honor, and personal integrity); and under Art. 1802 of the P.R. Civil Code, 31 P.R. Laws Ann. § 5141 (both for tortious interference with contracts and for defamation). Not only do the P.R. law claims far outnumber the federal claims, but them scope also exceeds that of the federal claims. On that point we note that although some of the P.R. law claims mimic the federal claims *(i.e.,* the Act 100 and Act 115 claims), the remaining P.R. law claims (wrongful discharge, tor-tious actions infringing Plaintiffs constitutional rights, tortious interference with contracts, and defamation) are distinct and each has its own elements of proof; proof that is not necessary to establish the Title VII claims. That the state-law claims predominate over the federal claims is, in and of itself, reason enough to decline to exercise supplemental jurisdiction. *[…]*

Moreover, we note that the P.R. law claims require a much fuller incursion into the performance of Szendrey as General Counsel and any shortcomings she may have had as such. This, in turn, leads us to the other reason for declining to exercise supplemental jurisdiction: the presence of complex or novel issues of state law. The main issue raised by Defendants in their motion to dismiss, that Plaintiffs' prosecution of their claims would run afoul of Canon 21 of the Puerto Rico Code of Professional Ethics, […], is at its apex in the P.R. law claims. For example, in order to prove that Defendants defamed her, Szen-drey would have to establish that what was said about her *(i.e.,* that she participated in wrongful acts) was false. In order to prove such falsity, Szendrey would have to reveal the extent of her participation regarding such wrongful acts, including what information she became aware of as General Counsel, what actions she took after learning such information, and what advice she offered'her client with regards to such information.

Canon 21 undisputably belongs to an exclusively Puerto Rican body of law, and one that deals with the highly sensitive matter of lawyers' conduct, and its relation to society's interest in a fully functioning legal system. *[…]* The interpretation of the canons is normally the province of the Puerto Rico Supreme Court, which is entrusted with the regulation and supervision of

the legal profession. *See, In re Godinez Morales,* […]at *3 (P.R. Feb. 3, 2004) (the authority to regulate the legal profession in Puerto Rico belongs exclusively to the P.R. Supreme Court as part of its inherent powers). We note, moreover, that Canon 21 is decidedly different to the corresponding Model Rule of the American Bar Association. Unlike this Court and several U.S. jurisdictions, Puerto Rico has not adopted the latest version of the American Bar Association's Model Rules.

Canon 21 is .decidedly silent on the issue of a lawyer's claim — whether in-house or not — against his former client, and the possibility, of divulging confidential information in order to pursue such a claim. While the parties have pointed us to decisions by several courts ruling one way or the other as to the viability of those claims, it is important to underscore that such decisions are based on the ethical provisions that governed the attorney claimants in those eases. Helpful though those decisions may be to understand the viability of a claim by an attorney against a former client when that attorney is bound by the New York Code of Ethics or by the ABA *88Model Rules, they do not conclusively establish whether a Puerto Rican attorney, bound by the P.R. Code of Ethics, may bring suit against his former client when such a suit would entail the disclosure of information subject to the attorney-client privilege. This is an issue of Puerto Rico law that has yet to be addressed by the Puerto Rico courts and which is imbued with important considerations of public policy. This is particularly so as to Szen-drey's constitutional claims; even if Canon 21 were, *for example,* held to bar an Act 80 claim, there would still be a question of whether an attorney's action to redress the violation of her constitutional rights must succumb under the heavy duty of silence imposed by Canon 21. Considerations of comity counsel against the Court assuming jurisdiction over such delicate and as of yet unresolved Puerto Rico law issues. *[…]*.

Because the Puerto Rico law claims substantially predominate over the federal claims in this case, and because they posit novel and complex issues of state law, the Court declines to exercise supplemental jurisdiction. Accordingly, the Puerto Rico law claims will be dismissed without prejudice, so that Plaintiffs may re-file them in the Puerto Rico courts.

II. Title VII

[…]

For the reasons explained above, the Court declines to exercise supplemental jurisdiction. Thus, the Puerto Rico law claims will be DISMISSED WITHOUT PREJUDICE. The Title VII claims against the individual defendants will be DISMISSED WITH PREJUDICE. Pending remain the Title VII claims against the corporate defendants.

SO ORDERED.

1

. The fourth cause of action is a direct action against the insurers.

2.7.6 Supplemental Jurisdiction Problems

Limited LLC was created under the laws of Delaware and is headquartered in New York. Its members (owners) are from New Jersey, Pennsylvania, and Connecticut. It wishes to bring a lawsuit against BigCo, Inc., a Delaware corporation headquartered in New York. The claim is a state law contract claim for $76,000. Limited LLC would like to add another state law claim - this one for fraud - against Dennis Defendo, a major shareholder of BigCo. The claim is related to the claim against BigCo,

alleging that Defendo committed fraud in connection with the Limited - Defendo agreement. This claim is for $70,000. Please analyze.

Limited LLC was created under the laws of Delaware and is headquartered in New York. Its members (owners) are from New Jersey, Pennsylvania, and Connecticut. It brings a federal law claim for $100,000 against Ima Sued, a resident of New Jersey. To the same litigation it adds a state law claim against Sued for $40,000. It then adds an additional state law claim against Sued's cousin and business partner, Bennie Sued, of Connecticut, and yet another claim against Ima Sued's friend, Denise Defendo, of New York. All of these claims arise from the same transaction as the original federal claim. Bennie Sued then brings two counterclaims arising under state law against Limited, both seeking $30,000. The first is related to the original federal claim and arises from the same transaction. The second is completely unrelated, arises from a separate business deal, and is for $50,000. Denise Defendo also brings two state law claims against Limited. One is for $10,000, and is related to the original federal claim. One is for $70,000, and is completely unrelated to any of the other claims in the lawsuit. Please analyze the subject matter jurisdiction issues.

2.8 Removal To Federal Court

2.8.1 General Removal Rule - 28 U.S.C. § 1441 - Actions removable generally

(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.

2.8.2 Procedure for Removal - 28 U.S.C. §1446(a), (d)

28 U.S.C. §1446(a), (d)

(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.

28 U.S.C.A. § 1446 (West)

(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.

2.8.3 Background For Removal - Concurrent Jurisdiction of State and Federal Courts

In general, courts defer to a plaintiff's choice of forum. One of the advantages that comes from being a plaintiff is that you get to choose the location and the court where you file, subject to limitations such as venue and personal jurisdiction, and courts consistently express a reluctance to disturb that choice. Because of concurrent jurisdiction, almost all cases that can be heard I federal court can also be heard in state court, and even if federal subject matter jurisdiction exists the choice in the first instance is the plaintiff's to make.

That said, there are occasions where the plaintiff's choice is overruled, and removal is one of those situations. Removal provides a way for a defendant to remove a case for which federal subject matter jurisdiction exists to federal court. The Constitutional requirement that there be federal subject matter jurisdiction continues; in addition, the requirements of the removal statutes must be met.

1. Federal Subject Matter Jurisdiction Must Exist. A necessary but not sufficient element for removal is that federal subject matter jurisdiction exists. If there is no federal subject matter jurisdiction, there can be no removal.

2. All Defendants Must Join. In a multidefendant case, what happens when some defendants want to remove the case to federal court and some are happy to stay in state court? The case stays in state court. Removal only is allowed when all

defendants served in the case join in the notice of removal. Chicago, Rock Island, & Pacific Railway Co. v. Martin, 178 u.S. 245 (1900).

3. Diversity Cases Can Be Different. The statute treats differently cases whose only basis for federal subject matter jurisdiction is diversity. In such a case, if any of the defendants – just one out of a 1,000 will do – is from the forum state, the case is not removable. That said, courts have been known to look closely at defendants whose nominal inclusion seems to be solely for the purpose of frustrating removal, and responding appropriately.

4. Procedure and Deadlines Matter. To remove a case, a notice of removal is filed not with the state court, but with the federal district court in the location where the state court is located (you can't pick a different geographic location; you must go to the nearest federal court house). The time to remove starts when the defendant is served in a case where federal subject matter jurisdiction could exist, and the defendant has only 30 days to file the notice. In some cases, as a case develops claims will be added or parties dropped in a way that creates federal subject matter jurisdiction, and in that case it may be possible to remove more than 30 days after filing – but in no case more than a year after the case begins. If a plaintiff voluntarily nonsuits a defendant from the forum state 13 months after filing, creating a case that would have been removable under the statute, tough beans – it's too late.

5. It Does Not Work in Reverse. There is no procedure for sending a case from federal court to state court. If a case is filed in federal court but there is no federal subject matter jurisdiction, it must be dismissed and, if possible, refiled.

6. Plaintiffs May Not Remove. Imagine a situation in which a plaintiff files a case in state court for which there is no federal subject matter jurisdiction. The defendant counterclaims and asserts a claim for which there is federal subject matter jurisdiction. Can the plaintiff now remove? No. Even though effectively a defendant on this claim, the plaintiff does not satisfy the statute.

7. Appeal from Removal Decisions By The Trial Court is Difficult At Best. If a federal court chooses not to accept a case that has been noticed for removal (the technical term is to remand it), there is no case in federal court from which any kind of review can be had. If it accepts the case, that will not be a final decision, and, as you recall from our study of appeals, that means that the normal process of appeal is a ways off.

8. Plaintiffs Can Manipulate Removal But Within Limits. A plaintiff can structure a case so as to reduce the chance of removal. For example in a diversity case the plaintiff can join a defendant from the forum state. The amount sought in damages can also be kept below the jurisdictional limit. Certain claims can be held back and added later, if state law would permit such amendments. That said, judges are generally not fools, and will disregard fraudulent joinder or excessively 'artful' pleading in considering a removal petition.

9. Other Removal Statutes. While Section 1441 is the main removal statute, there are others. Section 1442 deals with federal officers and agencies. The Class Action Fairness Act, which we will cover briefly when we get to class actions, provides a special method for removing certain kinds of class actions. Always remember that this course surveys U.S. Civil Procedure but we have neither the time nor the inclination to cover every single procedural device that might matter in practice.

10. Remand By Defendant. Once having removed successfully, can a defendant move to remand? In Avitts v. Amoco Production Co., 53 F.3d 690 (1995) the defendant removed a somewhat vague complaint that only referred to 'federal law.'

Plaintiff subsequently amended the complaint in federal court, asserting only state law claims. The federal court entered an order requiring the defendant to conduct an expensive environmental study, at which point the defendant moved to remand the case to state court. On interlocutory appeal, the Court of Appeals found that a federal question had never been successfully stated, and that so the case should be remanded, thereby vacating all relief entered by the federal court. Note that if a federal claim had been at some point successfully stated, the result might not have been the same, as federal jurisdiction would have attached.

2.8.4 Spencer v. United States District Court

Richard R. SPENCER, Executor of the Estate of Lindsay C. Spencer and Carmen West, Guardian Ad Litem for Wyley Spencer a minor, Petitioner, v. UNITED STATES DISTRICT COURT FOR the NORTHERN DISTRICT OF CALIFORNIA, Respondent, Altec Industries, Inc., and Does 1-30, jointly and severally, Real Party in Interest. United States Court of Appeals, Ninth Circuit.

DAVID R. THOMPSON, Senior Circuit Judge:

Petitioners seek a writ of mandamus ordering the district court to remand this action to state court. Petitioners argue the district court must remand pursuant to a bankruptcy court's order which petitioners claim requires the district court to abstain from exercising federal jurisdiction. In the alternative, petitioners contend that the joinder of a local, albeit diverse,- defendant following removal from state to federal court, destroyed subject-matter jurisdiction, requiring remand. *See.* 28 U.S.C. §§ 1441(b), 1447(c). Because we conclude that the district court did not clearly err in determining that the bankruptcy court's order does not require the district court to - abstain from exercising federal jurisdiction, and because we find no error in the district court's determination that federal diversity jurisdiction is not' destroyed by the joinder of a local, diverse defendant subsequent to removal, we deny the petition for a writ of mandamus.

I.

Lindsay C. Spencer, an electrical lineman, died as a result of injuries he sustained while working in an aerial lift bucket to repair and upgrade a Pacific Gas & Electric Company ("PG & E") utility pole. According to the petitioners, the operating controls of the lift bucket were unintentionally activated, causing the lift mechanism and the bucket to move suddenly and forcefully into the adjacent utility pole, injuring Mr. Spencer. The aerial lift truck then catapulted Mr. Spencer into the air, throwing him against a high voltage wire, causing his death by electrocution.

Mr. Spencer's son and estate brought the present wrongful death action in the superior court in California, alleging state law product liability claims against the manufacturer of the lift bucket, Altec Industries, and several Doe defendants.

Altec timely removed the case to the United States District Court for the Northern District of California on the basis of federal diversity jurisdiction. The plaintiffs are resident citizens of Alaska, and Altec asserts it is a citizen of Alabama. There is no dispute that the parties are diverse and that the required statutory amount in controversy is satisfied.

During discovery in the district court, the Spencers learned that possible negligence by PG & E may have caused or contributed to activating the lift bucket controls. They then moved to amend their complaint to name PG & -E as a defendant in the place of one of the Doe defendants. The Spencers concurrently moved to remand the action to state court, arguing that remand would be required due to the joinder of PG & E. Specifically, the Spenc-ers contended that because PG & E is a citizen of California for purposes of diversity jurisdiction, and because 28 U.S.C. § 1441(b) prohibits removal from state to

federal court when at least one defendant is a citizen of the state in which the action is filed, the joinder of PG & E would destroy federal removal jurisdiction and require remand under 28 U.S.C. § 1447(c).

At the time the Spencers sought to join PG & E as a defendant, PG & E was the Debtor in Chapter 11 bankruptcy proceedings in the Northern District of California. Accordingly, before the proposed joinder of PG & E could proceed, the Spencers *869had to obtain relief from the automatic stay imposed by 11 U.S.C. § 362(a). The Spencers, and PG & E by joint stipulation, obtained that relief by order of the bankruptcy court. The bankruptcy court order modified the automatic stay to permit join-der of PG & E "as a defendant in the State Court Action."

Relying on the language of the bankruptcy court's order, the Spencers supplemented their argument for remand to state court, contending that the order permitted their action to proceed exclusively in state court and therefore required the district court to abstain from exercising federal jurisdiction.

The district court granted the Spencers' motion to join PG & E as a defendant, but denied their motion to remand the action to state court. The district court rejected the notion that the bankruptcy court's order limited federal court non-bankruptcy jurisdiction. The district court concluded that the bankruptcy court's order was limited to lifting the automatic stay and did not require abstention. The district court also rejected the Spencers' contention that the § 1441(b) "forum defendant" rule, which limits federal removal jurisdiction, required remand to state court. The district court determined that the "forum defendant" rule is procedural rather than jurisdictional, and thus the addition of a local defendant did not require remand so long as removal was proper at the time the case was removed to federal court. The district court declined to certify its order for interlocutory appeal, and the petitioners then filed this petition for a writ of mandamus.

II.

"The remedy of mandamus is a drastic one, to be involved only in extraordinary situations." *Kerr v. United States Dist. Court,* 426 U.S. 394, 402, 96 S.Ct. 2119, 48 L.Ed.2d 725 (1976). The writ of mandamus "has traditionally been used in the federal courts only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' "[…]Because of the exceptional and extraordinary nature of mandamus, we have developed a five-factor test for evaluating the propriety of mandamus:

> (1) The party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief he or she desires.
>
> (2) The petitioner will be damaged or prejudiced in a way not correctable on appeal.
>
> (3) The district court's order is clearly erroneous as a matter of law.
>
> (4) The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules.
>
> (5) The district court's order raises new and important problems, or issues of law of first impression.

See Bauman v. United States Dist. Court, 557 F.2d 650, 654-55 (9th Cir.1977).

Of the foregoing five *Bauman* factors, we have stated " 'it is clear that the third factor, the existence of clear error as a matter of law, is dispositive.' " *[…]* Given the dispositive nature of the third *Bauman* factor, we consider that factor first.

*870A.

Applying the third *Bauman* factor to the petitioners' first asserted ground for relief, we conclude the district court did not commit clear error in its determination that the bankruptcy court's order lifting the automatic stay did not purport to require the district court to abstain from exercising otherwise proper federal jurisdiction.

The bankruptcy-court's order lifting the automatic stay provides, in pertinent part, that the stay is lifted for the "limited purpose of allowing [the Spencers] to add PG & E as a defendant in the State Court Action and for the parties to litigate the State Court Action to final judgment in the Superior Court of the State of California." *[…]*As the district court noted, the terms of the order do not reflect an intention that the district court abstain from exercising its otherwise proper jurisdiction. - Even assuming (without deciding) that the bankruptcy court could require such abstention, the order simply reflects the bankruptcy court's intention, pursuant to the stipulation of the parties, to lift the automatic stay to permit the litigation to proceed.

We conclude the district court did not clearly err as a matter of law in determining that the bankruptcy court's order did not limit the district court's jurisdiction. Thus, the petitioners have failed to satisfy the third *Bauman* factor with regard to the first ground on which they predicate their application for a writ of mandamus.

B.

We next consider the petitioners' contention that the district court should have remanded the case to state court because, once PG & E was added as a defendant, the district court lost subject-matter jurisdiction.

A civil action brought in • a state court over which federal Courts have original jurisdiction may be removed by the defendant to the appropriate district court. 28 U.S.C. § 1441(a). However, § 1441(b) imposes a limitation on actions removed pursuant to diversity jurisdiction: "such action[s] shall be removable only if none of the parties in-interest properly joined-and served as defendants, is a citizen of the State in which such action is brought." 28 U.S.C. § 1441(b). This "forum defendant" rule "reflects the belief that [federal] diversity jurisdiction is unnecessary because there is less reason to fear state court prejudice against the defendants if one or more of them is from the forum state." Erwin Chemerinsky, *Federal Jurisdiction* § 5.5, at 345 (4th ed.2003).

I-t is thus clear that the presence of,a local defendant at the time removal is sought bars removal. 28 U.S.C. § 1441(b).

What is less clear is whether the joinder of a local, but completely diverse defendant, after an action has been removed to federal court, requires remand. This is the question we confront in this case. The district court concluded it was not required to remand the case to state court, and we agree.1

*871Challenges to removal jurisdiction require an inquiry into the circumstances at the time the notice of removal is filed. When removal is proper at that time, subsequent events, at least those that do not destroy original subject-matter jurisdiction, do not require remand. *[…]*

Because the joinder of PG & E did not affect the propriety of the district court's original subject-matter jurisdiction, we need not decide whether an event occurring subsequent to removal which would defeat original subject-matter jurisdiction divests a district court of jurisdiction and requires remand. […]

We conclude that the post-removal join-der of PG & E, a "forum defendant," did not oust the district court of subject-matter jurisdiction. The forum defendant rule of 28 U.S.C. § 1441(b) is only applicable at the time a notice of removal is filed. Because no local defendant was a party to the action at that time, and given the preservation of complete diversity of the parties thereafter, the district court did not err in denying the Spencers' motion to remand.2 As stated above, we do not decide what the result would be if PG & E were a non-diverse defendant.

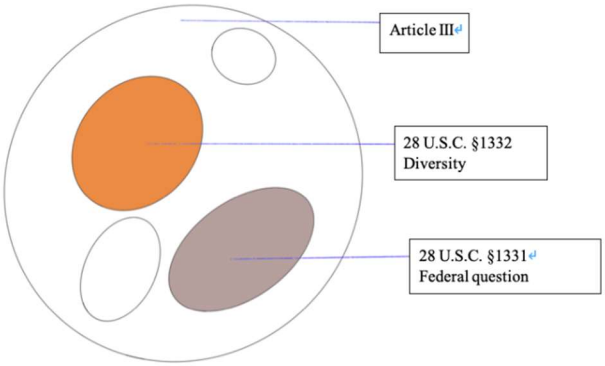
Petition for mandamus DENIED.

2.8.5 Removal Problems

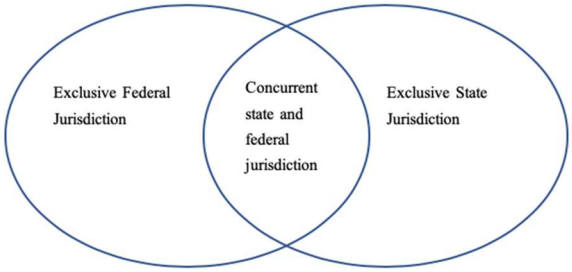
Perry Plaintiff (NJ) sues Donnie Defendant (NY) and Ima Sued (CT) in New York state court. Plaintiff asserts a state law claim but, like the state law claim in *Grable*, it requires interpretation of a federal statute. This claim is for $50,000 against each defendant. There also is a pure state law claim, unrelated, for $50,000, again against each defendant. Sued and Defendant then quickly bring federal question counterclaims against Plaintiff for $150,000 each. Both defendants then join in a timely notice of removal. Please analyze the removal issues.

2.9 Conclusion of Subject Matter Jurisdiction

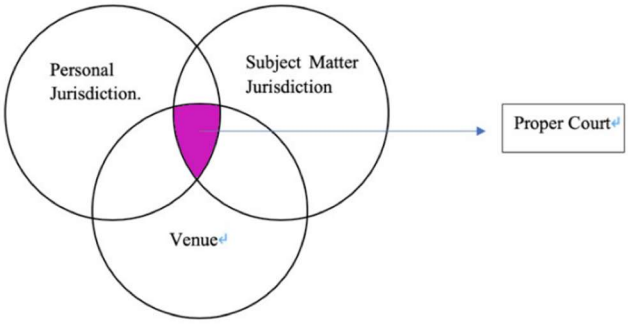
2.9.1 【Picture】ArticleIII & USC§1331&USC§1332



2.9.2 【Picture】Federal Jurisdiction & State Jurisdiction



2.9.3 【Picture】PJ&SMJ&Venue



2.9.4 Suggested Approaches to Subject Matter Jurisdiction Questions

When faced with a complicated subject matter jurisdiction (and I promise you will be), remember that you need to establish subject matter jurisdiction for each count. Remember that subject matter jurisdiction alone does not guarantee removability. For each count this might be helpful:

- Is there federal question jurisdiction?
- If not, is there diversity/alienage jurisdiction?
- If not, is there supplemental jurisdiction?
- If filed in state court, is the case removable?

2.9.5 Problems on Federal Subject Matter Jurisdiction

Perry Plaintiff (NY) has sued Don Defendant (NJ) and Denise Defendo (CT) in state court in New York. Against Defendant, he brings a state law contract claim on which he seeks $30,000, a related federal claim on which he seeks $20,000, and a completely unrelated state law claim on which he seeks $30.000. Against Defendo, he brings a state law contract claim related to the state law contract claim against Defendant, on which he seeks $40,000. Both Defendant and Defendo file proper and timely notices of removal. Please analyze.,

Perry Plaintiff (NY) files a state law claim against Don Defendant (NJ) in state court in Delaware, alleging breach of contract under which Defendants was supposed to make repairs on Plaintiff's home in New York. He seeks $100,000. Defendant files a notice of removal with the federal court in New York. Please analyze.

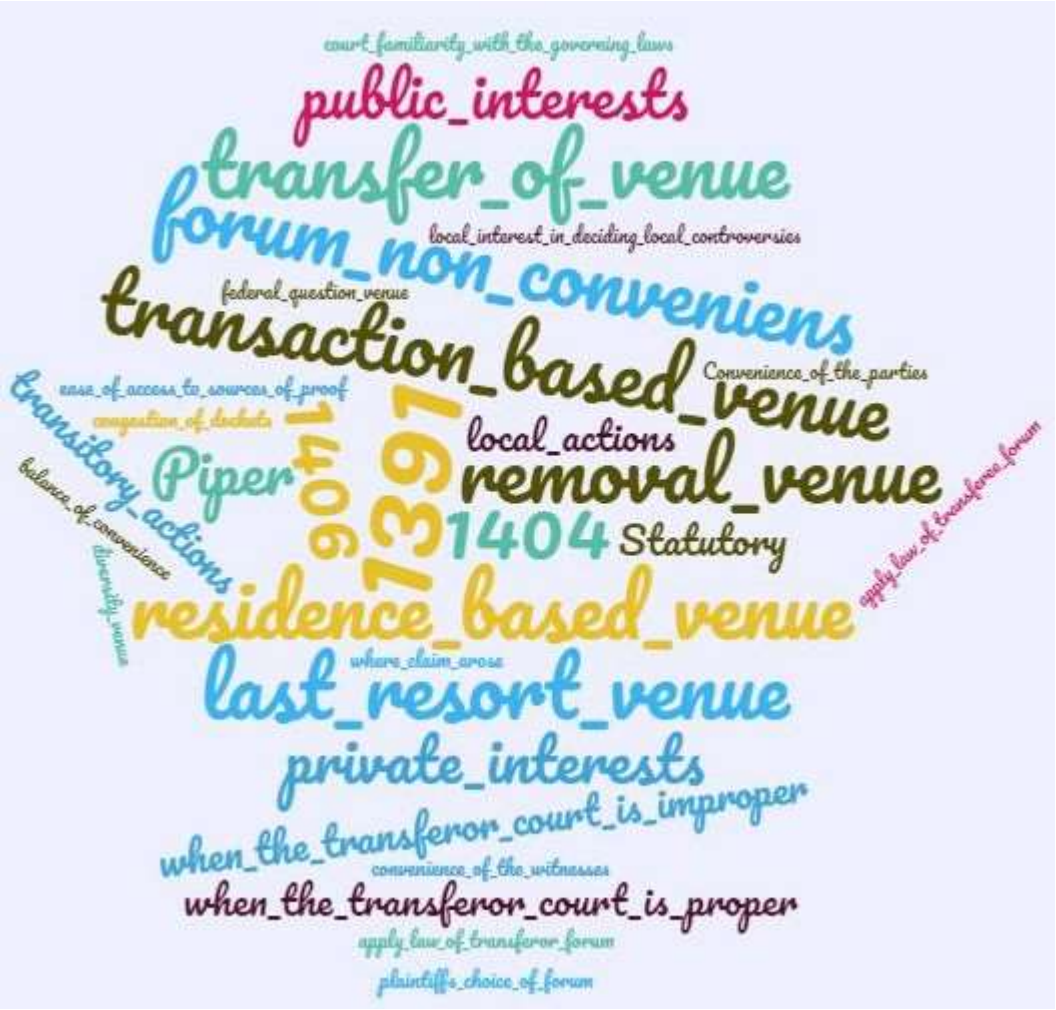
Perry Plaintiff (NY) files a federal law claim against Samuel Sued (NY) in federal court in New York. He asserts a federal law claim on which he seeks $50,000 and a state law claim arising from the same cluster of operative facts on wnich he seeks $50,000. Sued counterclaims against Plaintiff for $50,000 on a state law claim, asserting claims that again arise from the same cluster of operative facts. He also brings another counterclaim against Plaintiff on a federal law claim on completely unrelated facts, seeking $30,000. On this claim he adds Terry Third as another third party (counterclaim) defendant, seeking $30,000 on a state law claim arising from the same cluster of operative facts as his $30,000 federal law claim against Plaintiff. At the time of the incident, Third was a resident of Connecticut but moved to New York one day before Plaintiff filed his lawsuit. He has kept his Connecticut driver's license, however, as well as his voter registration in Connecticut, and has told friends he is in

New York indefinitely until he finishes a work assignment. Third adds two counterclaims of his own back against Sued, the first of which seeks $40,000 on state law claims arising from the same facts and circumstances as the claim on which Sued asserted against him. He adds a $40,000 counterclaim against Sued that arises from utterly unrelated facts. Please analyze.

Go back to the Wordcloud at the beginning of the chapter. You should be able to fit everyone of those terms (plus some more) into an outline on Subject Matter Jurisdiction.

3 Venue and Forum non Conveniens

WordCloud



3.1 Venue Generally - Introduction to Venue

3.1.1 The General Federal Venue Statute, 28 U.S.C. 1391

(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 corporation shall 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;

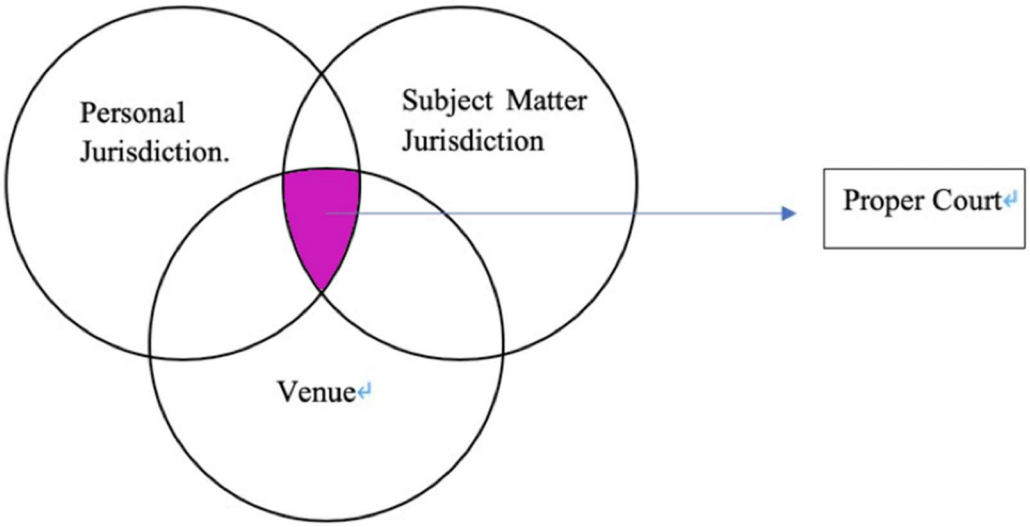
(3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title; or

(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.

3.1.2 PJ & SMJ & Venue



3.1.3 The Concept of Venue

Venue Doctrine Generally. There is no Constitutional dimension to venue. It exists purely as a statutory (and, in its origins, common law) doctrine. The objective of venue doctrine is to locate litigation in a court that is convenient for all the parties. As Civil Procedure topics go, it is pretty straightforward, although a bit complicated with many small moving parts.

Venue interacts with personal jurisdiction and subject matter jurisdiction to determine in which courtroom a lawsuit can and should be heard. Personal jurisdiction, as we have seen, protects defendants from being forced to appear in locations with too slight a connection to them, and to prevent states from overreaching in ways that interfere with the sovereignty of other states. Personal jurisdiction, as you recall, is waivable by the defendant. Subject matter jurisdiction deals with whether a lawsuit belongs in federal court or state court. At its root, this doctrine is based on the Constitution's creating a federal government of limited powers. Subject matter jurisdiction is not waivable. Both personal jurisdiction and subject matter jurisdiction have Constitutional dimensions, although both also have statutory elements. Venue, as we said, does not have a Constitutional dimension, and for our purposes is purely statutory.

Local and Transitory Actions. Section 1391 rejects making any distinction between local and transitory actions, but many states retain the distinction. Local actions generally have some connection to land - for example, a suit to determine title to land will be a local action almost anywhere, and a trespass to land remains a local action in some places. Transitory actions are everything that is not a local action. Before the statutory rejection of the doctrine, it did exist in federal courts. In one famous case, John Marshall sitting as a Circuit Judge held that Thomas Jefferson could not be sued in Virginia for a trespass to land that allegedly took place in Louisiana because it was a local action. (He couldn't be sued in Louisiana in those days, either, unless he happened to be physically present in the jurisdiction when service was attempted). For our purposes, local versus transitory actions falls in that category of doctrine that you should have heard about but that you won't be expected to apply, especially as it no longer matters in federal court.

Venue for Diversity and Venue for Federal Questions. Venue today is determined without regard to the source of federal subject matter jurisdiction. At one time the statute drew a distinction, but not today. If you run across old cases that discuss this, remember that the source of subject matter jurisdiction does not matter today. Again, we are not going to concern ourselves with this.

Judicial Districts. You will note that the venue statute refers to judicial districts. In some smaller states - for example, Vermont - the entire state constitutes a judicial district. In larger states, such as New York, the state will be divided into districts, such as the Southern District of New York. The statute talks about districts, not states. For venue purposes, a defendant situated in the Eastern District of New York would not be analyzed exactly the same as a defendant from the Southern, Western, or Northern districts.

Districts can be subdivided into divisions within the same district. This does not bear on whether venue is proper or improper, but when we get to venue transfer it is possible to transfer a case from one division to another in the same district. This can have the effect of changing which judge hears the case, which some attorneys might hope or fear would affect the outcome.

The Basic Rule.

We are going to talk about four different ways to set venue: *venue after removal* from state court, *residence based venue*, *transaction based venue*, and *catch all venue*.

Removal venue. If a case is removed from state court, Section 1391 does not apply. Venue is proper in the court to which the case was removed. End of story. You can forget all that follows if you are dealing with a case that has been removed.

Venue is proper. *See generally*, Wright & Miller, § 3732 Procedure for Removal—Venue in Removed Actions ("It . . . is immaterial that the federal court to which the action is removed would not have been a proper venue if the action originally had been brought there.")

Residence Venue. The first question to ask is this: are all the defendants from the same state? If they are not, residence-based venue will not apply. If they are all from the same state, then venue will be proper in any district in which any one of the defendants resides.

Transactional Venue. Did a "substantial part of the events or omissions giving rise to the claim" occur in the district where the lawsuit was filed? If so, venue is proper there. If not, venue is not proper. Note that the statute does not say "the majority (or even plurality) of events or omissions" nor does it say "any part." In many cases, there will be more than one district where substantial acts or omissions occurred, which yields a choice between those districts. While the substantiality line is not precise, and you will need to do forum specific research if the issue is material to a case you are involved in, in general in contract cases the court is likely to look at where a contract is negotiated and where it was to be performed, and in tort cases at where any tortious acts occurred and where harm was suffered. Some courts look only to the actions of the defendants; others look to the actions of both plaintiffs and defendants in assessing substantiality. While specific personal jurisdiction and transactional venue inevitably will involve some of the same facts, it has been argued that the two are analytically distinct and should be approached individually. *See generally*, Wright & Miller, § 3806 Section 1391(b)(2)—Transactional Venue.

Choice of Residence and Transactional Venues. Note that plaintiffs have a choice between residence venue and transactional venue, as well as a choice among the potential venues under either of those provisions. If all the defendants, for example, are from New York (let's say five from the Eastern District and one from the Southern District), but substantial parts of the acts or omissions occurred in the Western District of Pennsylvania and also the Eastern District of Tennessee, so far as venue goes the plaintiff has a choice. On those facts, the Eastern District of New York, the Southern District of New York, the Western District of Pennsylvania, and the Eastern District of Tennessee are all proper venues. On the other hand, the Northern District of New York, the Central District of Tennessee, and the Eastern District of Pennsylvania would not be proper venues. (Can you explain why?)

Our final provision, catch all venue, only comes into play if neither transactional nor residence venue provide a proper venue.

Catch All Venue. *Only if no other venue is proper* do we turn to 28 U.S.C. § 1391 (b)(3), the catch all provision. If, and only if, venue is not proper under either transactional or residence venue, venue is proper in "any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action." Take a moment and think about when this could arise. It is certainly possible that defendants might be from different states, but how likely is it that there is no US district where a "substantial part" of the activities or omissions giving rise to the claim occurred? Not very likely for a US-based case, which suggests that catch-all venue applies when the action has arisen outside the US.

Determining Residence for Venue. The rules for residence are set forth in 1391(c). For natural persons residence equals domicile. For corporations, LLCs, partnerships, labor unions, and other unincorporated associations, the test is the same: if they can be sued under their common entity name, they can be sued in any district where personal jurisdiction exists. (There is a provision for residence for plaintiffs, which is irrelevant to 1391(b) but perhaps not to some specialized venue statutes). For corporations, and probably for LLCs despite the use of the word 'corporation' in the statute, this is further narrowed to apply a district level test in 1391(d).

Residency for Aliens. Alien corporations, like domestic corporations, reside in any district in which they are subject to personal jurisdiction. Resident aliens reside in the district where they have permanent residence. Those natural persons not resident in the United States – which includes US citizens resident abroad as well as non-resident aliens – fall under (c)(3) and venue is proper in any judicial district.

Time For Determining Venue. Proper venue is determined at the outset of the litigation.

Waiver of Venue and Forum Selection Clauses. Venue can be waived, either explicitly or by failing to assert a venue defense. Procedurally, venue is considered a privilege and an objection to venue has to be affirmatively asserted. This normally occurs through a motion under Federal Rule 12. Parties can also agree to waive venue in advance. For example, as with personal jurisdiction, parties to a contract can waive venue objections and agree to a forum where venue would not otherwise have been proper. When asked to enforce such clauses, courts will ordinarily enforce these clauses in all but the most extraordinary cases, but will nonetheless look at systemic considerations, such as whether the selected location is convenient for nonparties. *See Atlantic Marine Construction Co., Inc. v. United States District Court for the Western District of Texas*, 571 U.S. 49 (2013) (Granting mandamus and ordering transfer of suit pursuit under 1404 pursuant to forum selection clause).

Defective Venue. When venue is improper, and even when it is proper but the location is perhaps not the best location, courts can transfer the case to another federal forum where venue is proper. We address that in the section that follows.

3.2 Transfer of Venue

3.2.1 When the Transferor Court is Proper - 28 U.S.C. § 1404 (a) – Change of Venue

28 U.S.C. § 1404 (a) – 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.**

3.2.2 When the Transferor Court is Improper - 28 U.S.C. § 1406 (a), (b) – Cure or Waiver of Defects

28 U.S.C. § 1406 (a), (b) – 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.

3.2.3 Smith v. Yeager

Barbara SMITH and Clarence Gasby, Plaintiffs, v. Martin J.A. YEAGER, et al., Defendants.
Civil Action No. 16-554 (RBW)
United States District Court, District of Columbia.
Signed 01/13/2017

[…]

MEMORANDUM OPINION

REGGIE B. WALTON, United States District Judge

The plaintiffs, Barbara Smith and Clarence A. D. Gasby, initiated this action against the defendants, Martin J. A. Yeager, Land, Carroll & Blair, P.C. ("Land Carroll"), where Yeager was a principal and agent, Gregory T. Dumont, and Mid-Atlantic Commercial Law Group, LLC ("Mid-Atlantic"), where Dumont was a principal and agent, asserting a legal malpractice claim regarding the defendants' representation of the plaintiffs "in a landlord-tenant matter," (the "L and T matter") "in the Superior Court of the District of Columbia," (the "Superior Court"). Complaint and Demand for Jury Trial ("Compl") ¶¶1, 8-9, 14, ECF No. 1-3. Specifically, the plaintiffs allege that the defendants breached their "duty to use [the] degree of care reasonably expected of other legal professionals with similar skills acting under the same or similar circumstances" while representing them in the L and T matter in Superior Court. Id. ¶ 38. Currently before the Court is the defendants' Motion to Transfer Venue Under 28 U.S.C. § 1404 ("Defs.' Mot."), which seeks to transfer this action to the United States District Court for the Eastern District of Virginia. Upon careful consideration of the parties' submissions, the Court concludes for the following reasons that it must deny the defendants' motion.1

I. BACKGROUND

"On February 7, 1994, the landlord for Union Station, Union Station Venture, Ltd. [("Union Station Venture"),] entered into a lease agreement [("Lease")] with La Femme Noire D.C., Incorporated [("La Femme Noire")], a District of Columbia

corporation" and' subsidiary of Ark Restaurants Corporation ("Ark Restaurants"). Compl. ¶ 16. Smith, a former employee of Ark Restaurants, "signed the lease in her official capacity as an officer of *54[La Femme Noire]." Id. Four years later, La Femme Noire, as part of a "deal [that] was structured as an asset sale," assigned its lease agreement with Union Station Venture to Finally Free, Inc. ("Finally Free"), "a Delaware corporation formed by the [plaintiffs." Id. ¶ 17. "In or about 2007, [Union Station Venture] sold its interest in Union Station to Union Station Investco, LLC [("Union Station Investco")]." Id. ¶ 18. "Thereafter, [Finally Free] fell behind in the payment of the rent [and], on or about January 25, 2013, [Union Station Investco] filed the [L and T] matter" solely against La Femme Noire, "seeking possession of the premises on the grounds of the unpaid rent." Id

On or about February 12, 2013, La Fem-me Noire "retained [the defendants] to provide [it] legal services" in the L and T matter. Defs.' P. & A. at 2. La Femme Noire entered into a Representation Agreement (the "Agreement") with Land Carroll, which outlined the terms and conditions governing the legal services that would be provided in the L and T matter. See generally Defs.' Exhibit ("Ex.") C (Representation Agreement ("Agreement")). On March 21, 2013, "[u]pon information and belief [that] La Femme [Noire] ha[d] never been properly incorporated in D.C.[,] or [in] any other jurisdiction," United Station Investco "moved to amend its complaint to add [ ] Smith and [ ] Gasby to the [L and T] matter as individual [defendants." Compl. ¶ 20. "On April 10, 2013, in open court," the defendants provided "the assignment documents purporting to show that the Lease was assigned to [Finally Free] in 1998, but did not demonstrate that [La Femme Noire] existed at the time the [L]ease was signed or assigned." M. ¶ 24. Consequently, Smith and Gasby "were added as defendants to the [L and T matter]." Id. The parties dispute whether Smith and Gasby became a party to the Agreement after being named as individual defendants in the L and T matter. See Counterclaim (Mar. 29, 2016) ("Coun-tercl.") ¶ 12, ECF No. 6 (asserting that "Gasby[ ] orally requested that [Land Ca-roll] represent" the plaintiffs "pursuant to the terms of the [ ] Agreement"); see also Pis.' Opp'n at 5 (denying that such an oral agreement modifying the Agreement was ever made).

During the L and T pre-trial and trial proceedings, the defendants did "not provide any proof that [La Femme Noire] existed at any point" and "conceded that the corporation never existed." Compl. ¶ 25; see also id. ¶¶ 21-30. The L and T matter "resulted in a judgment being entered personally against [the plaintiffs ... on September 19, 2013," id. ¶ 14, and according to the plaintiffs, "[t]he sole basis to hold ... Smith and Gasby liable was the mistaken belief and concession by the [defendants that [La Femme Noire] never existed as an entity and at all times was just a name," id. ¶ 30. Thereafter, "Smith and Gasby retained new counsel to assist them with managing various issues," who were able to "confirm!] that [La Femme Noire's] Articles of Incorporation had been filed" and therefore was a valid existing entity. Id. ¶ 32. Smith and Gasby then filed "a Rule 60 motion to vacate the judgment" in the L and T matter, id. ¶ 33, for the purpose of demonstrating "that [La Fem-me Noire] in fact existed at all relevant times," id. ¶ 34, and that they "were never in possession [of the premises] in their personal capacities and therefore there was no subject matter jurisdiction as against them in the Landlord & Tenant Branch," id. ¶ 33. However, that motion was denied. See id. ¶ 34.

On January 22, 2016, Smith and Gasby initiated this legal malpractice action against the defendants in Superior Court. See Compl. The defendants then removed the plaintiffs' case to this District pursuant *55to 28 U.S.C. § 1441(a). See Notice of Removal ¶ 5, ECF No. 1. After the case was removed to this Court, the defendants responded to the plaintiffs' Complaint and

filed a counterclaim for breach of contract based on the plaintiffs' failure to adhere to the terms of the Agreement. See Countercl. at 1. The defendants now move to transfer this case to the Eastern District of Virginia. See generally Defs.' Mot.

II. STANDARD OF REVIEW

28 U.S.C. § 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." 28 U.S.C. § 1404(a) (2012). The decision to transfer a case is discretionary, and a district court must conduct "an individualized, 'factually analytical, case-by-case determination of convenience and fairness.' " New Hope Power Co. v. U.S. Army Corps of Eng'rs, 724 F.Supp.2d 90, 94 (D.D.C. 2010) (quoting SEC v. Savoy Indus. Inc., 587 F.2d 1149, 1154 (D.C. Cir. 1978)). And the moving party "bears the burden of establishing that the transfer of th[e] action is proper." Greater Yellowstone Coal. v. Bosworth, 180 F.Supp.2d 124, 127 (D.D.C. 2001) (citation omitted).

As a threshold matter, a district court must determine that the proposed transferee court is located "in a district where the action might have been brought." Fed. Housing Fin. Agency v. First Tenn. Bank Nat'l Ass'n, 856 F.Supp.2d 186, 190 (D.D.C. 2012) (Walton, J.) (quoting Montgomery v. STG Intern., Inc., 532 F.Supp.2d 29, 32 (D.D.C. 2008)). If so, then a district court

> considers both the private interests of the parties and the public interests of the courts[.] The private interest considerations include: (1) the plaintiffs' choice of forum, unless the balance of convenience is strongly in favor of the defendants; (2) the defendants' choice of forum; (3) whether the claim arose elsewhere; (4) the convenience of the parties; (5) the convenience of the witnesses ..., but only to the extent that the witnesses may actually be unavailable for trial in one of the fora; and (6) the ease of access to sources of proof. The public interest considerations include: (1) the transferee[] [court's] familiarity with the governing laws; (2) the relative congestion of the calendars of the potential transferee and transfer- or courts; and (3) the local interest in deciding local controversies at home.

Shapiro, Lifschitz & Schram, P.C. v. Hazard, 24 F.Supp.2d 66, 71 (D.D.C. 1998) (citation omitted).

III. ANALYSIS

There is no dispute that this case could have been brought in the Eastern District of Virginia, as the plaintiffs are residents of New York and all of the defendants reside in Virginia, Compl. ¶¶2-7, where the proposed transferee court, the Eastern District of Virginia, is located, see 28 U.S.C. § 1391(b)(1) ("A civil action may be brought in ... a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located.").2 Accordingly, the issues for *56the Court to assess are therefore; (1) whether the defendants are estopped from seeking a venue change after filing a counterclaim in this district; if not, (2) whether the forum-selection clause in the Agreement requires this case to be transferred to the Eastern District of Virginia; and if not, (3) whether the defendants have satisfied their burden of showing that the balancing of the private and public interest factors of § 1404(a) weighs in favor of transferring this case to the Eastern District of Virginia.

A. The Filing of a Counterclaim Does Not Prevent a Party from Seeking a Venue Change

The plaintiffs assert that the defendants "waived their ability to seek a transfer" by removing this case from Superior Court to this Court, and then filing their Counterclaim in the case, thereby "submit[ing] themselves to the jurisdiction of this Honorable

Court." Pis.' Opp'n at 3. In response, the defendants argue that the filing of a compulsory counterclaim does not constitute a waiver of either jurisdiction or venue. See Defs.' Reply at 4-6.

"Unlike a motion to dismiss for improper venue under Rule 12(b)(3), a motion to transfer venue under [§] 1404(a) is not a 'defense' that must be raised by pre-answer motion or in a responsive pleading." Nichols v. Vilsack, 183 F.Supp.3d 39, 42 (D.D.C. 2016) (citing 14D Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 3829 (4th ed.)). This is so because "the purpose of [§ 1404(a)] is to prevent the waste of time, energy and money and to protect litigants, witnesses and the public against unnecessary inconvenience and expense." Intrepid Potash-New Mexico, LLC v. U.S. Dep't of Interior, 669 F.Supp.2d 88, 92 (D.D.C. 2009) (quoting Van Dusen v. Barrack, 376 U.S. 612, 616, 84 S.Ct. 805, 11 L.Ed.2d 945 (1964)). Additionally, "[f]or a § 1404(a) motion, 'there is no claim that venue is improper ... [and] a request to transfer [under § 1404(a)] [is not] waived by the [defendant if not raised prior to or in a responsive pleading.' " Id. (quoting W. Watersheds Project v. Clarke, Civil Action No. 03-1985(HHK), slip op. at *6 n.9 (D.D.C. July 28, 2004)). Moreover, "a motion to transfer may be made at any time after the initiation of an action under [§] 1404(a)." Great Socialist People's Libyan Arab Jamahiriya v. Miski, 496 F.Supp.2d 137, 140 n.3 (D.D.C. 2007) (Walton, J.).

Here, the defendants did not waive their ability to seek a transfer of venue pursuant to § 1404(a) by filing a counterclaim after this case was removed to this Court in conjunction with their answer to the plaintiffs' Complaint. In their § 1404(a) motion, the defendants are not claiming that venue is improper in this District, and in fact, have acknowledged that venue is proper in this District. See Notice of Removal (Mar. 23, 2016), ECF No. 1, ¶¶ 4-5 ("The United States District Court for the District of Columbia has jurisdiction over this action pursuant to 28 U.S.C. § 1332(a), diversity jurisdiction.... Pursuant to 28 U.S.C. § 1441(a), [the defendants are entitled to remove this action to this Court because it is the district court embracing the place where the action is currently pending."). Rather, the defendants seek to transfer this case "[f]or the convenience of [the] parties and witnesses, [and] in the interest of justice." Defs.' P. & A. at 3 (citing § 1404(a)). Accordingly, because the defendants move to transfer this case pursuant to § 1404(a), which they may do "at any time after the initiation of an action," Miski, 496 F.Supp.2d at 140 n.3, their filing of a counterclaim in this District does not prohibit them from seeking a transfer under § 1404(a).

*57B. The Agreement's Forum Selection Clause Does Not Modify the Court's § 1404(a) Analysis

The Agreement's forum-selection clause provides that the parties "hereby consent to the jurisdiction of the courts of the Commonwealth of Virginia and to venue in the courts of the City of Alexandria, Virginia for purposes of resolving any disputes between the parties.". Defs.' Mot., Ex. C (Agreement) ¶13. The defendants argue that this case should be transferred to the Eastern District of Virginia because the forum-selection clause 'in the Agreement should be given mandatory effect, and because the plaintiffs "consented to personal jurisdiction and venue in Virginia." Defs.' P. & A. at 4. In response, the plaintiffs contend that they are not bound by the forum-selection clause of the Agreement because they never contracted to be parties to the Agreement in their individual capacities. Pis,' Opp'n at 4-6. The plaintiffs also argue that, even assuming that they are bound by the terms of the Agreement, the forum-selection clause is permissive and not binding because the clause lacks "language clearly establishing exclusive jurisdiction and venue, to the exclusion of all others." Id. at 6 (citing Byrd v. Admiral Moving & Storage, Inc., 356 F.Supp.2d 234 (D.D.C. 2005)).

The Supreme Court has made clear that § 1404(a) "provides a mechanism for enforcement of forum-selection clauses that point to a particular federal district." Atl. Marine Constr. Co., Inc. v. U.S. Dist. Court for W. Dist. of Texas, — U.S. -, 134 S.Ct. 568, 579, 187 L.Ed.2d 487 (2013). "And as the [Supreme] Court stated, '[w]hen 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,... [0]nly under extraordinary circumstances unrelated to the convenience of the parties should a § 1404(a) motion be denied.'" One on One Basketball, Inc. v. Glob. Payments Direct, Inc., 38 F.Supp.3d 44, 49 (D.D.C. 2014) (quoting Atl. Marine Constr., — U.S. -, 134 S.Ct. at 581). Furthermore, "[t]he non-movant bears the burden of demonstrating that such extraordinary circumstances, exist and must show 'why the court should not transfer the case to the forum to which the parties agreed.' " McGowan v. Pierside Boatworks, Inc., 215 F.Supp.3d 48, 50, No. 16-cv-00758 (APM), 2016 WL 6088268, at *1 (D.D.C. Oct. 17, 2016) (quoting Atl. Marine Constr., — U.S. —, 134 S.Ct. at 582).

Here, the challenged . forum-selection clause does not require the Court "to-.adjust [its] usual, § 1404(a) analysis," Atl. Marine Constr., — U.S. —, 134. S.Ct. at 581, because the record does not show that the plaintiffs, in their individual capacities, contractually agreed to be bound,by ¡the Agreement or the terms of its forum-selection clause. As the Court previously noted, the parties dispute whether the plaintiffs are parties to the Agreement. See supra Part 1 at 3. However, the Agreement, which "may not be modified except by a writing signed by each party," Defs.' Mot., Ex. C (Agreement) ¶ 15, . is not signed by the plaintiffs in their individual capacities., see id. (showing that the parties to the Agreement are La Femme Noire and Land Carroll), and despite the defendants' representation that the plaintiffs "orally requested that [the defendants] represent them in their individual capacity," see Defs.' Mot., Ex. B (Dumont Aff.) ¶ 9, the record is devoid of any documents executed by the plaintiffs that modify the Agreement to reflect their intent to be bound by the Agreement in their individual capacities as required by the Agreement. Despite the absence of any such documentation, the defendants argue that "[w]hile Gasby may not have physically signed the Agreement, he agreed to its terms and authorized [his agent] to sign on his be*58half." Defs.' Reply at 2 (citing id. Ex. A (email correspondence dated February 21, 2013 ("February 21st Email")) at 1 ("Attached please find the signed agreement that I signed on behalf of Dan Gasby."). But, this email correspondence occurred shortly after Smith and Gasby, acting on behalf of La Femme Noire, retained Land Carroll to represent La Femme Noire in the L and T matter, see Defs.' P. & A. at 2, and one month before the plaintiffs in that matter moved to add Smith and Gas-by as individual defendants, see Compl. ¶ 20. Additionally, Gasby has submitted an affidavit attesting that he "did not sign the [] Agreement identified by [the defendants," nor did he "orally request, either on [his] behalf or on behalf of [] Smith, that [the defendants represent [the plaintiffs] interests under the same terms and conditions that [the defendants] had been purporting to represent La Femme Noir." Pis.' Opp'n, Ex. A (Affidavit of Clarence A.D. Gasby) ¶¶ 6-6. Thus, in reviewing the language found in the four corners of the Agreement, coupled with the additional evidence proffered by the parties, the Court finds that Smith and Gasby are not parties to the Agreement in their individual capacities. Accordingly, the plaintiffs are not bound by the Agreement's forum-selection clause, and thus, that clause does not alter the Court's § 1404(a) analysis.

C. Section 1404(a)'s Balancing Test

Now that the Court has determined that the forum-selection clause in the Agreement does not change the "calculus" of the Court's § 1404(a) analysis, Atl. Marine Constr., — U.S. -, 134 S.Ct. at 581, the Court turns to the private and public interest factors provided in § 1404(a).

1, The Private Interest Factors

a. The Parties' Choice of Forum and Where the Claims Arose

Generally, the plaintiffs choice of forum is given substantial deference, and therefore, the movant requesting a transfer of venue "bears a heavy burden of establishing that [the] plaintiffs' choice of forum is inappropriate." Thayer/Patricof Educ. Funding, L.L.C. v. Pryor Res., Inc., 196 F.Supp.2d 21, 31 (D.D.C. 2002) (citations omitted). Additionally, district courts are to defer to a plaintiffs choice of forum unless that forum has "no meaningful relationship to the plaintiffs claims or to the parties," U.S. ex rel. Westrick v. Second Chance Body Armor, Inc., 771 F.Supp.2d 42, 47 (D.D.C. 2011), or if "most of the relevant events occurred elsewhere," Aftab v. Gonzalez, 597 F.Supp.2d 76, 80 (D.D.C. 2009) (quoting Hunter v. Johanns, 517 F.Supp.2d 340, 344 (D.D.C. 2007)).

Here, the Court finds that the plaintiffs' choice of forum is entitled to deference because there is a substantial nexus between this District and the factual circumstances underlying the plaintiffs' legal malpractice allegations. The defendants devote the crux of their argument to the forum-selection clause in the Agreement. Defs.' Reply at 6-7. However, as the Court previously concluded, the Agreement's forum-selection clause has no bearing on its § 1404(a) analysis. See supra Part III.B. What is compelling is that the plaintiffs' legal malpractice claim stems from the defendants' alleged "acts or omissions made in the Landlord Tenant Branch of the Superior Court." Pis.' Opp'n at 9; see also Defs.' P. & A. at 6 (noting that "the underlying dispute involves a landlord-tenant action in [ ] Superior Court"). Consequently, because the factual circumstances surrounding the plaintiffs' legal malpractice claim arose in this District, and because the defendants have not carried their burden of demonstrating that the plaintiffs' choice of forum is unsuitable, the Court finds that "the location where the claims arose outweighs the [defendants'] choice of *59forum and therefore weighs in favor of [not] transferring this case." United States v. Quicken Loans, Inc., 217 F.Supp.3d 272, 278, No. 15-613 (RBW), 2016 WL 6838186, at *4 (D.D.C. Nov. 18, 2016) (Walton, J.).

b. The Convenience of the Parties and Witnesses and the Ease of Access to Sources of Proof

The defendants argue that transferring this case to the Eastern District of Virginia would promote convenience because (1) "[a]ll of the individual defendants live and work in Virginia, and the law firm defendants are Virginia businesses with them headquarters in Virginia"; (2) as "the plaintiffs reside in New York, the Eastern District of Virginia is no more inconvenient to them than [this District]," Defs.' P. & A. at 5; and (3) "the witnesses and documents relevant in this legal malpractice case are mainly located outside of [this District]," id. at 6. In response, the plaintiffs contend that transferring the case "will merely allow the [defendants the convenience of a shorter drive to the courthouse[, which] will then result in a longer drive for [the p]laintiffs, as they will have to drive out of the District of Columbia to the City of Alexandria." Pis.' Opp'n at 12.

"Unless all parties reside in the selected jurisdiction, any litigation will be more expensive for some than for others." Kotan v. Pizza Outlet, Inc., 400 F.Supp.2d 44, 50 (D.D.C. 2005) (quoting Moses v. Bus. Card Express, Inc., 929 F.2d 1131, 1139 (6th Cir. 1991)). Therefore, "for this factor to weigh in favor of transfer, litigating in the transferee district must not merely shift inconvenience to the plaintiffs, but rather should lead to an overall increase in convenience for the parties." U.S. ex rel. Westrick, 771 F.Supp.2d at 48.

The defendants have not demonstrated that transferring the case to the Eastern District of Virginia "will lead to a net increase in convenience for all parties." Id. While it is true that the defendants either reside or have their principal offices in Virginia and the majority of the legal work conducted in the underlying L and T matter may have occurred in Virginia, the convenience the defendants seek by transferring this case from this District to the Eastern District of Virginia is minimal and benefits only them. Other than the defendants and some other representatives who participated in the L and T matter, the plaintiffs and the other "potential witnesses will be required to travel from either New York or some other location outside the City of Alexandria." Pis.' Opp'n at 13 (noting that "the [plaintiffs will likely need to call non-party witnesses located within the District of Columbia as this matter relates to a case litigated in the District of Columbia that relate[s] to premises leased in the District of Columbia"). Consequently, transferring the case to the Eastern District of Virginia will only "shift inconvenience to the plaintiffs." U.S. ex rel. Westrick, 771 F.Supp.2d at 48. Therefore, because the defendants "have not shown that transferring this case will result in more than marginal relief," id and because this District is a more convenient forum for the plaintiffs and many of the witnesses, this factor weighs against transferring this case to the Eastern District of Virginia.

2. The Public Interest Factors

a. The Relative Congestion of the Transferee and Transferor Courts

The defendants contend that their "transfer request is not solely due to the convenience for parties and witnesses, or to obtain a procedural advantage, [but that] they also seek a speedy resolution to the litigation." Defs.' Reply at 7 (footnote omitted). In response, the plaintiffs assert *60that the number of filings in this District and in the Eastern District of Virginia "are arguably comparable" "[g]iven their reasonably close geographic proximity," and thus "the balance of congestion ... remains equal." Pis.' Opp'n at 11.

"In this [District, potential speed of re'solutioh is examined by comparing the median filing times to disposition in the courts at issue." Fed. Housing Fin. Agency, 856 F.Supp.2d at 194 (quoting Spaeth v. Mich. State Univ. Coll. of Law, 845 F.Supp.2d 48, 60 (D.D.C. 2012)). According to the latest statistics concerning federal judicial caseloads, the median filing-to-disposition period in this District was 8.0 months, compared to 5.2 months in the Eastern District of Virginia. U.S. District Courts—Combined Civil and Criminal Federal Court Management Statistics at 2, 25 (June 30, 2016), available at http://www.uscóürts.gov/statistics/table/na/federal-court-management-statistics/2016/06/30-1. 'Accordingly, 'the relative congestion of the Eastern District of Virginia weighs in favor of transfer to that court, but only slightly, considering that the filing-to-disposition period is not that significant.

b. The Local Interest in Deciding Local Controversies at Home

The plaintiffs argue that this District "ha[s] a greater interest than Virginia ... in litigating [this] District of Columbia legal malpractice action" because their claims arise out of the defendants' alleged "acts or omissions made in" Superior Court during the litigation of the L and T matter. Pis.' Opp'n at 9. Similar to the majority of its arguments, the defendants direct the Court to the Agreement's forum-selection clause as support for why venue in the Eastern District of Virginia outweighs the local interest of this District to decide local controversies. Defs.' Reply at 6. However, as the Court previously concluded, it owes the Agreement no deference because the record does not demonstrate that the plaintiffs are parties to the Agreement, see supra Part III.B, and therefore, the argument has no bearing on the Court's analysis. On the other hand, because the

dispute in this case.concerns the quality of legal representation provided in Superior Court by the defendants, who provided that representation based on membership in the District of Columbia Bar, the Court agrees that this District has a stronger local interest in this matter. Therefore, this factor weighs against transferring this case to the Eastern District of Virginia.

IV. CONCLUSION

In sum, the Court concludes that the defendants' filing of a counterclaim in conjunction with their response to the plaintiffs' Complaint does not bar them from moving to have this case transferred pursuant to § 1404(a), and that the plaintiffs are not parties to the forum-selection clause of the legal services Agreement which the defendants contend requires that this case be litigated in the state of Virginia. Whether this case should be transferred is therefore governed by 28 U.S.C. § 1404(a), and the Court finds that the balance of factors outlined in § 1404(a) weighs in favor of the plaintiffs' position. Thus, this District is deemed the more appropriate forum for the adjudication of this case. Each of the private and public interest factors, with the exception of the relative congestion of both the transferee and transferor courts, weigh in favor of not transferring this case to the Eastern District of Virginia. Accordingly, the Court denies the defendants' motion to transfer this case to the United States District Court for the Eastern District of Virginia.

*61SO ORDERED this 13th day of January, 2017.3

3.2.4 Notes on Venue Transfer

Transfer Generally. There are two statutes that allow for transfer of a case to a different venue. One, Section 1404, applies when the original venue is a proper one. The other, Section 1406, applies when the original venue is not proper. Courts have also applied Section 1406 when personal jurisdiction was lacking in the original jurisdiction.

It can matter under which provision transfer is made. Under Section 1404, the law of the original jurisdiction follows the case. For example, if transfer is made under Section 1404 from a venue where the statute of limitations would allow the suit, and the case is sent to another proper venue where the statute of limitations would have blocked the suit, the more generous statute of limitations of the original forum applies. The same would be true in reverse - if a statute of limitations would bar one or more claims in the original jurisidiction, they would be barred in the district to which the case is transferred, even if that district would not have barred them had suit originally been brought there. The same applies to substantive law - if the original jurisdiction applies substantive contract or torts law differently than the receiving jurisdiction, which law applies will depend on whether transfer was made under 1404 or 1406. Under 1404, the original forum law goes with the case. Under 1406, the law of the first proper forum applies. If, for example, a case is filed in a district where the statute of limitations would not bar the suit, but venue is improper and transfer is made under 1406 to a district where venue is proper, if the statute of limitations applicable in the new district would bar the claim, that statute of limitations would apply.

Remember: Venue After Removal is Always Proper. As you apply the different rules on applicable law under 1404 and 1406, remember that venue is proper when a case is removed from state court. Which statute would apply to a transfer made after removal?

Public and Private Interests. You see the court addressing the public and private interests in determining whether to make transfer. The interests of the parties matter, but the court also looks at issues such as how crowded dockets are and the

convenience of witnesses. As we saw earlier, a valid forum selection agreement normally will be almost but not quite absolutely controlling, but only if the parties to the lawsuit were also parties to the forum selection agreement.

Time To Transfer. As this case illustrates, there is no set deadline to filing a transfer motion. Unlike removal, appeal, or even asserting a defense, there is no point at which it is simply too late under the rules. That said, the economies of transfer are more readily realized if the motion is made early in the case.

3.3 Forum Non Conveniens

Forum Non Conveniens

3.3.1 Piper Aircraft Co. v. Reyno

454 U.S. 235 (1981)

[…]

JUSTICE MARSHALL delivered the opinion of the Court.

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. 479 F. Supp. 727 (1979). The United States Court of Appeals for the Third Circuit reversed. 630 F. 2d 149 (1980). 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 [239] 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 that the plane crashed after developing a spin, and suggested that mechanical failure in the plane or the propeller was responsible. At Hartzell's request, this report was reviewed by a three-member Review Board, which held a 9-day adversary hearing attended by all interested parties. The Review Board 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 [240] actions against Piper and Hartzell in the Superior Court of California, claiming negligence and strict liability.[3] Air Navigation, McDonald, and the estate of the pilot are not parties to this litigation. The survivors of the five passengers whose estates are represented by Reyno filed a separate action in the United Kingdom against Air Navigation, McDonald, and the pilot's estate.[4] 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."[5]

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, pursuant to 28 U. S. C. § 1404(a).[6] Hartzell moved to dismiss for lack of personal jurisdiction, or in the alternative, to transfer.[7] In December 1977, the District Court quashed service on [241] Hartzell and transferred the case to the Middle District of Pennsylvania. Respondent then properly served process on Hartzell.

B

In May 1978, after 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. *Koster, supra,* at 524. 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. *Gilbert, supra,* at 508-509.[8]

[242] After describing our decisions in *Gilbert* and *Koster,* the District Court analyzed the facts of these cases. It began by observing that an alternative forum existed in Scotland; Piper and Hartzell had agreed to submit to the jurisdiction of the Scottish courts and to waive any statute of limitations defense that might be available. It then stated that plaintiff's choice of forum was entitled to little weight. The court recognized that a plaintiff's choice ordinarily deserves substantial deference. It noted, however, that Reyno "is a representative of foreign citizens and residents seeking a forum in the United States because of the more liberal rules concerning products liability law," and that "the courts have been less solicitous when the plaintiff is not an American citizen or resident, and particularly when the foreign citizens seek to benefit from the more liberal tort rules provided for the protection of citizens and residents of the United States." 479 F. Supp., at 731.

The District Court next examined several factors relating to the private interests of the litigants, and determined that these factors strongly pointed towards Scotland as the appropriate forum. Although evidence concerning the design, manufacture, and testing of the plane and propeller is located in the United States, the connections with Scotland are otherwise "overwhelming." *Id.,* at 732. The real parties in interest are citizens of Scotland, as were all the decedents. Witnesses who could testify regarding the maintenance of the aircraft, the training of the pilot, and the investigation of the accident — all essential to the defense — are in Great Britain. Moreover, all witnesses to damages are located in Scotland. Trial would be aided by familiarity with Scottish topography, and by easy access to the wreckage.

The District Court reasoned that because crucial witnesses and evidence were beyond the reach of compulsory process, and because the defendants would not be able to implead potential Scottish third-party defendants, it would be "unfair to make Piper and Hartzell proceed to trial in this forum." *Id.,* [243] at 733. The survivors had brought separate actions in Scotland against the pilot, McDonald, and Air Navigation. "[I]t would be fairer to all parties and less costly if the entire case was presented to one jury with available testimony from all relevant witnesses." *Ibid.* Although the court recognized that if trial were held in the United States, Piper and Hartzell could file indemnity or contribution actions against the Scottish defendants, it believed that there was a significant risk of inconsistent verdicts.[9]

The District Court concluded that the relevant public interests also pointed strongly towards dismissal. The court determined that Pennsylvania law would apply to Piper and Scottish law to Hartzell if the case were tried in the Middle District of Pennsylvania.[10] As a result, "trial in this forum would be hopelessly complex and confusing for a jury." *Id.,* at 734. In addition, the court noted that it was unfamiliar with Scottish law and thus would have to rely upon experts from that country. The court also found that the trial would be enormously costly and time-consuming; that it would be unfair to burden citizens with jury duty when the Middle District [244] of Pennsylvania has little connection with the controversy; and that Scotland has a substantial interest in the outcome of the litigation.

In opposing the motions to dismiss, respondent contended that dismissal would be unfair because Scottish law was less favorable. The District Court explicitly rejected this claim. It reasoned that the possibility that dismissal might lead to an unfavorable change in the law did not deserve significant weight; any deficiency in the foreign law was a "matter to be dealt with in the foreign forum." *Id.,* at 738.

C

On appeal, the United States Court of Appeals for the Third Circuit reversed and remanded for trial. The decision to reverse appears to be based on two alternative grounds. First, the Court held that the District Court abused its discretion in conducting the *Gilbert* analysis. Second, the Court held that dismissal is never appropriate where the law of the alternative forum is less favorable to the plaintiff.

The Court of Appeals began its review of the District Court's *Gilbert* analysis by noting that the plaintiff's choice of forum deserved substantial weight, even though the real parties in interest are nonresidents. It then rejected the District Court's balancing of the private interests. It found that Piper and Hartzell had failed adequately to support their claim that key witnesses would be unavailable if trial were held in the United States: they had never specified the witnesses they would call and the testimony these witnesses would provide. The Court of Appeals gave little weight to the fact that piper and Hartzell

would not be able to implead potential Scottish third-party defendants, reasoning that this difficulty would be "burdensome" but not "unfair," 630 F. 2d, at 162.[11] Finally, the court stated that resolution of the suit [245] would not be significantly aided by familiarity with Scottish topography, or by viewing the wreckage.

The Court of Appeals also rejected the District Court's analysis of the public interest factors. It found that the District Court gave undue emphasis to the application of Scottish law: " `the mere fact that the court is called upon to determine and apply foreign law does not present a legal problem of the sort which would justify the dismissal of a case otherwise properly before the court.' " *Id.,* at 163 (quoting *Hoffman* v. *Goberman,* 420 F. 2d 423, 427 (CA3 1970)). In any event, it believed that Scottish law need not be applied. After conducting its own choice-of-law analysis, the Court of Appeals determined that American law would govern the actions against both Piper and Hartzell.[12] The same choice-of-law analysis apparently led it to conclude that Pennsylvania and Ohio, rather than Scotland, are the jurisdictions with the greatest policy interests in the dispute, and that all other public interest factors favored trial in the United States.[13]

[246] In any event, it appears that the Court of Appeals would have reversed even if the District Court had properly balanced the public and private interests. The court stated:

"[I]t is apparent that the dismissal would work a change in the applicable law so that the plaintiff's strict liability claim would be eliminated from the case. But . . . a dismissal for forum non conveniens, like a statutory transfer, `should not, despite its convenience, result in a change in the applicable law.' Only when American law is not applicable, or when the foreign jurisdiction would, as a matter of its won choice of law, give the plaintiff the benefit of the claim to which she is entitled here, would dismissal be justified." 630 F. 2d, at 163-164 (footnote omitted) (quoting *DeMateos* v. *Texaco, Inc.,* 562 F. 2d 895, 899 (CA3 1977), cert. denied, 435 U. S. 904 (1978)).

In other words, the court decided that dismissal is automatically barred if it would lead to a change in the applicable law unfavorable to the plaintiff.

We granted certiorari in these case to consider the questions they raise concerning the proper application of the doctrine of *forum non conveniens*. 450 U. S. 909 (1981).[14]

[247] 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). That case arose out of a collision between two vessels in American waters. The Canadian owners of cargo lost in the accident sued the Canadian owners of one of the vessels in Federal District Court. The cargo owners chose an American court in large part because the relevant American liability rules were more favorable than the Canadian rules. The District Court dismissed on grounds of *forum non conveniens*. The plaintiffs argued that dismissal was inappropriate because Canadian laws were less favorable to them. This Court nonetheless affirmed:

"We have no occasion to enquire by what law rights of the parties are governed, as we are of the opinion [248] that, under any view of that question, it lay within the discretion of the District Court to decline to assume jurisdiction over the controversy. . . . `[T]he court will not take cognizance of the case if justice would be as well done by remitting the parties to their home forum.' " *Id.,* at 419-420 (quoting *Charter Shipping Co.* v. *Bowring, Jones & Tidy, Ltd.,* 281 U. S. 515, 517 (1930).

The Court further stated that "[t]here was no basis for the contention that the District Court abused its discretion." 285 U. S., at 423.

It is true that *Canada Malting* was decided before *Gilbert,* and that the doctrine of *forum non conveniens* was not fully crystallized until our decision in that case.[15] However, *Gilbert* in no way affects the validity of *Canada Malting.* Indeed, [249] by holding that the central focus of the *forum non conveniens* inquiry is convenience, *Gilbert* implicitly recognized that dismissal may not be barred solely because of the possibility of an unfavorable change in law.[16] Under *Gilbert,* dismissal will ordinarily be appropriate where trial in the plaintiff's chosen forum imposes a heavy burden on the defendant or the court, and where the plaintiff is unable to offer any specific reasons of convenience supporting his choice.[17] If substantial weight were given to the possibility of an unfavorable change in law, however, dismissal might be barred even where trial in the chosen forum was plainly inconvenient.

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." 330 U. S., at 508. 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." 330 U. S., at 527. 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 [250] 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.

Except for the court below, every Federal Court of Appeals that has considered this question after *Gilbert* has held that dismissal on grounds of *forum non conveniens* may be granted even though the law applicable in the alternative forum is less favorable to the plaintiff's chance of recovery. See, *e. g., Pain* v. *United Technologies Corp.,* 205 U. S. App. D. C. 229, 248-249, 637 F. 2d 775, 794-795 (1980); *Fitzgerald* v. *Texaco, Inc.,* 521 F. 2d 448, 453 (CA2 1975), cert. denied, 423 U. S. 1052 (1976); *Anastasiadis* v. *S.S. Little John,* 346 F. 2d 281, 283 (CA5 1965), cert. denied, 384 U. S. 920 (1966).[18] Several Courts have relied expressly on *Canada Malting* to hold that the possibility of an unfavorable change of law should not, by itself, bar dismissal. See *Fitzgerald* [251] v. *Texaco, Inc., supra; Anglo-American Grain Co.* v. *The S/T Mina D'Amico,* 169 F. Supp. 908 (ED Va. 1959).

The Court of Appeals' approach is not only inconsistent with the purpose of the *forum non conveniens* doctrine, but also poses substantial practical problems. If the possibility of a change in law were given substantial weight, deciding motions to dismiss on the ground of *forum non conveniens* would become quite difficult. Choice-of-law analysis would become extremely important, and the courts would frequently be required to interpret the law of foreign jurisdictions. First, the trial court would have to determine what law would apply if the case were tried in the chosen forum, and what law would apply if the case were tried in the alternative forum. It would then have to compare the rights, remedies, and procedures available under the law that would be applied in each forum. Dismissal would be appropriate only if the court concluded that the law applied by the alternative forum is as favorable to the plaintiff as that of the chosen forum. The doctrine of *forum non conveniens,* however, is designed in part to help courts avoid conducting complex exercises in comparative law. As we stated in *Gilbert,* the public interest factors point towards dismissal where the court would be required to "untangle problems in conflict of laws, and in law foreign to itself." 330 U. S., at 509.

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,[19] a court could not dismiss the case on grounds of *forum non* [252] *conveniens* where dismissal might lead to an unfavorable change in law. The American courts, which are already extremely attractive to foreign plaintiffs,[20] would become even more attractive. The flow of litigation into the United States would increase and further congest already crowded courts.[21]

[253] The Court of Appeals based its decision, at least in part, on an analogy between dismissals on grounds of *forum non conveniens* and transfers between federal courts pursuant to § 1404(a). In *Van Dusen* v. *Barrack,* 376 U. S. 612 (1964), this Court ruled that a § 1404(a) transfer should not result in a change in the applicable law. Relying on dictum in an earlier Third Circuit opinion interpreting *Van Dusen,* the court below held that that principle is also applicable to a dismissal on *forum non conveniens* grounds. 630 F. 2d, at 164, and n. 51 (citing *DeMateos* v. *Texaco, Inc.,* 562 F. 2d, at 899). However, § 1404(a) transfers are different than dismissals on the ground of *forum non conveniens.*

Congress enacted § 1404(a) to permit change of venue between federal courts. Although the statute was drafted in accordance with the doctrine of *forum non conveniens,* […] it was intended to be a revision rather than a codification of the common law. *Norwood* v. *Kirkpatrick,* 349 U. S. 29 (1955). District courts were given more discretion to transfer under § 1404(a) than they had to dismiss on grounds of *forum non conveniens. Id.,* at 31-32.

The reasoning employed in *Van Dusen* v. *Barrack* is simply inapplicable to dismissals on grounds of *forum non conveniens.* That case did not discuss the common-law doctrine. Rather, it focused on "the construction and application" of § 1404(a). 376 U. S., at 613.[22] Emphasizing the remedial [254] purpose of the statute, *Barrack* concluded that Congress could not have intended a transfer to be accompanied by a change in law. *Id.,* at 622. The statute was designed as a "federal housekeeping measure," allowing easy change of venue within a unified federal system. *Id.,* at 613. The Court feared that if a change in venue were accompanied by a change in law, forum-shopping parties would take unfair advantage of the relaxed standards for transfer. The rule was necessary to ensure the just and efficient operation of the statute.[23]

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.[24] In these cases, however, the remedies that [255] 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. 330 U. S., at 524.[25] When the home forum has [256] 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.[26]

[257] 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. *Gilbert,* 330 U. S., at 511-512; *Koster,* 330 U. S., at 531. Here, the Court of Appeals expressly acknowledged that the standard of review was one of abuse of discretion. In examining the District Court's analysis of the public and private interests, however, the Court of Appeals seems to have lost sight of this rule, and substituted its own judgment for that of the District Court.

(1)

In analyzing the private interest factors, the District Court stated that the connections with Scotland are "overwhelming." 479 F. Supp., at 732. 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.[27] However, the District Court did not act [258] unreasonably in concluding that fewer evidentiary problems would be posed if the trial were held in Scotland. A large proportion of the relevant evidence is located in Great Britain.

The Court of Appeals found that the problems of proof could not be given any weight because Piper and Hartzell failed to describe with specificity the evidence they would not be able to obtain if trial were held in the United States. It suggested that defendants seeking *forum non conveniens* dismissal must submit affidavits identifying the witnesses they would call and the testimony these witnesses would provide if the trial were held in the alternative forum. Such detail is not necessary.[28] Piper and Hartzell have moved for dismissal precisely because many crucial witnesses are located beyond the reach of compulsory process, and thus are difficult to identify or interview. Requiring extensive investigation would defeat the purpose of their motion. Of course, defendants must provide enough information to enable the District Court to balance the parties' interests. Our examination of the record convinces us that sufficient information [259] was provided here. Both Piper and Hartzell submitted affidavits describing the evidentiary problems they would face if the trial were held in the United States.[29]

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. It is true, of course, that if Hartzell and Piper were found liable after a trial in the United States, they could institute an action for indemnity or contribution against these parties in Scotland. It would be far more convenient, however, to resolve all claims in one trial. The Court of Appeals rejected this argument. Forcing petitioners to rely on actions for indemnity or contributions would be "burdensome" but not "unfair." 630 F. 2d, at 162. Finding that trial in the plaintiff's chosen forum would be burdensome, however, is sufficient to support dismissal on grounds of *forum non conveniens.*[30]

(2)

The District Court's review of the factors relating to the public interest was also reasonable. On the basis of its [260] 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.[31] The Court of Appeals found that the District Court's choice-of-law analysis was incorrect, and that American law would apply to both Hartzell and Piper. Thus, lack of familiarity with foreign law would not be a problem. Even if the Court of Appeals' conclusion is correct, however, all other public interest factors favored trial in Scotland.

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." 330 U. S., at 509. 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 an [261] 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.

JUSTICE POWELL took no part in the decision of these cases.

JUSTICE O'CONNOR took no part in the consideration or decision of these cases.

JUSTICE WHITE, concurring in part and dissenting in part.

I join Parts I and II of the Court's opinion. However, like JUSTICE BRENNAN and JUSTICE STEVENS, I would not proceed to deal with the issues addressed in Part III. To that extent, I am in dissent.

JUSTICE STEVENS, with whom JUSTICE BRENNAN joins, dissenting.

In No. 80-848, only one question is presented for review to this Court:

"Whether, in an action in federal district court brought by foreign plaintiffs against American defendants, the plaintiffs may defeat a motion to dismiss on the ground of [262] *forum non conveniens* merely by showing that the substantive law that would be applied if the case were litigated in the district court is more favorable to them than the law that would be applied by the courts of their own nation." Pet. for Cert. in No. 80-848, p. i.

In No. 80-883, the Court limited its grant of certiorari, see 450 U. S. 909, to the same question:

"Must a motion to dismiss on grounds of *forum non conveniens* be denied whenever the law of the alternate forum is less favorable to recovery than that which would be applied by the district court?" Pet. for Cert. in No. 80-883, p. i.

I agree that this question should be answered in the negative. Having decided that question, I would simply remand the case to the Court of Appeals for further consideration of the question whether the District Court correctly decided that Pennsylvania was not a convenient forum in which to litigate a claim against a Pennsylvania company that a plane was defectively designed and manufactured in Pennsylvania.

[…]

3.3.2 Notes on Forum Non Conveniens

Piper as Strategy. Take a moment and appreciate the masterful craft and strategy displayed in *Piper* by the defense counsel. Why do you think the defense lawyers did not just make their *forum non conveniens* motion in California state court, where the case originated? Note the tools used to move the case to a forum where we can guess that they expected a more friendly reception to their arguments. Not just knowing the rules, but knowing how to use them ethically to get to a result favorable to one's client is what great lawyers do, and *Piper* seems to be an example of lawyers making full use of their skills to get the case where they wanted it to be when the issue key to its resolution was decided. The plaintiffs chose not to refile in

the UK – where, among other things, they would have been liable for the defense's attorneys' fees if they lost and where damage awards were likely to be less generous. The FNV dismissal in *Piper* thus represented a complete win for defendants even though in theory the case could have been pursued elsewhere.

Forum Non Conveniens and the Transfer Statutes. *Forum non Conveniens* is a common law doctrine that allows a court, even when venue is technically proper, to decide that a forum simply is not the right place for the lawsuit to proceed. The remedy, as we saw in *Piper*, is dismissal of the lawsuit, The federal court transfer statutes of 28 U.S.C. 1404 and 1406 make *forum non conveniens* dismissals rare when a case can be transferred to a proper venue within the federal system. State courts often have similar provisions with regard to transfer within in a state, but there is no procedure for transferring a case from one state system to another. In such situations, *forum non conveniens* remains a preferred course. If there is a forum selection clause that designates a state court, forum non conveniens might be an appropriate way for a federal court to handle the case so it can be refiled in state court. But, overall, in the federal system *forum non conveniens* finds its application most naturally in cases similar to *Piper* where the alternative forum is not within the United States, making the doctrine one of particular interest to international lawyers.

Existence of an Alternative Forum. One issue a court must confront when considering a dismissal on *forum non conveniens* grounds is whether an appropriate and available alternative forum exists. Those moving for dismissal may be asked to promise to waive certain procedural defenses that might make the alternative forum unavailable in fact if they were asserted (such as statute of limitations or personal jurisdiction), and may have to show that the alternative court could get personal jurisdiction over the parties necessary to the case but not urging the motion. The issue also arises with regard to whether the alternative forum is within a system that provides a adequate - not necessarily perfect or fully equivalent to the US - level of justice. *Compare 2002 Irrevocable Tr. for Richard C. Hvizdak v. Huntington Nat'l Bank*, No. 208-cv-556, 2008 WL 5110778 (M.D. Fla. Dec. 1, 2008) (unpublished) (Defendants established that China was an adequate forum but court refused to dismiss on FNV grounds for other reasons); *Wang v. General Motors, LLC*, 371 F. Supp. 3d 407 (E.D. Mich. 2019) (China not an available alternative forum where no showing was made that Chinese court would entertain employment claims of the type at issue).

3.4 Venue Reviewed

1. Was the Case removed?

    a. Yes – Venue is Proper

    b. No - Proceed to 2

2. Does a Specialty Venue statute apply?

    a. Yes – Apply that statute. That will not come up in this course, but don't forget that specialty venue statutes exist in areas such as patents.

    b. No -Proceed to 3.

3. Apply 1391

        a. Determine the residency by judicial district of the defendants

            1) Individuals = domicile

2) Corporations, LLCs, partnerships, etc. = personal jurisdiction.

3) Remember to take into account any non-resident citizens and aliens.

4) Now proceed to b.

b. Are *all* the defendants residents of the State in which the district is located?

i. No – Proceed to c.

ii. Yes

1. Is the suit filed in a district in which at least one of the defendants is resident?

a. Yes – Venue is proper.

b. No – Refile in or transfer to a district in which at least one of the residents resides, or proceed to c to see if this district can work on transactional grounds.

c. Is the district chosen one where 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"?

i. Yes – Venue is proper.

ii. No – Proceed to d.

d. Are there district(s) other than the present district where transactional or residence jurisdiction exists?

i. Yes - Either transfer under 1406 or dismiss and refile in one of those districts.

ii. No - proceed to e.

e. Is any one of the defendants subject to personal jurisdiction in this district?

i. Yes – Venue is proper

ii. No – Why are you here?

f. Even if venue is proper:

i. Does a forum selection clause mandate 1404 transfer? (Note that whether the first forum is one of the possible proper forums will be determined without regard to the forum selection clause, although the clause will require transfer to the selected forum in all but exceptional cases).

ii. Is there an argument for *forum non conveniens*? (Note that a forum selection clause that names a non-federal forum would be addressed through forum non conveniens).

Remember if the case is transferred:

> if the transferor court is proper -> §1404(a) applies. Law applicable in the original forum goes with the case.

> if the transferor court is improper -> §1406(a) applies. Law applicable in the first proper forum controls the case.

3.5 Practice Questions on Venue

Perry Plaintiff (Southern District NY) files a lawsuit against Dan Defendant (NJ) in state court in Texas, seeking $100,000 on a state law claim. Defendant removes to federal court. The contract arises from a contract that was mainly negotiated in the southern district of New York and that was largely to be performed about fifty percent in the district of New Jersey and fifty percent in the district of Connecticut. Defendant was in a hotel room in Texas when he participated in one Zoom meeting to discuss issues during the course of the contract negotiations. The statute of limitations, we will assume, in Texas for such a contract claim is three years, which would make the lawsuit timely when filed. The statute of limitations in New York, Connecticut, and New Jersey are all two years, which would make the lawsuit time barred (that is, a motion to dismiss on statute of limitations grounds should be granted if the lawsuit was filed in New York or New Jersey). Defendant really does not want to litigate the lawsuit in Texas. Please analyze.

Same as above, but this time there is a forum selection clause that names the eastern district of New York as the desired forum. For the purposes of analysis assume that dockets no more nor less crowded in the eastern district of New York than the other districts, and that witnesses will be no more inconvenienced by a forum in the eastern district of New York than one in any of the referenced districts other than Texas.

John Ma (Shenzhen, China) has been sued in federal district court in California by Bringah Claim (CA). The claim alleges breach of contract for activities that largely were to take place in China, although the contract was negotiated in China, Singapore, and San Francisco. The contract, which was recorded in both English and Chinese versions, specifies that in the case of ambiguity the Chinese version controls, and also specifies that Chinese law will govern the agreement. While Claim is located in California, and her documents (almost all electronic) are under her control in California, the remainder of the witnesses and documents are in China. China, as you know, does not have the same kind of party-driven discovery the US has, which Claim argues is critical to her suit, and also has a civil law system rather than a common law system. Ma would prefer to litigate in China. Chinese courts will entertain breach of contract claims. Please analyze.

Same as above, except that in this case the contract specifies a forum in a commercial court in Shenzhen, China.

4 Choice of Law and the Erie Doctrine

WordCloud

4.1 Choice of Law Generally - Horizontal Choice of Law

The coverage in this chapter will be somewhat summary. The goal is to give you awareness of these doctrines but to reserve the time required for a deep look for other topics that I consider more important for our purposes.

As you recall from our look at personal jurisdiction, the idea of territoriality is important to courts in the US. Courts, state and federal, sit in a given location, and their powers they can exercise are often determined by that location. In most cases, they will apply the law of the jurisdiction to cases before them.

But – not always. On occasion, courts will be asked to apply the law of a different jurisdiction. This can come about for many reasons. Not infrequently, parties to a contract will select the law that governs the contract. This can save much time and conflict if litigation arises later. For example, if parties from Shenzhen, China, and New York City in the United States meet at a trade show in Singapore to negotiate a purchase contract for widgets, which are to be shipped to Long Beach, California,

with title passing to the purchaser when they are loaded on board a container ship in Hong Kong, there may be room for debate with regard to whose law applies to any dispute arising from the contract. A choice of law provision can avoid this debate if the governing law has a reasonable connection with the contract. Choice of law issues also arise when there is no pre-existing agreement but there is an issue as to which jurisdiction's law should apply. You may recall that just such an issue arose in the Chinese Drywall litigation with regard to imputing the behavior of subsidiary corporations to the parent corporation. The court avoided this issue by concluding, somewhat interestingly, that the applicable law in China and the US state was identical:

> TG faults the district court for applying the forum state's law (Florida law) instead of Chinese law to the question of whether to impute TTP's Florida contacts to TG. TG concedes, however, that "Chinese law is not materially different on this issue from Florida law, and the outcome should be the same under either law." Accordingly, we need not choose because "if the laws of both states relevant to the set of facts are the same, or would produce the same decision in the lawsuit, there is no real conflict between them." Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 839 n. 20, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985). Therefore, we apply Florida law.
>
> *In re: Chinese-Manufactured Drywall Products Liability Litigation*, 753 F.3d 521, 529 (5th Cir. 2014)

This kind of choice of law rules often goes by the name of conflicts of law, and generally involves a 'horizontal' choice between two different jurisdictions with some connection to the dispute. An extensive body of law has grown up nationally and internationally.

In the United States alone, there have been radically different approaches to choice (or conflict) of laws, summarized in and to significant degree affected by in the American Law Institute's Conflict of Law Restatements. To oversummarize, the First Restatement applied what in quarter one we referred to as rules – simple, clear, somewhat rigid statements, such as that the law that applied to a tort claim was the law of the place where the tort occurred. The Second Restatement shifted the approach significantly, moving to a more standard-based approached where the jurisdiction with the most legitimate interest in providing governing law was to be identified.

Other nations have their own approaches. For example, in China, Article 6 of the Law of the Application of Law for Foreign-related Civil Relations makes it clear that as for application of foreign laws on a foreign-related civil relation, if multiple laws are enforced in different regions within the foreign country, the laws of the region that has the closest relation with this foreign-related civil relation shall apply. In the European Union, a regulation commonly known as Rome I (Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations). ("Rome I Regulation"). For non-contractual claims, a different regulation, commonly called Rome II (Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations), generally follows a place of the tort (lex loci delicti for you Latin readers) approach to choice of law.

Choice of law is an important tool of great lawyers. Rules vary by jurisdiction and getting the court to apply to preferred rule for your client can determine success or failure. This can be done by contract (remember the *Burger King* case in the personal

jurisdiction section, where when forming the relationship the parties had elected to have Florida law apply to any disputes) or it can be a determination the court makes in the absence of any agreement by the parties.

While conflicts of law is a standalone course, the following case will give you a taste of how courts approach such issues.

4.2 General Motors Corp. v. Eighth Judicial District Court of the State of Nevada ex rel. County of Clark

May 11, 2006

134 P.3d 111

OPINION

By the Court,

Hardesty, J.:

In this original writ petition, we clarify Nevada's choice-of-law jurisprudence in tort actions. We conclude that the most significant relationship test, as provided in the Restatement (Second) of Conflict of Laws section 145, should govern the choice-of-law analysis in tort actions unless a more specific section of the Second Restatement applies to the particular tort claim. Consequently, we no longer adhere to the choice-of-law analysis previously set forth in *Motenko v. MGM Dist., Inc.*[1]

FACTS

In April 2002, real party in interest Heather Simmons was driving her 1996 Chevrolet Metro on Interstate 15 in southern Nevada. Jerry Freeland was driving his truck a short distance ahead of Simmons. Freeland's truck struck an object on the road that punctured his fuel tank and caused the tank to spill diesel fuel. When Simmons' vehicle came into contact with the diesel fuel, she lost control and her vehicle overturned. As a result of the accident, Simmons was rendered a quadriplegic.

Simmons is an Arizona resident. Except for the accident and spending several weeks in Nevada for medical treatment, Simmons has no contact with Nevada. After the accident, Simmons *469brought suit against several defendants, including petitioners General Motors Corporation (GM) and Chapman Mesa Auto Center (Chapman Auto). The complaint alleges that Simmons' injuries were caused by, among other things, the failure of her vehicle's roof assembly. Simmons asserts causes of action against GM and Chapman Auto for negligence, breach of implied warranty, strict liability, negligent failure to warn, and negligent infliction of emotional distress.

GM is a Delaware corporation with its principal office located in Michigan. GM manufactured the 1996 Chevrolet Metro that Simmons was driving when the accident occurred. Chapman Auto is the independent auto dealer located in Arizona that sold the Chevrolet Metro to Simmons. Chapman Auto is not a GM dealer, nor is it affiliated with GM in any way.

GM and Chapman Auto sought dismissal of the case for forum non conveniens or, in the alternative, to have the district court apply Arizona law. The district court denied the motion to dismiss and determined that Nevada law should apply. As a result, GM filed this petition for a writ of mandamus, challenging the district court's order and seeking to compel the district court to dismiss the case for forum non conveniens or, in the alternative, to apply Arizona law. Chapman Auto joins in this petition.

DISCUSSION

The decision to entertain a petition for a writ of mandamus lies within this court's discretion.2 "A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust or station, *see* NRS 34.160, or to control an arbitrary or capricious exercise of discretion."3

A writ of mandamus is an extraordinary remedy.4 Consequently, we will only exercise our discretion to entertain a mandamus petition when there is no "plain, speedy and adequate remedy in the ordinary course of law"5 or "there are either urgent circumstances or important legal issues that need clarification in order to promote judicial economy and administration.' '6 Because this case presents important choice-of-law issues that need clarification in *470order to promote judicial economy and administration, we exercise our discretion to entertain that part of the writ petition challenging the denial of GM's and Chapman Auto's motion to apply Arizona law.7

Since this court's 1996 decision in *Motenko,* Nevada has followed the "overwhelming interest" test for resolving choice-of-law issues in tort actions. The "overwhelming interest" test can best be described as a hybrid of principles contained in the First and Second Restatements of Conflict of Laws. While this "overwhelming interest" test was intended to create a seemingly bright-line approach to resolving choice-of-law issues, it did not deviate from prior tests in a way that furthered the elusive goals of uniformity and predictability in complex, multiparty tort actions, and it fails to take advantage of the ongoing legal scrutiny by other courts and commentators given to the Second Restatement. Therefore, we conclude that our choice-of-law jurisprudence in tort actions warrants review.

Before Motenko, Nevada followed the vested rights approach

Historically, Nevada followed the First Restatement's vested rights approach when confronted with choice-of-law issues in tort actions.8 This approach required the court to apply the "substantive law of the forum in which the injury occurred."9 Although the application of the vested rights approach proved predictable, this court later expressed concern with the test in *Motenko.10* In that case, this court abandoned the vested rights approach because that test blindly applied the substantive law of the forum where the injury occurred and produced "unjustifiably harsh results."11

The current state of the law under Motenko

In *Motenko,* the plaintiff and his mother were Massachusetts residents.12 While visiting Las Vegas, the mother fell and injured herself in a hotel.13 The plaintiff then filed a claim for loss of *471parental consortium in a Nevada district court.14 The district court applied the vested rights approach and determined that Nevada law applied because the injury occurred in Nevada.15 This court agreed with the district court's determination that Nevada law applied but did so after creating and applying the "overwhelming interest" test.16

Although a majority opinion was not reached, the *Motenko* court created the new "overwhelming interest" test, which retained a key feature of the vested rights approach and borrowed principles from the Second Restatement's "most significant relationship" test.17 The *Motenko* test requires the trial court to apply the substantive law of the forum in tort cases unless "another state has an overwhelming interest."18 Another state has an overwhelming interest if two or more of the *Motenko* factors are met.19 This approach reduces the conflict-of-law analysis in tort actions to a quantitative comparison of contacts, without any regard to a qualitative comparison of true conflicts-of-law between states.

The Motenko test is a hybrid of the vested rights approach and the most significant relationship test

Both the vested rights approach and the *Motenko* test start from the premise that the law of the forum governs the choice-of-law analysis in tort cases.20 Thus, both approaches emphasize a predictable and identifiable starting point that helps to further uniformity and predictability.

The *Motenko* test also borrowed and then modified some, but not all, of the Second Restatement's most significant relationship test for torts.21 The Second Restatement's most significant relationship test for torts is comprised of two sections. First, section 145(1) states that the rights and liabilities of the parties in tort *472actions are determined by the local law of the state that "has the most significant relationship to the occurrence and the parties under the principles stated in § 6." Second, section 145(2) lists four contacts to be considered when applying the section 6 principles.22

Despite the clearly stated framework in section 145(1), the *Motenko* test ignores the qualitative principles in section 6, but utilizes the four quantitative contacts in section 145(2).23 The Second Restatement's four quantitative contacts in section 145(2) were designed to play a supporting role to the primary qualitative principles of section ó.24 Thus, the *Motenko* test effectively reversed the clearly stated order of priority between section 6 and section 145(2) by making the section 145(2) contacts the primary inquiry. The test also ignored the application of other Restatement sections in choice-of-law determinations designed specifically for a particular tort claim. Thus, *Motenko* created a new, independent test that lacks the historical evaluation, and cannot benefit from ongoing legal scrutiny, to be realized from the First and Second Restatements.

The Motenko test fails to further certainty, predictability, and uniformity

The stated purpose of the *Motenko* test was to meet "the goal of a higher degree of certainty, predictability and uniformity of result."25 However, as this court's decision in *Northwest Pipe Co. v. District* Court26 demonstrates, the application of the *Motenko* test to multiparty tort actions hinders, rather than promotes, these goals.

In *Northwest Pipe*, the defendant, an Oregon corporation, was sued for wrongful death in Nevada by family members of individ*473uals who were killed in a California car accident. Two of the decedents were Nevada residents and four of the decedents were California residents. Nine of the eleven plaintiffs were Nevada residents with the remaining two residing in California.27

The plurality and concurrence applied the *Motenko* overwhelming interest test and produced an outcome in which the Nevada plaintiffs' claims proceeded under Nevada law and the California plaintiffs' claims against the same defendant proceeded under California law.28 Instead of qualitatively analyzing the contacts that each cause of action and party had with the competing states, the court simply counted the number of *Motenko* contacts each plaintiff had with California.29 While this approach may seem simplistic enough to produce uniform and predictable results, it took a plurality and a concurrence, and a dissent to determine which state's law applied to each cause of action.

As demonstrated in Northwest Pipe, the Motenko test does not deviate from the vested rights approach in a way that furthers the goals of uniformity and predictability in complex, multiparty tort actions. Limiting an inquiry in a difficult area of law to simply counting contacts between the competing states and the parties ignores an essential part of the Second Restatement's most significant relationship test-which state has the most significant relationship to the tort and the parties? This question can be answered most effectively through the qualitative analysis framework that the most significant relationship test provides.

The Second Restatement's most significant relationship test now governs tort actions in Nevada

We take this opportunity to clarify Nevada's choice-of-law jurisprudence and hold that the Second Restatement's most significant relationship test governs choice-of-law issues in tort actions unless another, more specific section of the Second Restatement applies to the particular tort. Consequently, we overrule *Motenko*. While we are cognizant that choice-of-law analyses may, at times, lead to subjective results, the best approach to keeping those results uniform is to apply the law of the state that has the most significant relationship to the occurrence and the parties.30

*474The Second Restatement's most significant relationship test begins with a general principle, contained in section 145: the rights and liabilities of parties with respect to an issue in tort are governed by the local law of the state that, "with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6." Section 6 identifies the following principles:

> (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
>
> (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
>
> (a) the needs of the interstate and international systems,
>
> (b) the relevant policies of the forum,
>
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
>
> (d) the protection of justified expectations,
>
> (e) the basic policies underlying the particular field of law,
>
> (f) certainty, predictability and uniformity of result, and
>
> (g) ease in the determination and application of the law to be applied.

These principles are not intended to be exclusive and no one principle is weighed more heavily than another.31

Importantly, section 145 is a general statement and will not apply to all tort actions. As the dissent in *Northwest Pipe* noted, the Second Restatement has developed other sections that specifically apply to certain torts.32 Thus, the Second Restatement is designed to provide a particular framework depending on the nature of the tort.

Section 146 of the Second Restatement governs personal injury claims

The nature of the current claim is one for personal injury. Section 146 of the Second Restatement provides a particularized framework for analyzing choice-of-law issues in personal injury cases. Section 146 states that the rights and liabilities of the parties are governed by the "local law of the state where the injury occurred" unless "some other state has a more significant relationship" to the occurrence under the principles stated in section 6.

*475The general rule in section 146 requires the court to apply the law of the state where the injury took place. We conclude that in order for the analysis to move past this general rule and into the section 6 principles, a party must present some evidence of a relationship between the nonforum state, the occurrence giving rise to the claims for relief, and the parties. If no evidence is presented, then the general rule of section 146 governs. However, if a party does present evidence of a relationship between the nonforum state, the occurrence giving rise to the claims for relief, and the parties, then the analysis moves to an evaluation of that evidence under the section 6 principles to determine which state has a more significant relationship to the occurrence and the parties.

The section 6 factors inject flexibility into the choice-of-law analysis. Unlike the vested rights approach and the quantitative focus of the *Motenko* approach, an analysis of the section 6 factors considers the "content of and the policies behind the [forum and nonforum state's] competing internal laws."33 This is the crux on which an informed decision rests its reasoning. The *Motenko* dissent recognized this principle, stating that "[a] qualitative evaluation under the most significant relationship doctrine promotes consideration of differing state policies and interests underlying the particular issue as factors for making the choice-of-law decision."34

Nevada law applies to Simmons' causes of action against GM

GM has failed to present any evidence demonstrating that Arizona has a relationship to the occurrence giving rise to Simmons' claims for relief against GM. The car accident occurred in Nevada, and Nevada is the place of the injury. Additionally, GM is a Delaware corporation with its principal office located in Michigan. GM manufactured the 1996 Chevrolet Metro outside Arizona's borders. While a GM car was sold in Arizona to an Arizona resident, Chapman Auto, which is located in Arizona, is not a dealer or in any other way affiliated with GM.

Because Simmons' claims for relief against GM are centered in Nevada where the accident occurred and Michigan where the car was manufactured, and GM has no relationship with Arizona, GM has failed to present any evidence to suggest that the general rule under section 146 should not apply. Thus, Nevada law applies to *476Simmons' claims against GM because Nevada is the place where the injury occurred.

Arizona law applies to Simmons' causes of action against Chapman Auto

Conversely, Chapman Auto has presented evidence demonstrating that Arizona has some relationship to the occurrence giving rise to Simmons' claims against Chapman Auto. Chapman Auto is an independent auto dealer located in Arizona and Simmons is an Arizona resident. Chapman Auto sold the Chevrolet Metro to Simmons in Arizona. Simmons is suing Chapman Auto for injuries resulting from the failure of a roof assembly in a vehicle sold in Arizona. If Chapman Auto is found liable, the occurrence giving rise to liability will have occurred in Arizona.

Thus, the inquiry moves beyond the general rule in section 146 and into an analysis under the section 6 principles to determine whether Arizona or Nevada has a more significant relationship to Simmons, Chapman Auto, and the sale of the vehicle.35 Applying the section 6 principles, Arizona has a more significant relationship to Chapman Auto and Simmons than Nevada.

Section 6(2) (c)

Section 6(2)(c) states that ' 'the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue" should be considered. Unlike Nevada, Arizona has made a policy choice to allow comparative fault defenses to strict liability claims where product misuse is asserted as a defense.36 Here, there is an allegation that Simmons was driving in excess of the speed limit. If this allegation is proven true, then Arizona has an interest in seeing that its car dealers who operate solely in Arizona receive some protection in strict liability claims.

Further, Arizona's comparative fault defense to tort actions differs from Nevada's.37 Arizona permits recovery by a plaintiff who is found by a jury to be greater than 50% comparatively at fault, where Nevada does not.38 In such a case, Arizona only reduces the *477recovery by the percentage of comparative fault. Therefore, Arizona has made a policy decision to provide some compensation to plaintiffs regardless of their percentage of comparative fault.

In contrast, Nevada has made policy decisions to allow plaintiffs in strict liability actions to recover the full amount of their injuries regardless of fault but to prevent recovery by plaintiffs on other tort theories if their comparative fault exceeds 50%. Further, Nevada has an interest in protecting tourists who travel its roads. While these policies are indeed important, they carry less weight when they are being applied to an individual with little contact with Nevada who is seeking damages from a resident of the nonforum state for claims that arose out of that state. Thus, on balance, Arizona's interest in having its law applied to the causes of action that an Arizona resident plaintiff raised against an Arizona car dealer outweighs Nevada's interest in applying its own law.

Section 6(2) (d) and (f)

Section 6(2)(d) states that another factor relevant to a choice-of-law analysis is ' 'the protection of justified expectations.' ' As previously stated, the relationship between Simmons and Chapman Auto is centered in Arizona. When Simmons purchased the car from Chapman Auto, the parties were justified in expecting that the relationship would be governed by Arizona law. Both parties were domiciled in Arizona and the transaction occurred in Arizona. Moreover, protection of this justified expectation furthers the section 6(2)(f) considerations of "certainty, predictability and uniformity of result." Thus, the protection of both parties' justified expectations, along with considerations of certainty, predictability, and uniformity of results, weigh in favor of applying Arizona law.39

Section 6(2) (g)

Lastly, section 6(2)(g) recommends that the courts consider the "ease in the determination and application of the law to be applied." The analysis so far produces an outcome resulting in two separate state laws being applied to a single trial. But in this case, *478both states' laws can be accommodated by jury instructions that explain the law applicable to each defendant with respect to Simmons' claims and any potential comparative fault defenses to those claims. Additionally, the district court can utilize special verdict forms to guide the jury in making its determination. Thus, this consideration does not counsel against instructing the jury on two separate state laws.

We conclude, therefore, that Arizona law applies to the causes of action alleged against Chapman Auto because Arizona has a more significant relationship to the claims for relief, Simmons, and Chapman Auto than Nevada.40

CONCLUSION

We now hold that in Nevada, section 145 of the Second Restatement governs choice-of-law issues in tort actions unless the Second Restatement contains a section that specifically addresses a particular tort. Because section 146 governs choice-of-law issues in personal injury claims, we apply the most significant relationship test set forth in section 146 to this case.

Applying section 146, we deny the petition as to GM because, as a legal matter, the car accident and GM have no relationship with Arizona. Consequently, Nevada law applies to Simmons' claims for relief asserted against GM. However, we grant the petition as to Chapman Auto because Arizona has a more significant relationship to Simmons, Chapman Auto, and the sale of the vehicle. Consequently, Arizona law applies to Simmons' claims for relief asserted against Chapman Auto. We deny the petition with respect to the district court's refusal to dismiss the underlying action on forum non conveniens grounds. Accordingly, we direct the clerk of this court to issue a writ of mandamus directing the district court to apply Arizona law to Simmons' claims for relief against Chapman Auto.

[…]

39

We note that there appears to be a difference in the duty imposed under Arizona law from the duty imposed under Nevada law on the failure to inspect and warn claim. *Compare Witt Ice & Gas Co.* v. *Bedway,* 231 P.2d 952, 954 (Ariz. 1951) (stating that " '[a]n imperative social duty requires a vendor of a mechanical device to take at least such easily available precautions as are reasonably likely to prevent serious injury to those who by using such a device may be exposed to dangers arising from its defective construction' " (quoting *Ebbertv. Philadelphia Electric Co.,* 198 A. 323, 327 (Pa. 1938))), *with Long v. Flanigan Warehouse Co.,* 79 Nev. 241, 249, 382 P.2d 399, 404 (1963) (stating that a retailer had no duty to inspect or test for a claimed latent defect after the retailer had received the product and inspected it for transit damage).

[…]

Maupin, J.,

concurring in part and dissenting in part:

I agree with the adoption of the Second Restatement as a reasonable construct for resolving conflict of law disputes. I would, however, apply Nevada law to both defendants.

4.3 The Erie Doctrine - Vertical Choice of Law in U.S. Federal Courts

The Erie doctrine brings together two issues: What substantive law should a federal court apply when deciding a diversity case to which no statute applies, and what procedures should it follow? You will see that the answer to both of these questions changed in the late 1930s, in part because of the Erie case itself. Erie is referred to a 'vertical' choice of law because it involves a choice between a federal rule and a state rule, requiring a court to choose not between horizontal rivals but between different levels of government.

Governing Law In Federal Court Before Erie

First, let's be clear about a foundational issue that sometimes gets overlooked - the issue faced in Erie arose because no federal or state statute applied. Under the Supremacy Clause of the Constitution, any valid federal statute would override any state rule. At the time of Erie, the law already was (as it remains) that state statutes and Constitutional provisions that apply in state

court also apply and are controlling law in a diversity case in federal court. As you will see in Erie, there was no state statute on point, so the courts involved were looking to judge-made, common law.

The rule that applied before Erie came from the case of *Swift v. Tyson*, 41 U.S. 1 (1842). As with *Erie,* this case involved interpreting and applying one of the earliest federal statutes, the Rules of Decision Act (Section 34 of the Judiciary Act of 1789). The statute provided that: "The laws of the several states, except where the Constitution, treaties or statutes of the United States shall 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."

The central question in both *Erie* and *Swift v. Tyson* was the scope of "laws of the several states". Did the "laws" refer only to state constitutions and statutes? Were the decisions of state court within the meaning of "laws of the several states"? Put differently, was common law as applied by the courts of the state included, or only codified rules such as statutory and constitutional law?

In between the two cases a shift occurred in the general understanding of what it is courts are about when they establish precedents. At the time of *Swift v. Tyson*, a court operating in a common law setting might view itself as not creating law, but as discovering law. The law could be viewed as a thing apart, determinable from the operation of logic from first principles. This, in fact, was precisely the view expressed by the *Swift v. Tyson* court:

> It is, however, contended that the 34th 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. That section provides
>
> that the laws of the several states, except where the constitution, treaties or statutes of the United States shall 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.
>
> 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 34th 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[p19] 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, upon its true intendment and construction, 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. Undoubtedly the decisions of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this court, but they cannot furnish positive rules or conclusive authority by which our own judgments are to be bound up and governed.

By the time Erie was decided the philosophical conception of what it is courts do had undergone a substantial change. Under the influence of legal realism and the legal positivists, it came to be accepted that judges did indeed make law and that cases were not just evidence of some hidden body of law but the law itself. Put differently, courts were recognized to be law-making bodies, not just law applying bodies, and judge-made law was understood to be law as much as any other law. Against this changed background, Erie arose.

It wasn't just changes in philosophy that led to *Erie*, however. A series of cases revealed how applying different law in state and federal court created opportunities for forum selection (aka forum shopping) that made the merits secondary to procedural maneuvering.

One noteworthy case was *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U. S. 518 (1928). In that case, Brown & Yellow Taxicab wanted to enter into an exclusive contract with the L&N Railroad to be the only cab company that could solicit business at the L&N railroad station in Bowling Green, Kentucky. The problem was, such agreements were illegal under Kentucky common law, meaning that if the agreement was challenged in Kentucky state court it would be invalidated. Brown & Yellow then reincorporated in Tennessee. This created diversity jurisdiction for a lawsuit between Brown & Yellow and its rival, Black & White. Brown & Yellow then brought suit in federal court to prevent Black & White from interfering with its exclusive agreement. Because federal common law did not prohibit these kinds of agreements, Brown & Yellow won at trial, on appeal, and at the Supreme Court. The outcome of the case depended entirely on which court the lawsuit proceeded, state or federal, and moving the place of incorporation of a local taxicab company to a neighboring state allowed an agreement that violated the laws of the host state to be upheld.

In an influential dissent, Justice Holmes took issue with the result. In part, he challenged the idea that common law was a unified, 'transcendental' body of law.

> If there were such a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute, the Courts of the United States might be right in using their

> independent judgment as to what it was. But there is no such body of law. The fallacy and illusion that I think exist consist in supposing that there is this outside thing to be found.

Holmes's dissent was to prove influential in *Erie*, as you will see.

Procedure: The background of the Rules Enabling Act

For the first 150 years of the republic, the US federal courts relied on the procedural rules of the states in which they sat, which was known as the "conformity principle". The enactment of the Rules Enabling Act on June 19, 1934, was a revolution in the development of civil procedure in the United States. The Rules Enabling Act allowed the creation of a uniform federal system of procedure, merging both law and equity in the federal courts.

The Rules Enabling Act came near the end of a decades-long effort to reform procedure in federal courts in particular and US courts in general. Both common law writs and reform codifications were seen to be prone to manipulation on technical grounds, leading to results not based on justice. The Rules were in a large part an effort to get beyond a "sporting theory of justice" and to a system where the results conformed with the facts and the governing substantive law.

The Federal Rules of Civil Procedure, which provide a uniform system of procedure for the federal courts, were adopted by the Supreme Court in 1937 and became effective in 1938. The Federal Rules were promulgated based on the authority delegated to the Supreme Court by the Rules Enabling Act. The process of passing the rules can be simplified as follows: first, a committee of academics, lawyers and judges proposed the rules (and today, changes to the rules), then the. Supreme Court reviews and if they approve, send the rules to Congress. The final step is Congress's approval to allow the rules to take effect.

The Rules were still new when *Erie* came to the Court.

So, as you read *Erie*, think for a moment about the experienced federal practicioner in 1938. This practitioner would need to be an expert in the state procedural code, which was being replaced by the new Federal Rules of Civil Procedure with regard to practice in federal court. Such a practitioner also needed to be a master of federal general common law, which often provided the rule of decision in federal court. After you finish *Erie*, think of what of the expertise that mattered in federal court in 1937 was still going to matter in 1939.

4.4 Erie Railroad v. Tompkins

Mr. Justice Brandéis

delivered the opinion of the Court.

The question for decision is whether the oft-challenged doctrine of *Swift* v. Tyson[1] 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 h.e was rightfully on the premises as licensee because on a commonly used beaten: footpath which rah 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.

*70The 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, 90 F. 2d 603, 604, 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."

*71The 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,* 16 Pet. 1, 18, 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:

> "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 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 commerbial 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 *72instrument, or what is the just rule furnished by the principles of commercial law to govern the case."

The Court in applying the rule of § 34 to equity cases, in *Mason* v. *United States,* 260 U. S. 545, 559, said: "The statute, however, is merely declarative of the rule which would exist in the absence of the statute." 2 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 § 34,3 and as to the soundness of the rule which it introduced.4 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, *73the 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

Criticism of the doctrine became widespread after the decision of *Black & White Taxicab Co.* v. *Brown & Yellow Taxicab Co.,* 276 U. S. 518.6 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 *74waa sustained lay 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;7 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.8

On the other, hand, the mischievous results of the doctrine had becoihe 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 *75or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the non-citizen.9 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.10 In addition to questions of purely commercial law, "general law" was held to include the obligations under'contracts entered into and to be performed within the

State,11 the extent to which a carrier operating within a State may stipulate for exemption from liability for his own negligence -or that of his employee;12 the liability for torts committed within the State upon persons resident or property located there, even where the question of liar *76bility depended upon the scope of a property right conferred by the State;13 and the right to exemplary or punitive damages.14 Furthermore, state decisions construing local deeds,15 mineral conveyances,16 and even devises of real estate17 were disregarded.18

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. Through this jurisdiction individual citizens willing to remove from their own State and' become citizens of another might avail themselves of the federal rule.19 And, without even change of residence, a corporate citizen of *77the State could avail itself of the federal rule by re-incorporating under the laws of another State, as was done in the *Taxicab* case.

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.20 Other legislative relief has been proposed.21 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.22 But the uncon*78stitutionality 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. Co.* v. *Baugh,* 149 U. S. 368, 401, against ignoring the Ohio common law of fellow servant liability:

> "I am aware that what has been termed the general law of the country — which is often little less than what the judge advancing the doctrine thinks at the time should be the general law on a particular subject — has been often advanced in judicial opinions of this court to control a . conflicting law of a State., I admit that learned judges have fallen into the habit1 of-repeating this doctrine as a convenient mode of brushing aside the law of a State in conflict with their views. And I confess that, moved and governed by the authority of the great names of those judges, I have, myself, in many instances, unhesitatingly and confidently, but I think now-erroneously, repeated the same doctrine. But, notwithstanding the great names which may be cited in favor of the doctrine, and notwithstanding the frequency with which the doctrine 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 inde*79pendence 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.23 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 "—:

> "but 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 Supremé 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 *80unconstitutional § 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 whicíi 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.,* 307 Pa. 203; 160 A. 859, the only duty owed to the plaintiff was to refrain from wilful or wanton injury. The plaintiff denied that such is the Pennsylvania law.24 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 thjat 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 opini*o*n.

Reversed.

A dissent has been omitted

1

Footnotes have been omitted

4.5 Erie's Progeny and the Doctrine Today

Federal General Common Law: Justice Brandeis states in *Erie* that there is, henceforth, no federal general common law. That should not be misinterpreted to mean that there is no federal common law. Federal courts continue to make common law in many areas, including admiralty and in disputes between states. What federal courts do not do, after *Erie*, is develop or attempt to discover a *general* common law covering matters such as torts and contracts. After *Erie*, the common law of the forum state is applied.

Substantive versus Procedural. The holding of *Erie* is deceptively simple - a federal court can apply federal procedural rules, but must apply state substantive rules of decision. In application, however, what seems a simple binary test has proved difficult

to apply, and as time has gone on the issues presented have only become more esoteric. Spotting a sometimes hidden Erie issue can be a challenge for US litigators.

Erie Progeny. Erie issues could easily fill an entire quarter. Many casebooks go through the *Erie* cases in-depth, exploring the difficult issues within the cases and the development of the doctrine. Because our goals in covering *Erie* are more limited - mainly, familiarity and the ability to spot an *Erie* issue - we have chosen a different approach. We will move through the *Erie* cases in a summary fashion, You will note the Court struggling to come to a coherent and easily applied approach to *Erie* issues.

The first big application of the new doctrine came in *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945). This case involved a diversity suit for fraud, Federal courts interpreting federal law could apply an equitable exception to the statute of limitations. Finding the statute of limitations outcome-determinative, the Court held that the federal court must apply the statute of limitations as the state court would. Plaintiffs should not be encouraged to choose forums based on different outcomes on the same substantive right.

Ask yourself, however, if 'outcome-determinative' really is a reliable test for distinguishing procedural and substantive rules. What if a court requires lawsuits to be filed on a certain size paper, or closes the clerk's office an hour earlier than the equivalent state office – failure to comply with these rules on the last day a lawsuit could be filed would indeed be outcome determinative, but does that make them 'substantive' rules?

The issue in *Ragan v. Merchants Transfer & Warehouse Co.,* 337 U.S. 530 (1949) was whether state law or a federal rule of civil procedure governed when a lawsuit commenced so as to cut off the running of the state statute of limitations. Under state law, the action was only commenced when service was made on the defendant. However, under Federal Rule 3, an action was commenced with the filing of the complaint. The court said the state law of statute of limitations was substantive and should be applied. As you consider this holding, remember that the applicable statute of limitations can be seen as part of the overall remedy provided, and also remember that for other purposes such as calculating times in the case Rule 3 still governs when a lawsuit is deemed to commence.

In the same year, *Cohen v. Beneficial Indus. Loan Corp.,* 337 U.S. 541 (1949)*,* raised a new issue. In New Jersey, state law required someone bringing a derivative suit to post a bond before the lawsuit was filed in state court. The issue was whether the bond needed to be applied in federal court. (You may remember that we saw *Cohen* before in the context of whether this issue could be raised on appeal before the case was final). The Court found that the bond requirement was substantive and needed to be followed in federal court.

Woods v. Interstate Realty Co., 337 U.S. 535 (1949), also involved access to the courts. In Mississippi, a company that does business in Mississippi but which fails to properly register as a foreign corporation is not allowed to bring suit in the Mississippi state courts. The question was whether this rule also barred access to the federal courts. Again, the Court held that the state rule was substantive and must be followed,.

The Court began a somewhat more nuanced approach in *Byrd v. Blue Ridge Rural Elec. Co-op.*, *Inc.,* 356 U.S. 525 (1958). The plaintiff had been injured and wished to bring a lawsuit. One important issue was whether the plaintiff was an employee of the defendant, as this would determine whether the case could go forward as a tort case as opposed to a workmen's compensation

case. The *Erie* issue had to do with *who would decide* whether the plaintiff was an employee or not. In state court, this was an issue for the judge to decide, while in federal court it had traditionally been an issue for a jury to decide. *Byrd* represents a shift away from the outcome-determinative approach toward a balancing approach. **T**he court said that if it looked only to whether the rules was "outcome-determinative", state law would control. The Court found, however, a substantial federal issue in whether or not a jury would decide the issue, including an interest in maintaining consistency in federal allocations of duties between judges and juries. The court balanced the state and federal interest and found the federal interest in uniform judge and jury allocations to require the application of the federal law. *Byrd* represents a shift away from outcome-determinative to an approach that balances state and federal interests.

The Court returned to a service of process issue in *Hanna v. Plumer,* 380 U.S. 460 (1965). Under Rule 4(d)(1) as it existed at the time service could be made by leaving the papers with the defendant's wife at his home. Under Massachusetts law, that was not sufficient and the papers would have to be hand-delivered to the defendant himself, The issue was outcome determinative as it was too late to serve the defendant again according to Massachusetts law. In *Hanna*, the Court found controlling that there was a federal rule directly on point which, if valid, should be applied. In dicta, the court looked to two policies underlying Erie - one, the avoidance of forum shopping, and two, avoiding giving litigants who could access federal court through diversity rights state litigants would not have.

In *Gasperini v. Center for Humanities*, 518 U.S. 415 (1996), the court faced a situation where a state statute had provisions for when a new trial was awardable. The Court found this substantive.

In *Shady Grove Orthopedic Assn., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010), a state statute had provisions that effectively prevented any kind of state class action to enforce the substantive right in the statute. Notwithstanding the different outcome that would apply if a class action was allowed in federal court - effectively increasing the defendant's exposure from hundreds to millions of dollars - the Court round Rule 23 on point and controlling, and allowed the federal class to go forward. Note that at an individual basis, the recovery was the same, although aggregation greatly changed the importance of the lawsuit to the defendant.

Erie Netted Out: While Erie cases may seem hard to sort out - and in plenty of cases the Court splits on a given issue - there is a process that will help you get at least close.

1) Is there a clearly substantive state law on point, such as the duty of care in *Erie*? If so, it controls.

2) Is there a federal rule of procedure on point that controls in a way that does not redefine the original substantive right? If so, the federal rule of procedure controls, and analysis is over.

3) What happens when a state rule that is somewhat substantive conflicts with federal practice? In this setting, balancing is required. The two interests identified in Hanna - avoiding forum shopping and creating unequal outcomes between state and federal court - must be taken into account,. At the same time, the state interest in having its rule must be considered, along with the federal interest in having the uniform federal rule apply.

The outcome is not preordained, but courts seem able to live with it.

Erie and Statutes of Limitation. *Erie's* progeny do provide clear guidance in routine statutes of limitations cases. It is worth remembering these.

Guaranty Trust v. York - the state Statute of Limitations applies because it is "outcome determinative"

Ragan - Commencement of suit for statute of limitations purpose is governed by state law, not FRCP 3

5 Pleading

WordCloud

5.1 Introduction to Pleading

In this section of the course we look at pleading – the process through which claims and responses are set out in writing.

The federal rules are a system, and as in any system choices made with one part will affect other parts. That is true with respect to pleading. Pleading serves many purposes, and the designers of a procedural system have decide which aspects of pleading are given preference. This, in turn, will affect how other aspects of the procedural system function.

Some of the things pleading might do include:

- Start the litigation
- Provide Notice

- Set out the facts underlying claims and defenses
- Identify causes of action and defenses
- Screen or filter out bad cases (e.g., cases that invoke no accepted legal theory)
- Simplify case for resolution
- Help to define what case was about for purposes of using the judgment to preclude or assist future claims

In looking at balancing between the functions of pleading, choices arise. These include:

- Should pleading be used to resolve the case, or just to set the stage?
- How much factual detail should be required - or permitted?
- Once a party has set out its position in pleadings, should it be allowed to amend its pleadings and so change the positions it has taken?
- Do we apply the same pleading rules to all kinds of cases?
- Should we allow a party to assert multiple - and perhaps even inconsistent - legal and factual theories in pleadings and responses?
- Once a pleading has been entered, do statutes of limitations affect changes to that pleading?

Think back to our case involving the student disappearance of a remarkable pig from a farmer's pig pen. As you read through the following short history of pleading, think about how different pleading systems would approach a lawsuit based on that disappearance. Think also about how the roles assigned to the pleading stage have an effect on what need not or must be handled at other stages of the case.

5.2 The History and Purposes of American Pleading

This section has been adapted from Ray Worthy Campbell, *Getting a Clue: Two Stage Complaint Pleading as a Solution to the Conley-Iqbal Dilemma*, 114 Penn St. L. Rev. 1191 (2010)

The History and Purposes of Pleadings

Much has been asked of pleadings. At times, such as under the common law, the pleading process served to define and narrow the case. Under Code pleading, the pleadings set forth the essential facts and defined the contours of the case. The complaint was required to set forth the facts supporting the cause of action, with those same facts acting as boundaries beyond which no proof could be introduced. Under the Federal Rules of Civil Procedure, which shifted more of the burden of defining and shaping litigation to discovery, pleadings were asked first and foremost to provide notice.

As Charles Clark summarized the shifting function of pleadings more than a decade before the adoption of the Federal Rules:

[T]he purpose especially emphasized has varied from time to time. Thus in common law pleading especial emphasis was placed upon the issue-formulating function of pleading; under the earlier code pleading like emphasis was placed upon stating the material, ultimate facts in the pleadings: while at the present time the emphasis seems to have shifted to the notice function of pleading.

Even under the Federal Rules of Civil Procedure, the humble complaint must play multiple roles. Its filing supplies a start date for the litigation process. It provides notice of the nature of the claims being asserted. It identifies at least some of the relevant facts and sets the boundaries within which further facts may be developed during discovery. In conjunction with the answer and any later amended complaints, it defines and narrows the issues that must be resolved at trial. It provides a means for testing, and when appropriate dismissing, claims without a legal basis or for which jurisdiction does not lie. When litigation has ended, the complaint helps identify, for purposes of issue and claim preclusion, which issues were and might have been litigated.

A pleading standard that works brilliantly for one of these tasks – say, narrowing the issues for trial – might prove cumbersome for another, such as notice. In thinking about pleadings, it must be asked whether (and how much) pleadings should be used to resolve the litigation, and how much it should be used just to set the stage for other modes of resolution.

A. The Common Law and Code Eras: Narrowing and Defining the Case

At one time, pleadings played a much more central role in developing litigation than they do today. In both the common law and code eras pleadings were used to narrow and define the case. Under equity, pleadings took on the additional role of providing evidence to the court, substituting in large part for the trial. While these pleading regimes carried a cost – particularly in creating technical traps for the unwary and sometimes expanding the cost of the overall litigation – they did have the advantage of sometimes properly eliminating meritless cases and of simplifying and narrowing trial.

1. Common Law Pleading

In the Common Law era, pleading practice focused on narrowing and defining the case. It did not rely on the opening document to achieve that function, but achieved case definition through an extensive exchange of pleadings. The initial writ provided notice, some statement of the facts underlying the claim, and indication of the legal theory. Then commenced a complex dance of response and counter-response. The defendant denied or admitted the facts alleged, challenged the legal sufficiency of the allegations through demurrers, or presented defenses that would defeat the claim even given the truth of plaintiff's allegations. The exchange of pleadings could proceed through several iterations, with each new round providing traps for the unwary.

Common law pleading practice possessed one cardinal virtue – it simplified trial. The goal of the complex exchange of pleadings was to narrow the case to a single issue of fact or law that could be decided at trial. Compared to modern trials, the common law trial was a straightforward affair. Disputes could be tried in days, if not hours, and typically presented non-technical issues that a jury of common folk could readily comprehend.

The path to the trial, however, imposed substantial costs. Much depended on technicalities. Perhaps the most fundamental of these, until abolished, were the ancient forms of action. In part procedural, in part substantive, the forms provided for a certain kind of remedy for a certain kind of harm.

Let it be granted that one man has been wronged by another; the first thing that he or his advisers have to consider is what form of action he shall bring. It is not enough that in some way or another he should compel his adversary to appear in court and should then state in the words that naturally occur to him the facts on which he relies and the remedy to which he thinks himself entitled. No, English law knows a certain number of forms of action, each with its own uncouth name, a writ of right,

an assize of novel disseisin or of mort d'ancestor, a writ of entry sur disseisin in the per and cui, a writ of besaiel, of quare impedit, an action of covenant, debt, detinue, replevin, trespass, assumpsit, ejectment, case. This choice is not merely a choice between a number of queer technical terms, it is a choice between methods of procedure adapted to cases of different kinds.

At the outset of the lawsuit, the plaintiff faced irrevocable and consequential choices. Each form of action carried with it procedural anomalies – such as how jurisdiction over the defendant might be obtained, and which remedies would be available. Each also corresponded to certain kinds of facts, but not, however closely related, to others. Choosing a not-quite-right form of action meant dismissal. "The plaintiff must sue either in case or in trespass, and upon the accuracy of his claim depended the success of his action."

Choosing the right form of action was only the first of many pleading choices fraught with danger. For example, a defendant could not deny the legal basis for the claim while challenging the facts; a choice had to made between a demurrer and a denial. Once a choice was made, there was no going back for a do-over.

As time went on, the defects of common law pleading became increasingly clear. The pleading phase of the case could take a long time and cost a lot of money, pushing off the resolution of the case on the merits and pricing some litigants out of court. Worse than that, the pitfalls of pleading meant that some cases could be resolved on grounds that had nothing to do with the merits.

2. Equity Pleading

Pleading in equity followed its own distinct course, but also served to narrow and define the case. A suit in equity was commenced by filing a bill of complaint. The bill of complaint set forth the facts of the case along with a prayer for relief. The bill of equity included interrogatories to the opposing party, and as pleadings were exchanged much of the proof in the case was submitted through the pleadings themselves.

Fact pleading also was the rule in equity. The bill, which was used to initiate proceedings in Chancery, required as an essential element a listing of the facts which the plaintiff expected to prove, to which the defendant was required to respond with either admissions or denials under oath. While much of practice under the modern rules – such as joinder of parties and claims – derives from equity practice, modern notice pleading does not.

3. Code Pleading

With the industrial revolution well under way, the arcane and treacherous intricacies of common law pleading must have seemed as out of date as a torch lit medieval workshop. In an era that broke new ground in industrial efficiency and productivity, it was only natural that reformers wished the same for legal processes. The sometimes absurd technicalities of the common law looked ripe for replacement by a rationally engineered replacement.

The most influential of the U.S. reform efforts, the Field Code, sought to remedy the flaws of common law pleading by substituting "fact" pleading that diminished the importance of the causes of action. The complaint in code pleading dispensed with naming the cause of action in favor of a document setting forth the facts of the case. The goal was in part to simplify the process, and in part to reduce the ability of judges to act capriciously.

This new approach soon revealed problems of its own. Two merit mentioning. First, distinctions between "facts" and "ultimate facts" proved not so simple in application. Second, in order to avoid surprise and discipline the pleading process,

the proof offered at trial could not go beyond the allegations of the complaint. The disputes over what constituted proper pleading of facts enabled expensive wrangling over the pleadings, while the limitation on proof beyond the pleadings, coupled with restrictions on amending the complaint, sometimes made difficult adapting the case to factual developments..

B. 20th Century American Innovation: Notice Pleading

By the early 20th century it had become clear that neither code pleading nor common law pleading was the ideal solution to launching a lawsuit. Perhaps because lawyers of the era were so thoroughly steeped in common law traditions, technicalities proved resilient in legal practice. A new reform movement arose, this time directed at resolving cases on the merits rather than on technicalities. To achieve this, it seemed clear to some that the role of pleadings should be diminished.

An early advocate for reform was Roscoe Pound, then dean of the law school at the University of Nebraska. In a famous 1906 address to the American Bar Association, he decried what he saw as the "sporting theory of justice" where lawyerly skill mattered more than the merits and pushed for a new approach. For Pound, "the sole office of pleadings should be to give notice to the respective parties of the claims, defenses and cross-demands asserted by their adversaries."

Notice pleading quickly attracted adherents. In the 30 years following Pound's speech, a theory of notice pleading developed. This theory would diminish the role pleading might play in narrowing and resolving the case; at the same time, litigants would no longer need to fear pleading as a trap. So long as the function of notice was served, the litigation could proceed to resolution on the merits, with the expectation that merits resolution would yield more accurate and more respected results.

C. Pleading Under The Federal Rules

In the latter part of the 1930s, a confluence of events enabled a dramatic change in American federal court procedure. The passage of the Rules Enabling Act created two possibilities: merging equity and common law in the federal courts and the codification of federal procedure. This moved notice pleading from an academic concept to reality.

Charles Clark, a pleading expert and the principal draftsman of the Federal Rules of Civil Procedure, was a believer in simplified notice pleading. Largely as a result of Clark's influence, notice pleading was incorporated in the new Federal Rules of Civil Procedure adopted in 1938. Under this approach, the plaintiff was required only to provide "a short and plain statement of the claim showing that the pleader is entitled to relief." Pleading formalities, whether of facts or causes of action, were out; getting to the facts through discovery and resolving the claims on the merits was in.

The adoption of such minimal notice pleading was an American innovation. No modern pleading regime had required so little. Even today, pleading systems worldwide typically require fact pleading – often at a level far beyond what Americans think of as fact pleading.

1. Liberal Pleading In The Context Of Other FRCP Innovations

Notice pleading was far from the only innovation in the new federal rules. For our purposes, two stand out – liberal joinder and expansive discovery. Along with notice pleading, these innovations changed the nature of what constituted a lawsuit.

Liberal joinder of claims and parties, an approach modeled on equity procedure, expanded the scope of lawsuits. Under the common law, a writ by its nature stated a single cause of action. A case arose from and was linked conceptually to the specific legal right asserted. Under fact pleading, the facts laid out in the complaint circumscribed the litigation, and the plaintiff could not easily develop a case different from the alleged facts.

That changed under the federal rules. Under the federal rules, the contours of a case or controversy are no longer linked to the legal right asserted. Rather, the federal rules model looks to the "transaction or occurrence" from which the dispute arose. Multiple and inconsistent causes of action can be asserted based on the common transaction or occurrence; claims and counterclaims that are part of the transaction and occurrence complained of will be barred in future litigation the same as if they had been tried and lost. The goal was efficient and equitable handling of the underlying dispute without undue regard to technicalities.

This change allowed multiple defendants to be joined in a single action, so that complete justice could be done in one trial. It also allowed the assertion of multiple legal theories, so that plaintiffs need not fear losing a meritorious case because the wrong legal theory was asserted. This inclusive approach drew upon equitable tradition, and deferred until later in the case the task of narrowing the parties and issues involved.

The new rules also allowed an unprecedented amount of pretrial discovery. While pretrial discovery was known, to a limited degree, in code pleading and to a greater degree in equity practice, the new rules provided for a range of discovery tools that exceeded in scope anything that had previously existed in any one system.

That the federal rules marked a bold new step in legal procedure was clear at the time. What was perhaps less clear was exactly how the process of litigation would change as lawyers became familiar with the new tools provided. As this article will show, the combination of liberal joinder, expansive discovery and scant pleading opened the way to a new kind of litigation centered less on either pleadings or trial than had been the case in the past.

2. *Conley*: Notice Pleading Confirmed

While the Federal Rules clearly marked a change in direction, the rules left room for interpretation. In particular, the exact nature of what constituted adequate pleading was inherently a bit hazy under Rule 8, given the rule's careful avoidance of either of the words "fact" or "notice." While Clark clearly favored a liberal notice pleading regime requiring little in the way of fact pleading, other scholars, as well as some judges and attorneys, preferred a more restrictive pleading regime. For nearly 20 years after the adoption of the rules, uncertainty remained about just how much factual detail was required under Rule 8's "sort and plain statement" of the case.

The haziness was cleared in the landmark case of *Conley v. Gibson*.

5.3 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.

5.4 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.

5.5 First National Bank v. St. Croix Boom Corp.

This short case is included to give you a taste of the complexity and the pitfalls of pleading under both the common law and fact pleading. Here, in a code pleading regime, plaintiff could have gotten by with a general allegation, but alleged some facts. See what happens and ask yourself if that makes sense. From a systems design standpoint, ask yourself if the kind of discussion required in this case is a good use of scarce judicial resources.

First National Bank of Anoka *vs.* St. Croix Boom Corporation.
June 27, 1889.

Pleading — General Averment of Title Controlled by Facts Pleaded. Where a pleading sets out the facts by which the party claims to have acquired title to property, followed by a general allegation of ownership as a result of such facts, the particular facts alleged will control; and, if they are insufficient to sustain such result, the pleading is bad. Following *Pinney* v. *Fridley,* 9 Minn. 23, (34.)

Same — Conversion, how' Alleged. — In an action for wrongful conversion it is not necessary to plead the specific acts constituting the alleged conversion. A general allegation that the defendant has wrongfully eon- ' verted the property is sufficient.

Appeal by defendant from an order of the municipal court of Still-water, overruling its demurrer to the complaint in an action for the. conversion of 17,000 feet of logs of the value of $ 136.

J. N. & I. W. Castle, for appellant.

C. P. Gregory, for respondent.

By the Court.

The only allegation in the complaint as to plaintiff's right to or interest in the property alleged to have been wrongfully converted is "that the plaintiff, in the regular course of business, and to effect the payment of money already loaned and a debt owing, took an assignment of the logs marked F. D. A., and of the logs .bearing said mark, on or about the 9th of February, 1884, and then and *thereby* became, and ever since has continued to be, the owner of all the logs bearing said mark." The pleader might have contented himself with a general allegation of ownership, but he has attempted to set out all the facts by which the plaintiff became the owner, and *142then the general result following from those facts. In such a form of pleading the particular facts alleged will control, and, if they do not sustain the result reached, the pleading is bad. *Pinney* v. *Fridley,* 9 Minn. 23, (34.) In this case there are no facts alleged to support the conclusion that the plaintiff became the owner of the logs. It is not alleged by whom or to whom the money was loaned or the debt was owing, or from whom the assignment was taken, or that the party from whom taken had any interest in the logs. In fact it would appear that the pleader had studiously avoided alleging any material fact. The complaint, therefore, did not state a cause of action.

The second objection to the complaint, viz., that it does not state the particular acts constituting the alleged conversion, is not well taken. This is not necessary. A general allegation that the defendant has wrongfully converted the property is sufficient; but on the first ground the demurrer should have been sustained.

Order reversed.

5.6 Conley v. Gibson

355 U.S. 41 (1957)
CONLEY ET AL.
v.
GIBSON ET AL.
No. 7.
Supreme Court of United States.
Argued October 21, 1957.
Decided November 18, 1957.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

[…]

MR. JUSTICE BLACK delivered the opinion of the Court.

[…][1]

This class suit was brought in a Federal District Court in Texas by certain Negro members of the Brotherhood of Railway and Steamship Clerks, petitioners here, on behalf of themselves and other Negro employees similarly situated against the Brotherhood, its Local Union No. 28 and certain officers of both. In summary, the complaint [43] made the following allegations relevant to our decision: Petitioners were employees of the Texas and New Orleans Railroad at its Houston Freight House. Local 28 of the Brotherhood was the designated bargaining agent under the Railway Labor Act for the bargaining unit to which petitioners belonged. A contract existed between the Union and the Railroad which gave the employees in the bargaining unit certain protection from discharge and loss of seniority. In May 1954, the Railroad purported to abolish 45 jobs held by petitioners or other Negroes all of whom were either discharged or demoted. In truth the 45 jobs were not abolished at all but instead filled by whites as the Negroes were ousted, except for a few instances where Negroes were rehired to fill their old jobs but with loss of seniority. Despite repeated pleas by petitioners, the Union, acting according to plan, did nothing to protect them against these discriminatory discharges and refused to give them protection comparable to that given white employees. The complaint then went on to allege that the Union had failed in general to represent Negro employees equally and in good faith. It charged that such discrimination constituted a violation of petitioners' right under the Railway Labor Act to fair representation from their bargaining agent. And it concluded by asking for relief in the nature of declaratory judgment, injunction and damages.

The respondents appeared and moved to dismiss the complaint on several grounds: (1) the National Railroad Adjustment Board had exclusive jurisdiction over the controversy; (2) the Texas and New Orleans Railroad, which had not been joined, was an indispensable party defendant; and (3) the complaint failed to state a claim upon which relief could be given. The District Court granted the motion to dismiss holding that Congress had given the Adjustment Board exclusive jurisdiction over [44] the controversy. The Court of Appeals for the Fifth Circuit, apparently relying on the same ground, affirmed. 229 F. 2d 436. Since the case raised an important question concerning the protection of employee rights under the Railway Labor Act we granted certiorari. 352 U. S. 818.

[...The Court's reasoning regarding the first and the second ground are omitted here...]

Turning to respondents' final ground, we hold that under the general principles laid down in the *Steele, Graham,* and *Howard* cases the complaint adequately set forth a claim upon which relief could be granted. 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 [46] in support of his claim which would entitle him to relief.[5] Here, the complaint alleged, in part, that petitioners were discharged wrongfully by the Railroad and that the Union, acting according to plan, refused to protect their jobs as it did those of white employees or to help them with their grievances all because they were Negroes. If these allegations are proven there has been a manifest breach of the Union's statutory duty to represent fairly and without hostile discrimination all of the employees in the bargaining unit. This Court squarely held in *Steele* and subsequent cases that discrimination in representation because of race is prohibited by the Railway Labor Act. The bargaining representative's duty not to draw "irrelevant and invidious"[6] distinctions among those it represents does not come to an abrupt end, as the respondents seem to contend, with the making of an agreement between union and employer. Collective bargaining is a continuing process. Among other things, it involves day-to-day adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by contract. The bargaining representative can no more unfairly discriminate in carrying out these functions than it can in negotiating a collective agreement.[7] A contract may be fair and impartial on its face yet administered in such a way, with the active or tacit consent of the union, as to be flagrantly discriminatory against some members of the bargaining unit.

[47] The respondents point to the fact that under the Railway Labor Act aggrieved employees can file their own grievances with the Adjustment Board or sue the employer for breach of contract. Granting this, it still furnishes no sanction for the Union's alleged discrimination in refusing to represent petitioners. The Railway Labor Act, in an attempt to aid collective action by employees, conferred great power and protection on the bargaining agent chosen by a majority of them. As individuals or small groups the employees cannot begin to possess the bargaining power of their representative in negotiating with the employer or in presenting their grievances to him. Nor may a minority choose another agent to bargain in their behalf. We need not pass on the Union's claim that it was not obliged to handle any grievances at all because we are clear that once it undertook to bargain or present grievances for some of the employees it represented it could not refuse to take similar action in good faith for other employees just because they were Negroes.

The respondents also argue that the complaint failed to set forth specific facts to support its general allegations of discrimination and that its dismissal is therefore proper. The decisive answer to this is that the 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"[8] 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 [48] 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.[9] 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. Cf. *Maty* v. *Grasselli Chemical Co.,* 303 U. S. 197.

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

It is so ordered.

[…]

5.7 Pleading and Practice After Conley

This section has been adapted from Ray Worthy Campbell, *Getting a Clue: Two Stage Complaint Pleading as a Solution to the Conley-Iqbal Dilemma*, 114 Penn St. L. Rev. 1191 (2010)

While the Federal Rules clearly marked a change in direction, the rules left room for interpretation. In particular, the exact nature of what constituted adequate pleading was inherently a bit hazy under Rule 8, given the rule's careful avoidance of either of the words "fact" or "notice." While Clark clearly favored a liberal notice pleading regime requiring little in the way of fact pleading, other scholars, as well as some judges and attorneys, preferred a more restrictive pleading regime. For nearly 20 years after the adoption of the rules, uncertainty remained about just how much factual detail was required under Rule 8's "sort and plain statement" of the case.

The haziness was cleared in the landmark case of *Conley v. Gibson*. In this case, African American railroad workers brought a pro se claim that they had not been represented fairly by their union. The claim was dismissed by the lower courts for failure to state a claim, but the Supreme Court reversed. In language that opened the doors of the courthouse wide, the Court held that a complaint was sufficient "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief." The Court further held that so long as the defendant was on notice of the nature of the claim, specific facts need not be pleaded.

Conley was not briefed as a sufficiency of the pleadings case, and its sweeping language can be read as speaking to a demurrer type issue (do plaintiffs have a legal right?) as opposed to the sufficiency of the facts. Nonetheless, for a generation, *Conley* was understood to mean that the federal rules required far less than fact pleading.

Conley made hurdling the pleading barrier extraordinarily easy. Neoplatonic disputes about facts versus ultimate facts went away; technical failures in setting forth the claim rarely proved fatal. Within broad limits, plaintiffs got their day in court.

1. The Evolution of Litigation Under The Federal Rules

Taken in conjunction with the changes in joinder and discovery, notice pleading, as affirmed in *Conley*, ushered in a new era in how law suits were handled. Notice pleading made it easier for plaintiffs to launch the litigation process. The other reforms embodied in the Rules expanded the scope of that same litigation process. Unlike in times gone by, joinder allowed the inclusion of multiple defendants and multiple claims. Discovery became a new phase of litigation that absorbed massive amounts of lawyer time and client funds.

Pleading no longer served to define or control this process. Common law pleading had limited the subsequent litigation process to the precise legal issue identified at the outset; fact pleading set bounds on the facts that could be developed or proved. Notice pleading did not set comparable limits on the litigation process; indeed, the spirit of the Rules was to remove such constraints in order to allow parties to proceed into discovery and on to merits resolution.

In reducing the role of pleading, Clark seems to have expected that the path to the merits would prove short and efficient. Contrary to expectations, the path to merits resolution often proved long and expensive. The invention of photocopy machines and computers vastly expanded the scope of documents accessible to discovery requests. At first, the number and scope of interrogatories were limited only by the imagination of the litigating attorneys or the active intervention of judges, with no limits set by the rules themselves. Depositions similarly were unconstrained, subject to a judge choosing to intervene.

Over time, rather than being preparation to litigation, the discovery phase became the litigation. Trials became the exception, rather than the norm. Attorneys could spend their entire careers as "litigators" handling matters in federal court yet rarely, if ever, try a case.

As it happened, lawyers did not abandon the "sporting theory" of litigation and were quick to take advantage of the new playing field created by the extended discovery phase. The temptation to engage in "sporting" litigation was only increased because this contest, unlike pleadings or trial itself, largely took place away from the supervision or even active awareness of the supervising judge.

Defendants joined in a proceeding were locked into a discovery process that often proved long and expensive, even when the defendant's connection to the dispute was tangential. Discovery in a typical case includes interrogatories, document production and review, depositions and expert discovery. In multi-defendant cases, this pattern repeats across all defendants, and typically each defendant must not only engage in discovery related to itself and the plaintiff, but devote additional resources to monitor the discovery directed at its codefendants. Even if a tangential defendant is only along for the ride and can expect to win on the merits, it can be a high priced ticket.

To a significant extent, the evolution of federal practice since the 1970s has involved attempts to rein in this expansive discovery process. The "abuse" of discovery has been condemned. Judges have been encouraged to take a more active role in case management, with case conferences and discovery plans made the norm. Summary judgment, largely an innovative procedure at the times the Rules were established, took on greater prominence following the Trilogy cases. Default limits on the amount of discovery were imposed, both in limiting the default number of interrogatories and depositions, and in dialing back the scope of what was discoverable. All of this has happened, it should be noted, without any significant non-anecdotal evidence that the parties were engaging in disproportionately high levels of discovery.

Even so, the process can remain long and costly. For defendants, the first option for court-ordered exit in a well-pleaded case comes at summary judgment. Summary judgment presents, at best, a partial solution. The summary judgment stage typically is reached after the long and winding road of fact and expert discovery has been concluded, an expensive process (for cases that get into discovery, one study cited by the Twombly court shows that 90 percent of litigation costs were spent in the discovery process).

Reviewing an extensive record and preparing a summary judgment motion can also involve substantial expense. Since the judge cannot weigh the evidence in the place of the jury, even unpersuasive or conflicting evidence could suffice to keep a defendant in the case, and in complex cases confused witnesses or stray documents can create the kind of free floating factoids that might suffice to meet the summary judgment burden. Because denial of summary judgment is usually non-reviewable,

some judges are reluctant to grant even meritorious summary judgment motions, preferring to let the parties make the case go away in settlement rather than risk reversal.

Of course, court ordered resolutions are not the only ways a defendant can be removed from a lawsuit. If discovery shows a defendant has no culpability, a plaintiff can voluntarily dismiss that defendant. On occasion, this happens. A plaintiff might prefer not to muddy its narrative by including excess defendants, or might wish to preserve credibility before a tribunal by releasing those clearly not liable. To the extent retaining a defendant in a lawsuit imposes financial costs, the plaintiff might wish to terminate those costs.

The most common way for lawsuits to be resolved, however, is not through voluntary dismissal but through settlement, in which some payment is made to the plaintiff in connection with securing a dismissal. Plaintiffs can seek to extract settlement payments from defendants who have been wrongly joined. Plaintiffs and defendants in multi-defendant litigation have a marked asymmetry of costs. For the plaintiff, marginal costs may not increase proportionally with the number of defendants. The plaintiff can amortize its investment across multiple defendants; a defendant must bear the cost of full litigation. At depositions, for example, the plaintiff only needs to send one attorney. By contrast, for any important deposition, each defendant might send an attorney, even if it is not their witness and even if they plan to ask no questions. In some multi-defendant cases, each deposition might involve a dozen attorneys, with only one representing the plaintiff, and the rest representing various defendants.

2. The 90's And Beyond

Either side of the turn of the century saw extensive criticism, from academics, judges, legislators and practicing lawyers, of the litigation system spawned by the rules. The 1980s saw many federal judges imposing heightened pleading standards on selected cases. Spurred on by media coverage of a perhaps mythical litigation crisis, significant changes were made in the Rules to control discovery, and Congress imposed special heightened pleading requirements in securities cases. Almost beneath the radar, lower federal courts developed doctrines that had the effect of imposing heightened pleading requirements on certain types of cases. Supreme Court Response To the Problems of Conley

In general, the Supreme Court remained a bulwark against changing pleading standards and on occasion reversed lower court rulings that sought to impose greater pleading requirements. In *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993), the Court, speaking through Chief Justice Rehnquist, declined to impose higher pleading standards for suits against municipalities in § 1983 cases. In *Swierkiewicz v. Sorema*, 534 U.S. 506 (2002), the Court, speaking through Justice Thomas, rebuffed an attempt to create a higher pleading standard in employment discrimination cases. Perhaps ironically, in light of later events, the Court stressed in these opinions that changes in pleading standards should come through the rulemaking process, and not through judge-made common law.

5.8 Bell Atlantic Corp. v. Twombly

BELL ATLANTIC CORP. et al. *v.* TWOMBLY et al.

No. 05-1126.

Argued November 27, 2006

Decided May 21, 2007

*547Souter, J., delivered the opinion of the Court, in which Roberts, C. J., and Scalia, Kennedy, Thomas, Breyer, and Auto, JJ., joined. Stevens, J., filed a dissenting opinion, in which Ginsburg, J., joined, except as to Part IV, *post,* p. 570.

[…]

Liability under § 1 of the Sherman Act, 15 U. S. C. § 1, requires a "contract, combination ... , or conspiracy, in restraint of trade or commerce." The question in this putative class action is whether a § 1 complaint can survive a motion to dismiss when it alleges that major telecommunications providers engaged in certain parallel conduct unfavorable to *549competition, absent some factual context suggesting agreement, as distinct from identical, independent action. We hold that such a complaint should be dismissed.

I

The upshot of the 1984 divestiture of the American Telephone & Telegraph Company's (AT&T) local telephone business was a system of regional service monopolies (variously called "Regional Bell Operating Companies," "Baby Bells," or "Incumbent Local Exchange Carriers" (ILECs)), and a separate, competitive market for long-distance service from which the ILECs were excluded. More than a decade later, Congress withdrew approval of the ILECs' monopolies by enacting the Telecommunications Act of 1996 (1996 Act), 110 Stat. 56, which "fundamentally restructure[d] local telephone markets" and "subjected] [ILECs] to a host of duties intended to facilitate market entry." *AT&T Corp.* v. *Iowa Utilities Bd.,* 525 U. S. 366, 371 (1999). In recompense, the 1996 Act set conditions for authorizing ILECs to enter the long-distance market. See 47 U. S. C. §271.

[…]

Respondents William Twombly and Lawrence Marcus (hereinafter plaintiffs) represent a putative class consisting of all "subscribers of local telephone and/or high speed internet services . . . from February 8, 1996 to present." […]. In this action against petitioners, a group of ILECs,1 plaintiffs seek treble damages and declaratory and injunctive relief for claimed violations of §1 of the Sherman Act, ch. 647, 26 Stat. 209, as amended, 15 U. S. C. § 1, which prohibits "[ejvery contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations."

The complaint alleges that the ILECs conspired to restrain trade in two ways, each supposedly inflating charges for local telephone and high-speed Internet services. Plaintiffs say, first, that the ILECs "engaged in parallel conduct" in their respective service areas to inhibit the growth of upstart CLECs. […] Their actions allegedly included making unfair agreements with the CLECs for access to ILEC networks, providing inferior connections to the networks, overcharging, and billing in ways designed to sabotage the CLECs' relations with their own customers. *Ibid.* According to the complaint, the ILECs' *551"compelling common motivatio[n]" to thwart the CLECs' competitive efforts naturally led them to form a conspiracy; "[h]ad any one [ILEC] not sought to prevent CLECs . . . from competing effectively , the resulting greater competitive inroads

into that [ILEC's] territory would have revealed the degree to which competitive entry by CLECs would have been successful in the other territories in the absence of such conduct." *Id.,* ¶ 50, App. 26-27.

Second, the complaint charges agreements by the ILECs to refrain from competing against one another. These are to be inferred from the ILECs' common failure "meaningfully [to] pursu[e]" "attractive business opportunities]" in contiguous markets where they possessed "substantial competitive advantages," *[…]* and from a statement of Richard Notebaert, chief executive officer (CEO) of the ILEC Qwest, that competing in the territory of another ILEC " 'might be a good way to turn a quick dollar but that doesn't make it right,'" *id.,* ¶ 42, App. 22.

The complaint couches its ultimate allegations this way:

> "In the absence of any meaningful competition between the [ILECs] in one another's markets, and in light of the parallel course of conduct that each engaged in to prevent competition from CLECs within their respective local telephone and/or high speed internet services markets and the other facts and market circumstances alleged above, Plaintiffs allege upon information and belief that [the ILECs] have 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." *Id.,* ¶ 51, App. 27.2

*552The 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 '[circumstantial 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.'" 313 F. Supp. 2d 174, 179 (2003)[…]. 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." 313 F. Supp. 2d, at 179. 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." *Id.,* at 183. 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." *Id.,* at 188.

*553The 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." 425 F. 3d 99, 114 (2005) (emphasis in original). 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." *Ibid.*

We granted certiorari to address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct, 548 U. S. 903 (2006), 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," *Copperweld Corp.* v. *Independence Tube Corp.,* 467 U. S. 752, 775 (1984), "[t]he crucial question" is whether the challenged anticompetitive conduct "stem[s] from independent decision or from an agreement, tacit or express," *Theatre Enterprises,* 346 U. S., at 540. While a showing of parallel "business behavior is admissible circumstantial evidence from which the fact finder may infer agreement," it falls short of "conclusively establishing] agreement or . . . itself constituting] a Sherman Act offense." *Id.,* at 540-541. 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 deei*554sions" is "not in itself unlawful." *[…]*

The inadequacy of showing parallel conduct or interdependence, without more, mirrors the ambiguity of the behavior: consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market. […]. Accordingly, we have previously hedged against false inferences from identical behavior at a number of points in the trial sequence. An antitrust conspiracy plaintiff with evidence showing nothing beyond parallel conduct is not entitled to a directed verdict, […] proof of a § 1 conspiracy must include evidence tending to exclude the possibility of independent action, […]; and at the summary judgment stage a § 1 plaintiff's offer of conspiracy evidence must tend to rule out the possibility that the defendants were acting independently, […].

B

This case presents the antecedent question of what a plaintiff must plead in order to state a claim under §1 of the *555Sherman 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," *Conley* v. *Gibson,* 355 U. S. 41, 47 (1957). 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.4 And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable, and "that a recovery is very remote and unlikely." *Ibid.* 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 bespeak unlawful agreement. It

makes sense to say, therefore, that an allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without *557more, 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.

The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects the threshold requirement of Rule 8(a)(2) that the "plain statement" possess enough heft to "sho[w] that the pleader is entitled to relief." A statement of parallel conduct, even conduct consciously undertaken, needs some setting suggesting the agreement necessary to make out a § 1 claim; without that further circumstance pointing toward a meeting of the minds, an account of a defendant's commercial efforts stays in neutral territory. An allegation of parallel conduct is thus much like a naked assertion of conspiracy in a § 1 complaint: it gets the eomplaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of "entitle[ment] to relief." […]

We alluded to the practical significance of the Rule 8 entitlement requirement in *Dura Pharmaceuticals, Inc.* v. *Broudo,* 544 U. S. 336 (2005), when we explained that something beyond the mere possibility of loss causation must be *558alleged, lest a plaintiff with " 'a largely groundless claim' " be allowed to " 'take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.'" *Id.,* at 347 (quoting *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U. S. 723, 741 (1975)). So, when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, " 'this basic deficiency should ... be exposed at the point of minimum expenditure of time and money by the parties and the court.'"[…].

Thus, it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, cf. *Poller* v. *Columbia Broadcasting System, Inc.,* 368 U. S. 464, 473 (1962), but quite another to forget that proceeding to antitrust discovery can be expensive. As we indicated over 20 years ago in *Associated Gen. Contractors of Cal., Inc.* v. *Carpenters,* 459 U. S. 519, 528, n. 17 (1983), "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 *Car Carriers, Inc.* v. *Ford Motor Co.,* 745 F. 2d 1101, 1106 (CA7 1984) ("[T]he costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint"); Note, Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation, 78 N. Y. U. L. Rev. 1887, 1898-1899 (2003) (discussing the unusually high cost of discovery in antitrust cases); Manual for Complex Lit*559igation, Fourth, § 30, p. 519 (2004) (describing extensive scope of discovery in antitrust cases); 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," *post,* at 573, 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," *post,* at 573; 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. *Dura,* *560544 U. S., at 347 (quoting *Blue Chip Stamps, supra,* at 741; alteration in Dura).6

Plaintiffs do not, of course, dispute the requirement of plausibility and the need for something more than merely parallel behavior explained in *Theatre Enterprises, Monsanto,* and *Matsushita,* and their main argument against the plausibility standard at the pleading stage is its ostensible *561conflict 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." 355 U. S., at 45-46. 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, see 425 F. 3d, at 106, 114 (invoking Conley's "no set of facts" language in describing the standard for dismissal).7

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 *562fact in a context that suggests an agreement. 425 F. 3d, at 106,114. 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, […].

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 com*563plaint'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.8

*564III

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. *Supra,* at 550-551. Although in form a few stray statements speak directly of agreement,9 on fair reading these are merely legal conclusions resting on the prior allegations. Thus, the com*565plaint first takes account of the alleged "absence of any meaningful competition between [the ILECs] in one another's markets," "the parallel course of conduct that each [ILEC] engaged in to prevent competition from CLECs," "and the other facts and market circumstances alleged [earlier]"; "in light of" these, the complaint concludes "that [the ILECs] have entered into a contract, combination or conspiracy to prevent competitive entry into their . . . markets and have agreed not to compete with one another." Complaint ¶51, App. 27.10 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.11

*566We think that nothing contained in the complaint invests either the action or inaction alleged with a plausible suggestion of conspiracy. As to the ILECs' supposed agreement to disobey the 1996 Act and thwart the CLECs' attempts to compete, we agree with the District Court that nothing in the complaint intimates that the resistance to the upstarts was anything more than the natural, unilateral reaction of each ILEC intent on keeping its regional dominance. The 1996 Act did more than just subject the ILECs to competition; it obliged them to subsidize their competitors with their own equipment at wholesale rates. The economic incentive to resist was powerful, but resisting competition is routine market conduct, and even if the ILECs flouted the 1996 Act in all the ways the plaintiffs allege, see *id.,* ¶ 47, App. 23-24, there 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.

The complaint makes its closest pass at a predicate for conspiracy with the claim that collusion was necessary because success by even one CLEG in an ILEC's territory "would have revealed the degree to which competitive entry by CLECs would have been successful in the other territories." *Id.,* ¶ 50, App. 26-27. But, its logic aside, this general premise still fails to answer the point that there was just no need for joint encouragement to resist the 1996 Act; as the District Court said, "each ILEC has reason to want to avoid dealing with CLECs" and "each ILEC would attempt to keep CLECs out, regardless of the actions of the other ILECs." 313 F. Supp. 2d, at 184; […]

Plaintiffs' second conspiracy theory rests on the competitive reticence among the ILECs themselves in the wake of the 1996 Act, which was supposedly passed in the "'hop[e] that the large incumbent local monopoly companies ... might attack their neighbors' service areas, as they are the best situated to do so.'" Complaint ¶38, App. 20[…] Contrary to hope, the ILECs declined " 'to enter each other's service territories in any significant way,' " Complaint ¶ 38, App. 20, and the local telephone and high-speed Internet market remains highly compartmentalized geographically, with minimal competition. Based on this state of affairs, and perceiving the ILECs to be blessed with "especially attractive business opportunities" in surrounding markets dominated by other ILECs, the plaintiffs assert that the ILECs' parallel conduct was "strongly suggestive of conspiracy." *Id.,* ¶ 40, App. 21.

But it was 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 *568preceding 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 tp 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 opportunities]" by declining to compete as CLECs against other ILECs, Complaint ¶ 40, App. 21, 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,13 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, App. *56923-26. Not only that, but even without a monopolistic tradition and the peculiar difficulty of mandating shared networks, "[f]irms do not expand without limit and none of them enters every market that an outside observer might regard as profitable, or even a small portion of such markets." […]. The upshot is that Congress may have expected some ILECs to become CLECs in the legacy territories of other ILECs, but the disappointment does not make conspiracy plausible. We agree with the District Court's assessment that antitrust conspiracy was not suggested by the facts adduced under either theory of the complaint, which thus fails to state a valid § 1 claim.14

Plaintiffs say that our analysis runs counter to *Swierkiewicz,* 534 U. S., at 508, which held that "a complaint in an employment discrimination lawsuit [need] not contain specific facts establishing a prima facie case of discrimination under the framework set forth in *McDonnell Douglas Corp.* v. *Green,* 411 U. S. 792 (1973)." They argue that just as the prima facie case is a "flexible evidentiary standard" that "should not be transposed into a rigid pleading standard for discrimination cases," *Swierkiewicz, supra,* at 512, "trans-posting] 'plus factor' summary judgment analysis woodenly into a rigid Rule 12(b)(6) pleading standard . . . would be unwise," Brief for Respondents 39. As the District Court *570correctly understood, however, *"Swierkiewicz* did not change the law of pleading, but simply re-emphasized . . . that the Second Circuit's use of a heightened pleading standard for Title VII cases was contrary to the Federal Rules' structure of liberal pleading requirements." 313 F. Supp. 2d, at 181 (citation and footnote omitted). 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. *Swierkiewicz,* 534 U. S., at 514. 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. *Id.,* at 508.

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.

1

The 1984 divestiture of AT&T's local telephone service created seven Regional Bell Operating Companies. Through a series of mergers and acquisitions, those seven companies were consolidated into the four ILECs named in this suit: BellSouth Corporation, Qwest Communications International, Inc., SBC Communications, Inc., and Verizon Communications, Inc. (successor-in-interest to Bell Atlantic Corporation). Complaint ¶ 21, App. 16. Together, these ILECs allegedly control 90 percent or more of the market for local telephone service in the 48 contiguous States. *Id.,* ¶ 48, App. 26.

2

In setting forth the grounds for § 1 relief, the complaint repeats these allegations in substantially similar language:

> "Beginning at least as early as February 6,1996, and continuing to the present, the exact dates being unknown to Plaintiffs, Defendants and their co-conspirators engaged in a contract, combination or conspiracy to pre*552vent competitive entry in their respective local telephone and/or high speed internet services markets by, among other things, agreeing not to compete with one another and to stifle attempts by others to compete with them and otherwise allocating customers and markets to one another in violation of Section 1 of the Sherman Act." *Id.,* ¶ 64, App. 30-31.

5.9 Ashcroft v. Iqbal

ASHCROFT, FORMER ATTORNEY GENERAL, et *al. v.* IQBAL et al.
No. 07-1015.

[…]

*666Justice 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. We hold respondent's pleadings are insufficient.

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. *Id.,* at 1. 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. *Id.,* at 111. The high-interest detainees were held under restrictive conditions designed to prevent them from communicating with the general prison population or the outside world. *Id.,* at 112-113.

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. *Iqbal* v. *Hasty,* 490 F. 3d 143, 147-148 (CA2 2007). 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 *668(ADMAX SHU). *Id.,* at 148. As the facility's name indicates, the ADMAX SHU incorporates the maximum security conditions allowable under Federal Bureau of Prisons regulations. *Ibid.* ADMAX SHU detainees were kept in lock-down 23 hours a day, spending the remaining hour outside their cells in handcuffs and leg irons accompanied by a four-officer escort. *Ibid.*

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 and 19 "John Doe" federal corrections officers. […]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. […]

The 21-cause-of-action complaint does not challenge respondent's arrest or his confinement in the MDC's general prison population. Rather, it concentrates on his treatment while confined to the ADMAX SHU. The complaint sets forth various claims against defendants who are not before us. For instance, the complaint alleges that respondent's jailors "kicked him in the stomach, punched him in the face, and dragged him across" his cell without justification, *id.,* […]; subjected him to serial strip and body-cavity searches when he posed no safety risk to himself or others, *[…]* and refiised to let him and other Muslims pray because there would be "[n]o prayers for terrorists," *[…]*

The allegations against petitioners are the only ones relevant here. The complaint contends that petitioners desig*669nated 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." *[…]* It further alleges that "[t]he policy of holding post-September-llth 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." *[…]* 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." *[…]* The pleading names Ashcroft as the "principal architect" of the policy, *[…]* and identifies Mueller as "instrumental in [its] adoption, promulgation, and implementation," *[…]*

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. *Id.,* at 136a-137a (relying on *Conley* v. *Gibson,* 355 U. S. 41 (1957)). Invoking the collateral-order doctrine petitioners filed an interlocutory appeal in the United States Court of Appeals for the Second Circuit. While that appeal was pending, this Court decided *Bell Atlantic Corp.* v. *Twombly,* 550 U. S. 544 (2007), which discussed the standard for evaluating whether a complaint is sufficient to survive a motion to dismiss.

*670The Court of Appeals considered *Twombly's* applicability to this case. Acknowledging that *Twombly* retired the *Conley* no-set-of-facts test relied upon by the District Court, the Court of Appeals' opinion discussed at length how to apply this Court's "standard for assessing the adequacy of pleadings." 490 F. 3d, at 155. 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" Id.,* at 157-158. 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. *Id.,* at 174.

Judge Cabranes concurred. He agreed that the majority's "discussion of the relevant pleading standards reflected] the uneasy compromise . .. between a qualified immunity privilege rooted in the need to preserve the effectiveness of government as contemplated by our constitutional structure and the pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure." *Id.,* at 178 (internal quotation marks and citations omitted). Judge Cabranes nonetheless expressed concern at the prospect of subjecting high-ranking Government officials — entitled to assert the defense of qualified immunity and charged

with responding to "a national and international security emergency unprecedented in the history of the American Republic" — to the burdens of discovery on the basis of a complaint as nonspecific as respondent's. *Id.,* at 179. Reluctant to vindicate that concern as a member of the Court of Appeals, *ibid.,* Judge Cabranes urged this Court to address the appropriate pleading standard "at the earliest opportunity," *id.,* at 178. We granted certiorari, […] and now reverse.

*671II

[…]

Ill

In *Twombly, […]*the Court found it necessary first to discuss the antitrust principles implicated by the complaint. Here too we begin by taking note of the elements a plaintiff must plead to state a claim of unconstitutional discrimination against officials entitled to assert the defense of qualified immunity.

In *Bivens* — proceeding on the theory that a right suggests a remedy — this Court "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." *Correctional Services Corp.* v. *Malesko,* 534 U. S. 61, 66 (2001). Because implied causes of action are disfavored, the Court has been reluctant to extend *Bivens* liability "to any new context or new category of defendants."[…]That reluctance might well have disposed of respondent's First Amendment claim of religious discrimination. For while we have allowed a *Bivens* action to redress a violation of the equal protection component of the Due Process Clause of the Fifth Amendment,[…], we have not found an implied damages remedy under the Free Exercise Clause. Indeed, we have declined to extend *Bivens* to a claim sounding in the First Amendment. *Bush* v. *Lucas,* 462 U. S. 367 (1983). Petitioners do not press this argument, however, so we assume, without deciding, that respondent's First Amendment claim is actionable under *Bivens.*

In the limited settings where *Bivens* does apply, the implied cause of action is the "federal analog to suits brought against state officials under Rev. Stat. § 1979, 42 U. S. C. *676§ 1983." *[…]* Based on the rules our precedents establish, respondent correctly concedes that Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior.* […] Because vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution.

The factors necessary to establish a *Bivens* violation will vary with the constitutional provision at issue. Where the claim is invidious discrimination in contravention of the First and Fifth Amendments, our decisions make clear that the plaintiff must plead and prove that the defendant acted with discriminatory purpose. *[…]*. Under extant precedent purposeful discrimination requires more than "intent as volition or intent as awareness of consequences." *[…]*It instead involves a decisionmaker's undertak*677ing a course of action " 'because of,' not merely 'in spite of,' [the action's] adverse effects upon an identifiable group." *Ibid.* It follows that, to state a claim based on a violation of a clearly established right, respondent must plead sufficient factual matter to show that petitioners adopted and implemented the detention policies at issue not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion, or national origin.

Respondent disagrees. He argues that, under a theory of "supervisory liability," petitioners can be liable for "knowledge and acquiescence in their subordinates' use of discriminatory criteria to make classification decisions among detainees." Iqbal Brief 45-46. That is to say, respondent believes a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts

to the supervisor's violating the Constitution. We reject this argument. Respondent's conception of "supervisory liability" is inconsistent with his accurate stipulation that petitioners may not be held accountable for the misdeeds of their agents. In a § 1983 suit or a *Bivens* action — where masters do not answer for the torts of their servants — the term "supervisory liability" is a misnomer. Absent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct. In the context of determining whether there is a violation of a clearly established right to overcome qualified immunity, purpose rather than knowledge is required to impose *Bivens* liability on the subordinate for unconstitutional discrimination; the same holds true for an official charged with violations arising from his or her superintendent responsibilities.

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 *678entitled to relief." As the Court held in *Twombly,* 550 U. S. 544, 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." 550 U. S., at 555. Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement." *Id.,* at 557.

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." *Id.,* at 570. 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. *Id.,* at 556. 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. *Ibid.* 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.' " *Id.,* at 557 (brackets omitted).

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 hyperteehnical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for *679a plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. *Id.,* at 556. 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. 490 F. 3d, at 157-158. 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 competitive entry, in violation of the Sherman Act, 15 U. S. C. § 1. 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 *680unlawful 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. *Id.,* at 555. 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." *Id.,* at 565-566. 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. *Id.,* at 567. 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. *Id.,* at 570.

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." *Ibid.*

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." […]The complaint alleges that Ashcroft was the "principal architect" of this invidious policy, *681*[…]*and that Mueller was "instrumental" in adopting and executing it, *[…]*. 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. *Twombly,* 550 U. S., at 554-555. 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,' " *id.,* at 551, 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." […]It further claims that "[t]he policy of holding post-September-llth 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." *[…]* 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.

*682The September 11 attacks were perpetrated by 19 Arab Muslim hijackers who counted themselves members in good standing of al Qaeda, an Islamic fundamentalist group. A1 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, supra,* at 567, 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-llth detainees" in the ADMAX SHU once they were categorized as "of high interest." Complaint ¶69, App. to Pet. for Cert. 168a. 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 *683have 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." *Ibid.* 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,* 550 U. S., at 570.

To be sure, respondent can attempt to draw certain contrasts between the pleadings the Court considered in *Twombly* and the pleadings at issue here. In *Twombly,* the complaint alleged general wrongdoing that extended over a period of years, *id.,* at 551, whereas here the complaint alleges discrete wrongs — for instance, beatings — by lower level Government actors. The allegations here, if true, and if condoned by petitioners, could be the basis for some inference of wrongful intent on petitioners' part. Despite these distinctions, respondent's pleadings do not suffice to state a claim. Unlike in *Twombly,* where the doctrine of *respondeat superior* could bind the corporate defendant, here, as we have noted, petitioners cannot be held liable unless they themselves acted on account of a constitutionally protected characteristic. Yet respondent's complaint does not

contain any factual allegation sufficient to plausibly suggest petitioners' discriminatory state of mind. His pleadings thus do not meet the standard necessary to comply with Rule 8.

*684It 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. 550 U. S., at 554. 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," *ibid.,* 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 *685placed upon the discovery process. […]

Our rejection of the eareful-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. The costs of diversion are only magnified when Government officials are charged with responding to, as Judge Cabranes aptly put it, "a national and international security emergency unprecedented in the history of the American Republic." 490 F. 3d, at 179.

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 *686if petitioners are not yet themselves subject to discovery orders, then, they would not be free from the burdens of discovery.

We decline respondent's invitation to relax the pleading requirements on the ground that the Court of Appeals promises petitioners minimally intrusive discovery. That promise provides especially cold comfort in this pleading context, where we are impelled to give real content to the concept of qualified immunity for high-level officials who must be neither deterred nor detracted from the vigorous performance of their duties. 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. […] 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." […] 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 "[mjalice, 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 *687to evade the less rigid — though still operative — strictures of Rule 8. […]And Rule 8 does not empower respondent to plead the bare elements of his cause of action, affix the label "general allegation," and expect his complaint to survive a motion to dismiss.

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.

5.10 Notes on *Twombly* and *Iqbal* (aka *Twiqbal*)

Goals of Pleading. When great lawyers draft a complaint, meeting the minimum standards of *Twiqbal* is far from the only thing on their mind. The complaint is often the first chance the plaintiff gets to persuade the other side and the court that the case is a strong one. As a result, experienced plaintiffs will spend time crafting a complaint that effectively tells their story. In some cases, they go overboard and become subject to a motion to strike the complaint because it is too wordy or too argmentative. The point is, don't be misled by these cases into thinking that competent lawyers plan to skirt the minimum standards of pleading. Unless the complaint has been drafted by nonlawyers (as in *Conley*) or key facts are not knowable at the

time of pleading (as in *Twombly* and *Iqbal*), the focus will be on getting the story out in a way that builds a persuasive narrative, with minimum pleading standards a secondary consideration.

The Plausibility Standard. The plausibility standard set out in *Iqbal* seems, year after year, to confuse many students. The most common error students make is thinking that the inquiry asks whether the facts pleaded are plausible. That's not what the Court said, and would not be a proper approach if it had been as weighing of the facts is normally a job for the jury or in non-jury trials for the trial judge.

Plausibility (which we think is terrible choice of words precisely because it invites this confusion) really looks at sufficiency. Assuming that the facts alleged are true, are they sufficient to support the plaintiff's assertion that actionable wrongdoing took place? Or, are they at least equally consistent with explanations that would not lead to legal liability?

The plausibility/sufficiency test set out in Iqbal has three parts:

1) Accept all actual facts pleaded as true (e.g., a meeting was held at the Hilton Hotel on June 5 of last year). The standard rule in most pleading situations, by the way, is that the judge must accept as true all properly pleaded facts for the purpose of deciding a motion to dismiss.

2) Disregard all legal conclusions (e.g., defendants have engaged in a vast price-fixing conspiracy)

3) Looking only at the facts, do they meet the plausibility/sufficiency standard of setting out a situation that is not susceptible to an equally likely innocent explanation? (For example, in *Twombly*, are the facts sufficient to make one conclude that there was a conspiracy as opposed to independent action.)

Impact of Iqbal. What has been the impact of *Twombly* and *Iqbal*? Has it led to more dismissals? Has it led to higher quality cases in the federal courts? The answer to both questions, so far, is that it is hard to know.

There are settings where it is clear that *Twombly* and *Iqbal* create no real problem for plaintiffs. In a one-plaintiff, one-defendant suit where the facts are all public, little is changed. The facts that would establish liability are known to all, and if a case might exist it is easy to plead.,

That changes when not all the facts can be known to the plaintiff without some kind of factual discovery. Take, for example, a case in which someone has been fired by a corporation, and they wish to bring a lawsuit for employment discrimination, whether on the basis of race, gender, or some other ground. It's the rare defendant who will publicly state an improper reason for firing someone; more commonly, confidential memoranda or emails that only emerge in discovery fill in the story enough to refute a benign explanation. A similar situation can, at least in theory, arise in a multidefendant case - if a plane crashes, it seems likely that someone is at fault, but it may be difficult pleading a case against all the potentially liable parties. For various reasons, the impact of pleading standards on these kinds of cases is hard to measure authoritatively, and while the smart money might be on the side of *Twombly* and *Iqbal* having had an impact more research remains to be done.

Twiqbal and Discovery. The impact of *Twiqbal* is to close the doors to the courthouse, and thereby to foreclose access to discovery. You might ask whether plaintiffs can address this issue by conducting discovery before the lawsuit is filed. For various reasons, some arising from the structure of the rules and some perhaps from deeper concerns about whether a case or controversy exists, pre-filing discovery is not normally allowed in US federal courts. In certain exceptional cases - such as the

loss of evidence through death of a witness - exceptions can be made, but discovery to determine whether or not there is a case to be filed is not federal practice.

Some judges allow discovery after a case has been filed to determine whether deficiencies under *Twiqbal* can be cured with new facts; some do not. There is no federal rule requiring or structuring such discovery, and it is up to the judge.

Iqbal and the Trial Judge. Note that *Iqbal* vests much power in the trial judge. First, the trial judge gets to decide whether the case is 'plausible.' While this should be a sufficiency of the allegations question, different judges may find different sets of facts plausible. Second, note that the trial judge has more or less unreviewable discretion with regard to whether discovery into the missing facts should proceed before the motion for dismissal is decided. Some judges will allow the plaintiffs to obtain limited discovery on key facts needed to meet the standard; others will not. Ask yourself whether staying in court on a potentially meritorious claim should depend quite so much on which judge hears the case.

Burden of Pleading / Burden of Proof / Burden of Persuasion. *Conley*, *Twombly*, and *Iqbal* all involve the 'burden of pleading.' This burden involves what the plaintiffs (or, for an affirmative defense or a counterclaim, the defendants) have to include in the pleadings in order to withstand a motion to dismiss. You will see that the burden of pleading seems to have shifted, under the same rule, between *Conley* and *Iqbal*. At other stages of the case, we will look at the burden of proof or burden of production. This looks to whether enough actual evidence has been presented to allow a factfinder to conclude in favor of the party with the burden. If the evidence is not in the record, the burden is not. Finally, there is the burden of persuasion. This has to do with whether the factfinder, judge or jury, believes the evidence.

Imagine a lawsuit in which the defendant is accused of causing an automobile accident by driving over the speed limit while sending texts. At the burden of pleading stage, can you state the kind of evidence that would be needed to meet Iqbal? At the burden of production stage, the party with the burden would need to move beyond pleading to actual, admissible proof. For example, if at the pleading stage the allegation was that the defendant was going 60 miles per hour in a 30 mile per hour zone and was sending texts, at the burden of proof stage some evidence must be introduced that if believed would support that. The party with the burden might introduce eyewitness testimony, or records of texts send along with their time stamp, and so on. At the burden of persuasion stage, the admissible evidence has to be evaluated. For example, if three witnesses said the defendant appeared to be driving within the speed limit and one said he was not, the testimony of one meets the burden of production, but at the burden of persuasion stage the jury might decide to disbelieve that witness and believe the other three.

Rule 11 and Pleading True Facts. Ethical duties have an effect on lawyers throughout the dispute resolution process, including at the pleading stage. Lawyers cannot simply bridge over the facts missing in a Twombly and Iqbal situation by making them up or assuming their existence. They are under an ethical duty to investigate the facts before filling and to be truthful with the court. As we will see, failure to meet this duty can lead to ethical sanctions.

Current Status of Conley. Don't forget that *Conley* has been sent into retirement, but don't worry about *Conley*. Word is that life in retirement has proved very enjoyable.

5.11 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).

5.12 Beyond The Statement of the Claim - Other Pleading Issues

Jurisdiction. Rule 8(a) requires "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." As you saw in the section on subject matter jurisdiction, it is not enough to simply assert in a conclusory matter that federal subject matter jurisdiction exists. The basis for federal subject matter jurisdiction must be clear from the statement. For example, the leader cannot simply assert diversity; the complaint must give the domicile of the parties.

Prayer for Relief. Rule 8(c) requires "a demand for the relief sought, which may include relief in the alternative or different types of relief." Think back to our pig. Under the common law, under each writ only one form of relief could be sought. Under the Rules, the plaintiff can seek damages, return of the pig, or delivery of all the ham and bacon produced from the unfortunate swine. In the case of a default judgment, the demand for relief will provide a cap or ceiling for any recovery sought, so failure to plead all the damages can be significant. You will also remember that the prayer for relief bears on diversity and lineage jurisdiction.

Rule 9 – Pleading Special Matters. Rule 9 addresses a number of matters for which special pleading requirements apply. In general, these respond to special pleading requirements that existed before the Rules were adopted, and should be read in light of the Rules' general philosophy of avoiding harsh technicalities. While you should read the rule, we will not be concerned with any of these in any detail except for fraud.

Pleading Fraud. Rule 9(b) requires "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." This requirement reflects pleading requirements for fraud that arose under the common law and were carried forward into the pleading codes. Fraud is a crime of 'moral turpitude,' and allegations of fraud can harm the reputation of the

person accused. Fraud also provides a basis for punitive damages, so a legitimate fraud claim changes the bargaining zone for settlement, meaning that some cases plaintiffs might be tempted to include fraud claims to create an incentive for a quicker and more generous settlement. In general, the prudent practice for plaintiffs (or defendants raising a fraud defense) is to include the "the who, what, when, where, and how: the first paragraph of any newspaper story." *DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir. 1990). It remains to be seen how Rule 9(b) will interact with the *Twiqbal* requirements, which arguably impose even stricter requirements. While outside the scope of our course, it should also be noted that some statutes such as the Private Securities Litigation Reform Act (PSLRA) impose even stricter requirements when alleging, for example, securities fraud under that statute.

Pleading Special Damages. Rule 9 requires "if an item of special damage is claimed, it must be specifically stated." Understanding this requires understanding the difference between general damages and special damages. General damages are the damages that ordinarily flow from the cause of action. For example, in breach of contract, general damages would measure the harm directly attributable to the breach such as loss of profit on the deal or recoupment of the funds paid. Special damages would look to follow on damages that might or might not apply in all situations – for example, loss of reputation or business relationships because the million widgets ordered for resale were not provided under the breached contract and so could not be delivered to the plaintiff's customers, who might end their relationship with the plaintiff in light of that failure to deliver. In a false imprisonment tort, general damages for false arrest would ordinarily include emotional distress and damage to reputation, but damages incurred because the plaintiff was unable to make an important appointment while falsely imprisoned would be special damages. Failure to plead special damages does not lead to dismissal of the complaint so long as general damages exist, but it does prevent collecting the special damages.

5.13 Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment 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.

5.14 Responding to a Complaint - Answers, Motions to Dismiss, Etc.

Pleadings and Motions. This is a good time to discuss the difference between motions and pleadings. Under the common law, most of the exchanges between the parties were carried out in the form of pleadings. The pleadings were used to narrow the issues before the court and prepare the case for trial. Depending on the case, a court could grant judgment on the pleadings without trial if the pleadings made clear there was no triable case.

As an alternative in modern practice, the case can be developed through motions. A motion asks the court to take some action – dismiss the lawsuit, sanction the other party, order the production of withheld documents, and so on., The Rules of Civil Procedure set forth a number of opportunities for motions practice that can lead to reshaping or dismissal of the lawsuit. A motion to dismiss for failure to state a claim or a motion for summary judgment can lead to individual claims or the entire lawsuit being dismissed.

The choice between motions and pleadings comes up in the response to the complaint. There is no deadline for filing any motions in response to the complaint. The only deadline is for the answer. The defendant might file an answer, and at an appropriate time file a motion for judgment on the pleadings.

Alternatively and commonly, the defendant might file one of the motions available under Rule 12, with a motion to dismiss under Rule 12(b) being the most common. Such a motion can seek dismissal of some claims but not others.

Motions come up in many other contests in modern litigation. If there is a discovery dispute, it generally is brought to the court's attention through motion practice. If a party wants extra time to respond, it is brought up through a motion. And so on.

Time to respond. Note that Rule 12 defines the time within which a response to the complaint must be presented. These deadlines are calculated from the time of service on the defendant, and not on the time of filing the suit. In this course, you should be aware that the limits exist and that time can be limited, but we will not ask you to calculate times for response. In complex cases, it is not unusual for the parties to agree for an extension of the time for a response, or for the defendant to seek it from the court if the plaintiff refuses to agree. In the absence of an agreement, it is up to the court's discretion. Even with an agreement some judges intent on keeping their dockets moving may resist what they view as excessive or unnecessary extensions; other judges will routinely grant a first request for an extension of time if the time requested is not too great and if good reasons are presented (e.g., difficulty in obtaining information, an attorney's other obligations, etc.).

A motion to dismiss the entire case puts off any need to file an answer until after the motion is decided. When a motion to dismiss addresses some but not all claims in the complaint, most courts have held that there is no need to answer even on those counts not affected by the motion until the ruling is given. A minority of courts, however, have held that an answer must be filed with regard to those parts of the complaint not subject to the motion to dismiss. Once again, this is an example of a situation where if you are in US litigation the local precedent will need to be researched if the situation comes up.

Motions to dismiss. Rule 12(b) lists seven defenses that may be raised by motion: lack of subject-matter jurisdiction, lack of personal jurisdiction, improper venue, insufficient process, insufficient service of process, failure to state a claim upon which relief can be granted, and failure to join a party under Rule 19. We will get to Rule 19 when we get to joinder. The others besides 12(b)(6) should be familiar to you based on what we have studied so far. As you may recall, 12(b)(4), insufficient

process, challenges the content of the summons (there was something missing or improper in the papers that were served), while 12(b)(5), insufficient service of process, challenges the way in which the papers were delivered. Which would be the proper defense if the summons failed to include a copy of the complaint? Which would be the proper defense if the summons were left at the defendant's home, but put in the hands of a small child instead of a person of suitable age and discretion?

Note that the defenses listed in Rule 12(b)(2) through 12(b)(5) are waived if not made in a timely fashion. In contrast, lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted are not waived. Can you explain why?

What is covered by a 12(b)(6) failure to state a claim for which relief may be granted? In general, two things, First, as we saw in *Twiqbal*, if insufficient facts have been pleaded to meet the pleading burden, this is the appropriate motion. Second, if the claim made and facts alleged simply do not add up to a violation of a legal duty this would be the proper motion. This second kind of motion to dismiss was called a demurrer in the common law, and in your substantive law courses you should have seen many such motions by now, whether under the common law or more modern pleadings, as courts work to determine the limits of causes of action. In some cases, failure to state a claim is clear: if, for example, a student brought a claim against a professor for hurting their feelings by failing to call upon them in class, no legal duty exists that would give rise to recovery. In other cases, as you've seen in your substantive courses, the issue may be closer. For example, in the *Tarasoff v. Regents of the University of California* case the Supreme Court of California found that a therapist sometimes owes a duty to warn if a patient is dangerous. As stated, the rule of the case is, "When a therapist determines, or pursuant to the standards of his profession, should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger." Now imagine a situation where it is not a therapist who has a reason to believe that his client presents a serious danger of violence to another, but a lawyer. In *Tarasoff*, it was important that therapists routinely in the course of their work must determine whether a patient presents a danger to others, and on occasion are involved in having such patients involuntarily confined to mental hospitals. That's not part of the job of lawyers, and in light of that difference it may or may not be the case that *Tarasoff* should be extended to lawyers. If a *Tarasoff* type claim were to be brought against a lawyer – or even if a *Tarasoff* type claim is brought in a jurisdiction that has not yet had occasion to determine whether it would follow *Tarasoff* with regard to therapists – a motion pursuant to Rule 12(b)(6) would be a way to test whether the law reaches that behavior, perhaps cutting off the case before discovery or trial take place. We will see a court applying Rule 12(b)(6) in the case that follows.

You will remember from *Twiqbal* that normally allegations of fact must be accepted as true in deciding a Rule 12(b)(6) motion. A 12(b)(6) motion is not the place to dispute facts. If, on the other hand, a defendant offers facts to defeat the claim, the court should decide the matter as if a motion for summary judgment had been filed. If, for example, a claim is made for repayment of a debt, and defendant offers incontrovertible evidence that the debt has been repaid, and stuyles the motion as a 12(b)(6) motion, the motion should be resolved as one for summary judgment. In practice, both litigants and courts get sloppy about this, and appellate courts do not tend to overturn cases that get to a correct result despite mislabeling the nature of what they were doing.

In most cases, plaintiffs whose case is dismissed under Rule 12(b)(6) get at least one additional chance to replead. Courts will allow them to address the deficiencies identified in the ruling and correct the problems. On the other hand, courts may not

allow this if repleading appears futile, or if plaintiffs have failed to fix any problems after having had one or more chances to replead.

Other Motions Under Rule 12. There are other motions under rule 12 that might come up. Rule 12 (c) allows either party to seek judgment on the pleadings. It may be that the defendant has admitted sufficient facts in its answer that judgment follows from the admitted allegations; it may be that the plaintiff failed to make sufficient allegations to meet its burden of pleading. IT can also be that there is no dispute as to the facts and the only issue is the interpretation of a statute or a document such as a will. In either such cases where the result does not turn on disputed facts a Rule 12 (c) motion allows the court to rule.

A Rule 12 (e) motion for a more definite statement should be filed only when the complaint is so vague that defendant cannot formulate a response. These are rare, and likely to become more rare since complaints that can be challenged under Rule 12 (e) also seem susceptible to a Rule 12(b)(b) challenge under *Twiqbal*, which would lead to dismissal of the lawsuit rather than an amended complaint.

A Rule 12(f) motion to strike is aimed at extraneous material in the complaint or at insufficient defenses. In general, these are not favored by the courts. In some cases, materials are included in the pleadings that are prejudicial and irrelevant, and in such cases a 12(f) motion may succeed. It also works as a way to challenge a defense as not having been sufficiently pleaded.

Answers. If the case is not dismissed upon a motion or if not motion is filed, the defendant must file an answer. In the answer the defendant can challenge the accuracy of the facts alleged by the plaintiff, challenge the sufficiency of the legal theory, and present affirmative defenses.

The defendant is required, paragraph by paragraph of the complaint, to admit or deny the factual allegations of the complaint. In practice, defendants may evade giving straightforward admissions. One proper response is to state that the defendant does not have sufficient knowledge to admit or deny.. Failure to deny constitutes an admission, which can lead to judgment on the pleadings, so defense counsel need to be wary about being too creative in finding ways to avoid admissions. Stating that the defendant "neither admits nor denies" the allegation has been held to be admission because it failed to deny, and refusing to respond because the count called for a legal conclusion has been held to be an inappropriate response and hence an admission. Despite that, courts sometimes are more lenient than one would expect in tolerating these evasions. In some cases, defense counsel enter boilerplate denials of every count – even such simple matters as the address of the defendant – and courts sometimes tolerate that as a matter of local practice, but such boilerplate denials are generally recognized as improper and unethical, and lead to a risk of wholesale admissions.

Defenses are raised either by motion or in the answer, and as Rule 12 makes clear some are waived if they are not asserted in a timely fashion. Rule 8(c)(1) also lists affirmative defenses that must be raised or lost when responding to a pleading. The list in Rule 8 is not exhaustive - there are others that may be raised. In general, defendants bear the burdens of pleading, proof, and persuasion on affirmative defenses, and failure to adequately plead an affirmative defense can lead to loss of the defense.

Counterclaims, Crossclaims, and Impleading. At the time of the answer, the defendant may also assert counterclaims against the plaintiff (for example, claiming that it was the plaintiff, not the defendant, who breached the contract). If there is more than one defendant, the defendant might at this time bring a crossclaim against its codefendant if it arises from the same

set of issues. Last but not least, it might seek to bring in a third party that it claims is liable to it if it is liable to the plaintiff. We will cover the rules governing these additional claims when we get to joinder of claims and parties.

Responding to the response - the reply. In some cases, the plaintiff may be ordered by the court to reply to affirmative defenses, and this order may come in response to a request from the plaintiff that it be allowed to file a reply.

Twiqbal and Responsive Pleadings: One question left unanswered by *Twiqbal* was whether the heightened pleading standards applied to plaintiffs also apply to defendants. As you see from the foregoing, there are a number of responses defendants can make to the complaint.

With regard to counterclaims, the issue seems settled. Those bringing a counterclaim (or cross claim or third party impleader claim) are third party plaintiffs, and the standards of *Twiqbal* apply.

But what about answers and affirmative defenses? The lower courts have been split on this issue, as have academic commentators. Some say yes, and some say no. On the one hand, it seems unfair to subject plaintiffs to a one-sided burden. On the other hand, plaintiffs get to choose when and where to file, while defendants often have a limited time in which to file their response, limiting their ability to gather facts. So far, the leading case on point is from the Second Circuit court of Appeals in *GEOMC Co., Ltd. v. Calmare Therapeutics Incorporated*, 918 F.3d 92, 97 (2nd Cir. 2019). With regard to striking an affirmative defense, the court was applying the following test: "In order to prevail on a motion to strike [an affirmative defense], a plaintiff must show that: (1) there is no question of fact which might allow the defense to succeed; (2) there is no question of law which might allow the defense to succeed; and (3) the plaintiff would be prejudiced by inclusion of the defense." Applying *Twombly* in the context of that test, the court reasoned:

> Whether the first of the McCaskey factors should be reworded in light of Twombly, i.e., whether Twombly applies to the pleading of affirmative defenses, is an issue that has divided the many district courts and commentators that have considered it. Three comprehensive articles take three different approaches. One article favors applying Twombly to affirmative defenses. See Joseph A. Seiner, *Plausibility Beyond the Complaint*, 53 **Wm. & Mary L. Rev.** 987 (2012). One opposes applying *Twombly* to affirmative defenses. See Justin Rand, *Tightening Twiqbal: Why Plausibility Must Be Confined to the Complaint*, 9 **Fed. Cts. L. Rev.** 79 (2016). One proposes a "middle-ground approach." See *Note*, Nathan Pysno, *Should Twombly and Iqbal Apply to Affirmative Defenses?*, 64 **Vand. L. Rev.** 1633, 1670 (2011); see also *2* **Moore's Federal Practice** § 12.37[4] (3d ed. 2018) ("If a plaintiff files a motion to strike one or more defenses, the better view is that the plausibility standard of *Twombly* does not apply in judging the adequacy of the defendant's pleaded defenses, although there is some authority to the contrary." (footnote omitted)); 5 Charles A. Wright & Arthur R. Miller, **Federal Practice & Procedure** § 1274 (3d ed. 2018) (taking no position on whether *Twombly* applies to pleading affirmative defenses).
>
> We conclude that the plausibility standard of *Twombly* applies to determining the sufficiency of all pleadings, including the pleading of an affirmative defense, but with recognition that, as the Supreme Court explained in *Iqbal*, applying the plausibility standard to any pleading is a "context-specific" task. 556 U.S. at 679, 129 S.Ct. 1937.9 The Court described the context of *Iqbal* as one "where we are impelled to

give real content to the concept of qualified immunity for high-level officials who must be neither deterred nor detracted from the vigorous performance of their duties." 556 U.S. at 686, 129 S.Ct. 1937.

The key aspect of the context relevant to the standard for pleading an affirmative defense is that an affirmative defense, rather than a complaint, is at issue. This is relevant to the degree of rigor appropriate for testing the pleading of an affirmative defense. The pleader of a complaint has the entire time of the relevant statute of limitations to gather facts necessary to satisfy the plausibility standard. By contrast, the pleader of an affirmative defense has only the 21-day interval to respond to an original complaint, see Fed. R. Civ. P. 12(a)(1)(A)(i), the 21-day interval to amend, without court permission, an answer that requires a responsive pleading, see Fed. R. Civ. P. 15(a)(1)(B), or the 14-day interval to file a required response to an amended pleading that makes a new claim, see Fed. R. Civ. P. 15(a)(3).10 That aspect of the context matters. In addition, the relevant context will be shaped by the nature of the affirmative defense. For example, the facts needed to plead a statute-of-limitations defense will usually be readily available; the facts needed to plead an ultra vires defense, for example, may not be readily known to the defendant, a circumstance warranting a relaxed application of the plausibility standard.

5.15 Bower v. Weisman

Sachiko T. BOWER, Plaintiff, v. Frederick R. WEISMAN, Frederick Weisman Co., and Rare Properties, Inc., Defendants.
No. 85 Civ. 8916 (RWS).
United States District Court, S.D. New York.
June 30, 1986.
[…]

SWEET, District Judge.

Defendant Frederick R. Weisman ("Weisman") has moved to dismiss the second amended complaint ("complaint") of plaintiff Sachiko Bower ("Bower") (1) for lack of personal jurisdiction pursuant to Rule 12(b)(2), Fed.R.Civ.P.; (2) for a more definite statement pursuant to Fed.R.Civ.P. 12(e); (3) for a stay of the First, Second and Third claims in the complaint pursuant to the Federal Arbitration Act, 9 U.S.C. § 3; (4) for dismissal of claim Two for failure to state fraud with particularity as required by Rule 9(b), Fed.R.Civ.P.; (5) for dismissal of the Fourth, Fifth, Sixth and Seventh claims pursuant to Rule 12(b)(6) for failure to state a claim and; (6) for sanctions under Rule 11, Fed.R.Civ.P. For the reasons set forth below, these motions are granted in part and denied in part. Prior Proceedings

Bower commenced this action in New York State court on November 7, 1985, naming Weisman, Frederick Weisman Co. ("FWC") and Rare Properties, Inc. ("Rare Properties"), both Delaware corporations, as defendants. After removal, this court ordered expedited discovery and a trial date of December 3, 1985 to permit a resolution of the townhouse dispute prior to a December 19, 1985 scheduled closing date on a sale of the townhouse to a third party. By stipulation and order of November 25, 1985, Bower agreed to vacate the property and reserved the right to bring a damage action for the events set forth before. On *535January 18, Bower served the Second Amended Complaint in this action.

The Pleadings

According to the Second Amended Complaint, in July, 1985, Bower and Weisman terminated a fifteen-year close personal and business relationship. According to Bower, in exchange for valuable business and social assistance which Bower rendered to Weisman during their relationship, Weisman promised to provide Bower with an economic interest in his affairs and to provide Bower and her daughter with financial security. Bower contends that Weisman agreed to provide these benefits even after their relationship terminated, as long as Bower, a Japanese citizen, did not remarry or leave the United States and that Weisman breached a series of written and oral agreements, codifying Weisman's promise of financial security.

Bower asserts that in the final version of this agreement dated July 6, 1985, Weisman agreed (1) to purchase a house in California for Bower at a cost of $6.5 million; (2) to provide Bower with an irrevocable trust in the amount of $3.9 million and $100,000 in trust for Bower's daughter; (3) to pay Bower an annual sum of $120,000 for ten years over and above a promissory note held by FWC dated November 1,1983; (4) to pay Bower's living expenses until her remarriage or departure from the United States; (5) to provide rent-free possession of Weisman's New York townhouse until her remarriage or departure from the United States. Provision number (3) concerns a promissory note and consultant agreement executed on November 1,1983 by FWC and Preferred Capital International Inc. ("Preferred Capital"), a corporation wholly owned by Bower.

In mid-July, 1985, the Bower-Weisman relationship terminated, and according to Bower, Weisman reneged on this agreement and attempted to coerce her to leave the townhouse, which she asserts was purchased with her own money but which she sold to Weisman in 1980 at his request to accommodate his tax needs in reliance on his promises of a rent-free tenancy. In September and November, 1985, Weisman instructed his agents to enter the apartment, to strip it of artwork and furniture which was purportedly the property of Weisman, to change the locks on Bower's door when she was at work and her daughter was home ill, and to station three armed guards in the townhouse lobby, with instructions to prevent the entry of "unauthorized" individuals. Furthermore, Bower claims that Weisman's real estate agents and attorneys made unauthorized visits to the apartment and disturbed her personal belongings.

The complaint alleges seven claims arising from the July 6, 1985 agreement outlined above, each of which is challenged in this motion. Claim One asserts tort and contract claims for money damages arising from the "breach of express agreements"; Claim Two alleges fraud, misrepresentation and deceit in connection with the agreement; Claim Three is for "breach of contract and conversion" and concerns Weisman's attempt to remove Bower from the townhouse and his alleged conversion of art and furniture. Claims Four and Five charge the defendants with trespass and false imprisonment in connection with the townhouse, and Claims Six and Seven concern intentional infliction of emotional distress, and private nuisance, also in connection with Weisman's actions to recover the townhouse.

Jurisdictional Facts

As Weisman's motion challenges this court's jurisdiction over his person, it is necessary to set out the threshold jurisdictional facts. Weisman asserts that he is a California resident and has been such for forty-seven years, where he votes, owns real estate, and files his tax returns. While he admits to "occasional" visits to New York for social, cultural and entertainment purposes and to attend business meetings on behalf of a Maryland corporation, he insists that he owns no real or personal property in New York, has not negotiated or executed contracts in New York, and has not conducted business in New York.

Bower has put forth evidence demonstrating that Weisman was served with *536process in this action on January 18, 1986 while he was staying at a hotel in New York. Bower has also annexed checks from a joint bank account maintained in the names of "Frederick Weisman and Sachiko T. Bower" with the townhouse address imprinted on the checks. Although Weisman states that this account was for Bower's convenience, he closed the account at the termination of their relationship on July 17, 1985 and withdrew the entire balance. Weisman's statements for this account, as well as other mail addressed to him, were mailed to the townhouse.

Weisman's affidavit of November 7,1985 submitted in the prior state court proceedings recounts "... I occupied one of the residential units [of the townhouse property] as my living quarters in New York City, and I allowed plaintiff Bower to stay there as my companion/guest for approximately 5 years until July, 1985 when our relationship ended." The telephone records for the townhouse show a listing for three numbers under the name of "Mrs. F. Weisman" as well as a listing for FWC. Finally, in the affidavit which Weisman submitted in connection with the instant motion, Weisman admits to negotiating some "personal financial and business matters" with Bower and her accountant present, negotiations which Bower contends formed a part of the same agreement at issue in this action:

> On September 10, 1984, I attended a meeting in New York with plaintiff and our respective accountants. At that meeting, we engaged in preliminary discussions on a variety of topics regarding personal, financial and business matters. No agreement whatsoever with respect to any aspect of our dealings resulted from this meeting. In fact, there were numerous similar discussions which took place in California both before and after September 10, 1984, with respect to the same or similar topics.

Weisman affidavit, II2.

Discussion

~~I. Personal Jurisdiction~~

~~The subject matter jurisdiction of this case rests upon diversity of citizenship pursuant to 28 U.S.C. § 1332. Thus, the court must look to the New York Civil Practice Law ("CPLR") § 302(a) (McKinney 1972 & supp. 1984-85) to determine whether "long-arm" jurisdiction over defendant Weisman may be validly exercised. *Arrowsmith v. United Press International,* 320 F.2d 219, 223 (2d Cir.1963) (en banc). A court may rely on affidavits and other supporting materials to establish the jurisdictional facts, and the documents should be construed in the light most favorable to the plaintiff. *Marine Midland Bank, N.A. v. Miller,* 664 F.2d 899, 904 (2d Cir.1981). Moreover, to defeat Weisman's motion to dismiss for lack of personal jurisdiction, Bower need only make a *prima facie* jurisdictional showing. *Id.*~~

~~Weisman contends that his contacts with New York are too insubstantial for this court to appropriately exercise personal jurisdiction as he was present in New York for only approximately twenty days over the past year. However, the criteria to be employed in determining whether the requisite minimum contacts exist is not based upon a rigid quantitative analysis. "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." *International Shoe Co. v. Washington,* 326 U.S. 310, 319, 66 S.Ct. 154, 160, 90 L.Ed. 95 (1945). New York law requires that this court examine the totality of Weisman's activities within the state so that a determination may be made as to whether Weisman engaged in "purposeful~~

activity" thereby invoking the benefits and protections of the laws. *Hanson v. Denckla,* 357 U.S. 235, 253, 78 S.Ct. 1228, 1239, 2 L.Ed.2d 1283 (1958); *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.,* 15 N.Y. 2443, 261 N.Y.S.2d 8, 18, 209 N.E.2d 68, 75 (1965).

Section 302(a)(1) of the CPLR provides that personal jurisdiction may be exercised over a nondomiciliary defendant where a *537cause of action arises from a defendant's transaction of business within the state. Although Weisman claims to have done no business within New York, the affidavits submitted by the parties point to a contrary conclusion. On September 10, 1984, Weisman negotiated "personal financial and business matters" at a meeting held in New York with Bower and their respective accountants. Negotiation activity which substantially advances or is essential to the formation of a business agreement will constitute a legally sufficient basis for jurisdiction. *Geller v. Newell,* 602 F.Supp. 501, 503 (S.D.N.Y.1984) *citing Liquid, Carriers Corp. v. American Marine Corp.,* 375 F.2d 951 (2d Cir.1967). Although this negotiation did not result in the formation of a new contract, it did result in a significant modification of the parties' pre-existing contract, and Bower's claim for breach of contract arises from this and subsequent modifications. The law of New York places great weight on the locale where the negotiations of the contract occur. *Dogan v. Harbert Construction Co.,* 507 F.Supp. 254 (S.D.N.Y.1980), and if these negotiations "substantially advance" or are "essential" to the formation of a contract, they will constitute a sufficient basis for the exercise of personal jurisdiction. *Lehigh Valley Industries, Inc. v. Birenbaum,* 527 F.2d 87, 91 (2d Cir.1975).

The transaction of business requirement is also satisfied by other purposeful acts which defendant engaged in in New York State with regard to his relationship with Bower. "[C]ourts may look to factors such as listings in telephone directories, banking activities, letterheads showing a New York address." J. Weinstein, H. Korn & A. Miller, New York Civil Practice IT 302.11 (1978). First, Weisman maintained a bank account for a number of years in joint name with Bower, and has admitted to depositing funds in this account. The checks were imprinted with the name of both Weisman and Bower and included the townhouse address. Moreover, Weisman closed the account on July 17, 1985 and took control of the remaining balance. It would be disingenuous to argue that he received no benefits from its existence in New York.

Second, although Weisman does not own the New York townhouse, which is held by defendant Rare Properties, he stated that he has "occupied one of the residential units as my living quarters in New York City" (Weisman affidavit, 113) and had allowed Bower to remain in the townhouse as his guest for a five year period. In addition, the joint bank account statements along with other mailings were addressed to Weisman at the townhouse residence. Finally, the townhouse had several telephone listings, one of which was under the name "Mrs. F. Weisman." While each factor standing alone would be insufficient to establish personal jurisdiction, when taken in the aggregate Weisman's contacts with New York have been substantial and continuous. *See Sterling National Bank & Trust Co. of New York v. Fidelity Mortgage Investors,* 510 F.2d 870, 873 (2d Cir. 1975).

Because section 302(a)(1) provides a basis for the assertion of personal jurisdiction over Weisman by this court, it is not necessary to make a determination as to whether Bower's tort claims arise from tortious acts within the meaning of CPLR section 302(a)(2). Weisman has purposefully availed himself of the protections and privileges of New York state, and the continuous contacts which he maintained with New York made it reasonable and foreseeable that he might be haled into court. *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297, 100 S.Ct. 559, 567, 62 L.Ed.2d 490 (1980).

II. Motion for a More Definite Statement

Weisman argues that pursuant to Fed.R. Civ.P. 12(e), he is entitled to a more definite statement with respect to two aspects of the complaint. First, Weisman asserts that the complaint fails to disclose the specific provisions of the alleged agreements upon which plaintiff relies. Moreover, he argues that the complaint fails to reveal which parts of the agreements have been mod*538ified and which provisions remain in effect after these modifications. Second, Weisman urges that the complaint fails to identify which of the three defendants is charged with each act and merely discusses all as "defendant," as set forth in paragraphs 36, 40, 43-47, 50 and 52-55. For the following reasons, this motion for a more definite statement is granted.

A motion for a more definite statement may be granted if "a pleading ... is so vague and ambiguous that a party cannot reasonably be required to frame a responsive pleading ..." Fed.R.Civ.P. 12(e). A motion pursuant to Rule 12(e) should not be granted "unless the complaint is so excessively vague and ambiguous as to be unintelligible and as to prejudice the defendant seriously in attempting to answer it." *Boothe v. TRW Credit Data,* 523 F.Supp. 631, 635 (S.D.N.Y.1981). With respect to Weisman's first assertion, Bower's complaint is not so unintelligible as to preclude Weisman from drafting a responsive pleading. The essence of a complaint is to inform the defendant as to the general nature of the action and as to the incident out of which a cause of action arose. *Id. (quoting Roberts v. Acres,* 495 F.2d 57, 58 (7th Cir.1974)). Bower's complaint satisfies this requirement as it clearly identifies the offending acts. The complaint traced in detail the interactions of Bower and Weisman which led to the first written agreement of July, 1983, and the series of subsequent modifications that occurred in September through November of 1983, September, 1984, October, 1984 culminating in the final agreement of July 6,1985, embodied in paragraph 25. Moreover, paragraph 26 describes the provisions of the agreement that were allegedly violated by Weisman. Weisman has been given fair notice of the claims against him, and nothing prevents him from formulating a responsive pleading.

Weisman seeks to remove the ambiguity that is present in paragraphs 36, 40, 43-47, 50 and 52-55. These paragraphs employ the term "defendant" without specifying which particular defendant is referred to. Obviously, Weisman cannot effectively respond to Bower's complaint until he knows which claims Bower is asserting against him in his individual capacity. Although Rare Properties is a wholly owned subsidiary of FWC, of which Weisman is the sole owner, Bower has not produced any evidence that the proper corporate forms have not been observed with respect to these corporations. The motion for a more particular statement will be granted on this ground.

III. Motion to Stay Pending Arbitration of Claims

The court's discussion of the motion for a stay is omitted.

IY. Motion to Dismiss for Failure to State Fraud with Particularity

Fed.R.Civ.P. 9(b) requires that: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." There is tension between the specificity required under Rule 9(b) and the liberal pleading allowances of Fed.R.Civ.P. 8(a)(2) which requires only a "short and plain statement of the claim showing that the pleader is entitled to relief." However, Rule 9(b) does not render Rule 8 meaningless in fraud cases. The two rules must be read in conjunction with each other. *See,* 5 Wright & Miller, Federal Practice and Procedure: Civil § 1298, p. 406. Courts have not struck a balance between these rules by devising an easily applied test. Thus, the degree of specificity required will be dependent upon the facts of each case. *CIT Financial Corporation v. Sacks,* 10 F.R.D. 397, 398 (S.D.N.Y.1950).

Bower's allegations do no more than state generally that all three defendants intentionally misrepresented and defrauded the plaintiff by making promises and representations. In paragraph 32, Bower alleges that "[t]hose representations of the defendants were false and deceitful at the time they were made to the plaintiff ..." Such sweeping statements fail to clarify which alleged agreements form the basis of Bower's claim for fraud. "[A well-pleaded claim of fraud] normally includes the time, place, and content of the false representations, the facts misrepresented, and the nature of the detrimental reliance ..." *Elster v. Alexander,* 75 F.R.D. 458, 461 (N.D. Ga.1977); *see also Segal v. Gordon,* 467 F.2d 602 (2d Cir.1972). Bower's claim fails with respect to all of these particulars. Moreover, Bower's failure to separate Weisman from the two corporate defendants involved in this case makes it impossible for Weisman to frame an effective response.

Rule 9(b) seeks, in part, to assure that defendants "... are given notice of the exact nature of the fraud claimed, sufficient to permit responsive measures." *Todd v. Oppenheimmer & Co., Inc.,* 78 F.R.D. 415, 419 (S.D.N.Y.1978) *(citing Felton v. Walston & Co., Inc.,* 508 F.2d 577, 581 (2d Cir.1974)). Here, Bower's pleadings are vague and fail to provide the specificity required by Rule 9(b). Therefore, Bower's Second claim for misrepresentation, fraud and deceit is dismissed with leave to replead.

Y. Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted

When determining whether to grant a Rule 12(b)(6) motion, the court must primarily consider allegations in the complaint. 5 Wright & Miller, Federal Practice and Procedure: Civil § 1357, P. 592. However, at this early stage of the proceedings, a court's review of the sufficiency of the complaint is a very limited one. *Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974). The allegations are accepted as true, and the complaint is construed in a light most favorable to the pleader. *Id.*

The motion to dismiss for failure to state a claim is disfavored and is seldom granted. *Arfons v. E.I. DuPont de Nemours & Co.,* 261 F.2d 434, 435 (2d Cir.1958). The reason for such a policy is two-fold. First, "[t]he salvaged minutes that may accrue from circumventing these procedures can turn to wasted hours if the appellate court feels constrained to reverse the dismissal of the action." *Rennie & Laughlin, Inc. v. Chrysler Corporation,* 242 F.2d 208, 213 (9th Cir.1957). Second, courts are wary of dismissal in view of the policy of the federal rules which seeks to have determinations reached on the merits. *Id.* The test that is in accord with these goals is 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." *Conley v.* *540*Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957). Thus, this court must determine in the light most favorable to the plaintiff whether the following claims state any basis for relief.

A. Trespass

Plaintiff has alleged the necessary elements to sustain a cause of action in trespass. From July, 1983 to July, 1985, the agreements between Bower and Weisman contained a provision that in the event of the breakup of the parties' relationship, Bower would be permitted to reside rent-free at the 73rd Street townhouse so long as she paid all maintenance expenses and did not remarry or move out of the country. (2d Am.Complt. ¶¶ 23(h), 24.C.4, 25.e, 26.e). Upon termination of the relationship in August, 1985, plaintiff alleges that she was in actual possession of the townhouse and that she shared this residence only with her daughter, Teru. "Trespass is an action for injury to possession for which an action may be maintained even against an owner by the one entitled to possession." *Meadow Point Properties v. Nick Mazzoferro & Sons,* 219 N.Y.S.2d 908,

909 (Sup.Ct.Suffolk Co. 1961), *citing Steinfeld v. Morris,* 258 App.Div. 228, 16 N.Y.S.2d 155 (N.Y.Sup.1939). Because Bower alleges to have been in actual (and exclusive) possession of the townhouse, she may maintain an action for trespass.

Weisman contends that at most, Bower's interest in the property was limited to that of a licensee whereby plaintiff could assert merely a personal privilege to occupy the townhouse. Considering the allegations in the light most favorable to the plaintiff, Bower's complaint asserts a possessory interest in the townhouse beyond a licensing arrangement. However, even if Bower only qualified as a licensee, she would not necessarily be precluded from bringing an action for trespass. Only a licensee who has no interest in the premises will be unable to maintain such action. Prosser & Keeton, *The Law of Torts* § 13 at 77, n. 92 (5th ed. 1984).

Bower has also successfully pleaded the other requisite elements of trespass. In paragraph 52, Bower asserts that Weisman, through his agents, intentionally entered the townhouse property without her consent. She alleges that artwork was removed from the premises by defendant and/or his agents (¶ 40). Bower also states that defendant changed her apartment locks (HIT 42, 43) and placed three armed guards at the entrance of the property (1144).

As it does not appear beyond doubt that plaintiff has no possessory rights in the townhouse, it would be inappropriate to dismiss plaintiff's Fourth Claim for trespass. *See N.Y. Guardian Mortgagee Corp. v. James H. Northrop, Inc.,* 75 App. Div.2d 577, 426 N.Y.S.2d 579 (2d Dep't 1980). Defendant's motion to dismiss the trespass claim is denied.

B. False Imprisonment

The action for the tort of false imprisonment seeks to protect an individual's freedom from restraint of movement. Prosser & Keeton, *The Law of Torts,* § 11 at 47 (5th ed. 1984). The Court of Appeals of New York has set forth the following elements as constituting a cause of action for false imprisonment: (1) defendant intended to confine the plaintiff; (2) plaintiff was conscious of the confinement; (3) plaintiff did not consent to the confinement, and (4) confinement was not otherwise privileged. *Broughton v. State of New York,* 37 N.Y.2d 451, 373 N.Y.S.2d 87, 93, 335 N.E.2d 310, 313 (1975), *cert. denied,* 423 U.S. 929, 96 S.Ct. 277, 46 L.Ed.2d 257 (1975) *(citing* Restatement, (Second) of Torts, § 35).

Plaintiff's Fifth Claim for false imprisonment fails to set forth any facts which would support the allegation that plaintiff was confined at the 73rd Street townhouse. Bower alleges that due to the posting of three armed guards at the townhouse entrance, she "has been unable to freely enter and exit her home in the unfettered manner to which she is accustomed and ... has become a prisoner by virtue of the *541defendant's acts." (2d Am.Cmplt. II58). However, other paragraphs of Bower's Second Amended Complaint are entirely at odds with the proposition set forth above. Paragraph 42 states that on November 5, 1985, plaintiff left her house to go to work. Paragraph 44 states that the three armed guards were instructed "not to permit access to anyone *other than* the plaintiff, her daughter, or a person seeking access for emergency and/or medical purposes." This indicates that plaintiff was permitted ingress and egress from the townhouse. Moreover, paragraph 47 alleges that unauthorized persons entered the townhouse while Bower was not home. Plaintiff's own allegations support the conclusion that her movement was unrestrained. Thus, although Bower alleges that guards were placed in the lobby to restrict her entry and exit (2d Am.Cmplt. ¶ 57), she has failed to allege that her movement was restricted. Moreover, even if the conduct of defendant's agents caused Bower to feel like a prisoner (2d Am.Cmplt. 11 58), this is not enough to sustain a cause of action for false imprisonment since Bower has not alleged actual physical confinement. *See Sauls v. Bristol-Myers Co.,* 462 F.Supp. 887,

889 n. 9 (S.D.N.Y.1978). Plaintiff's Fifth Claim for false imprisonment is dismissed with leave to replead within twenty (20) days.

C. Intentional Infliction of Emotional Distress

The following components form a claim for intentional infliction of emotion distress: (1) an extreme and outrageous act by the defendant; (2) an intent to cause severe emotional distress; (3) resulting severe emotion distress; (4) caused by the defendant's conduct. *Conniff v. Dodd, Mead & Co.,* 593 F.Supp. 266, 269 (S.D.N.Y. 1984) *(citing Burba v. Rochester Gas and Electric Corp.,* 90 App.Div.2d 984, 456 N.Y.S.2d 578, 579 (4th Dep't 1982)). Plaintiff's complaint pleads each of the necessary elements of this cause of action to survive a 12(b)(6) challenge.

Paragraph 63 sets forth the "outrageous" acts by defendant that were directed at the plaintiff. First, three armed guards were placed in the lobby of the townhouse to prevent all persons except Bower, her child and medical personnel from entering or exiting from the townhouse. Second, the locks to Bower's apartment were changed without her consent which caused her to become "frightened and distraught" (1142). Third, Weisman, through his agents, entered plaintiffs apartment without her permission and removed artwork without her consent (¶ 40). Bower contends that defendant intended that such acts would cause her severe emotional distress (1164), and that she has, in fact, "suffered severe mental anguish, anxiety, and unwarranted pain and suffering." (1165).

These allegations demonstrate that defendant embarked upon a course of conduct that was designed to intimidate, threaten and humiliate the plaintiff and which resulted in emotional upset. It will be for the trier of fact to determine whether defendant's conduct went beyond all reasonable bounds of decency, *Halio v. Lurie,* 15 App.Div.2d 62, 222 N.Y.S.2d 759, 764 (2d Dep't 1961), and would arouse resentment against the defendant as to cause the trier of fact to exclaim that such conduct was "outrageous". Restatement (Second) of Torts § 46 comment (d) (1965).

D. Private Nuisance

The elements of a private nuisance in New York are: (1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act. *Copart Industries, Inc. v. Consolidated Edison Co.,* 41 N.Y.2d 564, 394 N.Y.S.2d 169, 173, 362 N.E.2d 968, 971 (1977) (citations omitted). Plaintiff's Seventh Claim for private nuisance must be dismissed since Bower has failed to allege an interference which is substantial in nature and unreasonable in character.

*542The "substantial" and "unreasonable" interference requirements distinguish an action for private nuisance from that of trespass. An action for trespass can be maintained without a showing of damage because it is the unprivileged entry upon the land that creates an immediate cause of action. However, an action for private nuisance cannot be sustained without a showing of damages. "The substantial interference requirement is to satisfy the need for a showing that the land is reduced in value because of the defendant's conduct." Prosser & Keeton, *supra,* § 87 at 623. "The law does not concern itself with trifles and there must be a real and appreciable invasion of the plaintiff's interests before he can have an action for either a public or private nuisance." Restatement (Second) of Torts § 821F comment c.

In paragraph 68, Bower asserts that defendant trespassed upon the townhouse, removed articles from the premises, changed locks and positioned guards in the lobby. However, plaintiff failed to allege that these acts caused a reduction in the value of

the property. "... [A]nnoyance cannot amount to unreasonable interference until it results in a depreciation in the market or rental value of the land." Prosser & Keeton, *supra,* § 88 at 627. Plaintiff's failure to plead a substantial and unreasonable interference with the land is fatal to her claim for private nuisance.

VI. Rule 11 Fed.R.Civ.P.

"Rule 11 of the Federal Rules of Civil Procedure requires the plaintiff's attorney to certify, on pain of sanction, that to the best of his knowledge, information and belief the complaint is warranted by existing law or a good faith argument for the extension of existing law." *Dore v. Schultz,* 582 F.Supp. 154, 158 (S.D.N.Y. 1984).

There is nothing before this court to suggest that plaintiff's claims are meritless nor is there anything to suggest that such claims were filed for improper purposes. Thus, defendant's motion for Rule 11 sanctions against the plaintiff is denied. In summary, Weisman's motion for a more definite stateihent pursuant to Fed.R.Civ.P. Rule 12(e) and motion to dismiss the Second Claim in the Complaint for failure to state fraud with particularity pursuant to Rule 9(b) is granted, and Bower has leave to replead within thirty (30) days of this opinion. In addition, Bower's Fifth Claim for false imprisonment, and Seventh Claim for private nuisance are dismissed, as they fail to state a claim upon which relief can be granted, Fed.R.Civ.P. 12(b)(6). All other motions are denied.

IT IS SO ORDERED.

5.16 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.

5.17 Amending the Complaint, Supplemental Pleadings, and Relation Back

Amendment of pleadings might at first seem a technical issue, but it involves a fundamental issue in design of a procedural system. Should plaintiffs be held to the case they set out at the beginning, or can they amend the pleadings to reflect new facts that are discovered?

In some pleading systems - notably the fact pleading systems that arose under the codes written to provide a reform alternative to the common law writs - deviating from the original complaint was not permitted. This is not wholly without justification - parties might withhold facts or claims, and advance them at a later stage of the litigation for strategic advantage.

The Federal Rules of Civil Procedure take a different approach. As you look at Rule 15, three things should be apparent.

First, there is an absolute right to amend, without any need to get court permission, early in the case. This part of the rule is quite straightforward.

Second, after that time is passed, amendment can be made with the permission of either the other party or the court. The Rules indicate that a court should "freely give leave when justice so requires" and as you will see the courts do embrace this permissive standard.

Supplemental pleadings allow the party to add pleadings related to facts that have occurred after the filing of the original claim. For example, if the defendant is charged with being a polluter, the supplemental pleadings might address pollution that occurs after the original complaint.

Finally, there is the issue of statutes of limitations. When a lawsuit is filed on a claim, it cuts off the statute of limitations. If it is filed before the statute runs, the lawsuit is timely.

What happens, however, when a lawsuit is amended after the statute of limitations has run? There are many ways this can arise. A different legal theory may be added to a claim or claims arising from a given set of facts. On the other hand, additional parties may be added via amendment, or wholly different and unrelated claims may be added. How should those be handled? Third, there may have been a mistake in the original pleading. A defendant's name may have been misspelled, or of two similarly named defendants the wrong one may have been named. How should this be handled? Finally, what about the situation where there is no mistake but the plaintiff learns the identity of a "John Doe" defendant after the statute has run? Does it matter if the "John Doe'" knows about the suit and knows that he or she is the defendant the plaintiff has in mind?

The following cases deal with these issues.

5.18 Beeck v. Aquaslide 'N' Dive Corp.

Jerry A. BEECK and Judy A. Beeck, Appellants, v. AQUASLIDE 'N' DIVE CORPORATION, Appellee.

No. 76-1934.

United States Court of Appeals, Eighth Circuit.

[…]

BENSON, District Judge.

This case is an appeal from the trial court's1 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.2 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. *539The 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 issues presented for review to be:

1. 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?

2. After granting the manufacturer's Motion for Leave to Amend in order to deny the prior admissions of design, manufacture and sale of the water slide in question, was it an abuse of the trial court's discretion to further grant the manufacturer's Motion for a Separate Trial on the issue of manufacture?

I. Pacts.

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 Aqua-slide 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 a,nd 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 Aqua-slide's insurer was of the opinion the "Aquaslide in question was definitely manufactured by our insured." The complaint was filed October 15, 1973.3 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.4

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 Aqua-slide, visited the site of the accident prior to the taking of his deposition by the plaintiff.5 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), F.R.Civ.P., which provides in part that once issue is joined in *540a lawsuit, a party may amend his pleading "only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires."

In *Foman v. Davis,* 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (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.,* 398 F.2d 578, 582 (8th Cir. 1968), held that "[prejudice *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, *[…]*, and is reviewable only for an abuse of discretion. *[…]* 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), F.R. Civ.P., 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,6 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 origi*541nal 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,7 and concluded "[ujnder 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.

III. Separate Trials.

[…]

We hold the Rule 42(b) separation was not an abuse of discretion.

The judgment of the district court is affirmed.

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5.19 Krupski v. Costa Crociere

KRUPSKI v. COSTA CROCIERE S. p. A.
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
No. 09-337.
[…]

Justice Sotomayor

delivered the opinion of the Court.

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 compensa*542tion for her injuries. Krupski's passenger ticket — which explained that it was the sole contract between each passenger and the carrier, App. to Pet. for Cert. 37a — -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." *Id.,* at 27a.

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." *Id.,* at 28a. 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," *Ibid.* 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. *Id.,* at 36a. 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." *Id.,* at 29a. The front of the ticket listed *543Costa 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. *Id.,* at 25a.

On July 2, 2007, Krupski's counsel notified Costa Cruise Lines of Krupski's claims. App. 69-70. 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." App. to Pet. for Cert. 23a-24a. 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. App. 23-26. 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. *Id.,* at 23. 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. *Id.,* at 31. Second, on March 20, 2008, Costa Cruise listed Costa Cro-ciere as an interested party in its corporate disclosure statement. App. to Pet. for Cert. 20a. Finally, on May 6, 2008, *544Costa Cruise moved for summary judgment, again stating that Costa Croeiere was the proper defendant. App. 5, 33-38.

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 Croeiere; 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. *Id.,* at 43-45, 56-59. 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. *Id.,* at 45. With her response, Krupski simultaneously moved to amend her complaint to add Costa Croeiere as a defendant. *Id.,* at 41-42, 52-54.

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 Croeiere by September 16, 2008. *Id.,* at 71-72. Complying with the court's deadline, Krupski filed an amended complaint on July 11, 2008, and served Costa Croeiere on August 21, 2008. *Id.,* at 73, 88-89. 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. *Id.,* at 85-86.

Shortly thereafter, Costa Croeiere — represented by the same counsel who had represented Costa Cruise, compare *id.,* at 31, with *id.,* at 100 — moved to dismiss, contending that the amended complaint did not relate back under *545Rule 15(c) and was therefore untimely. The District Court agreed. App. to Pet. for Cert. 8a-22a. 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)(l)(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)(l)(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. App. to Pet. for Cert. 14a-18a. 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. *Id.,* at 18a-21a. 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

*546amend and then in filing an amended complaint, the court concluded that Krupski knew of the proper defendant and made no mistake.

The Eleventh Circuit affirmed in an unpublished *per curiam* opinion. *Krupski* v. *Costa Cruise Lines, N. V., LLC,* 330 Fed. Appx. 892 (2009). 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.1 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)(l)(C)(ii),2 558 U. S. 1142 (2010), and we now reverse.

*547II

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(e)(1).

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

*548A

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. 330 Fed. Appx., at 895. By focusing on Krupski's knowledge, the Court of Appeals chose the wrong starting point.

The question under Rule 15(c)(l)(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)(l)(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.3

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 judg*549ment, 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)(l)(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. Brief for Respondent 11-16. 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)(l)(C)(ii) has been satisfied.

*550This 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; 3 Moore's Federal Practice §§15.02[1], 15.19[3][a] (3d ed. 2009). 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.

Our reading is also consistent with the history of Rule 15(c)(1)(C). That provision was added in 1966 to respond to a recurring problem in suits against the Federal Government, particularly in the Social Security context. Advisory Committee's 1966 Notes 122. Individuals who had filed timely lawsuits challenging the administrative denial of benefits often failed to name the party identified in the statute as the proper defendant — the current Secretary of what was then the Department of Health, Education, and Welfare— and named instead the United States; the Department of Health, Education, and Welfare itself; the nonexistent "Federal Security Administration"; or a Secretary who had recently retired from office. *Ibid.* By the time the plaintiffs discovered their mistakes, the statute of limitations in many cases had expired, and the district courts denied the plaintiffs leave to amend on the ground that the amended complaints would not relate back. Rule 15(c) was therefore "amplified to provide a general solution" to this problem. *551*Ibid.* It is conceivable that the Social Security litigants knew or reasonably should have known the identity of the proper defendant either because of documents in their administrative cases or by dint of the statute setting forth the filing requirements. See 42 U. S. C. § 405(g) (1958 ed., Supp. III). Nonetheless, the Advisory Committee clearly meant their filings to qualify as mistakes under the Rule.

Respondent suggests that our decision in *Nelson* v. *Adams USA, Inc.,* 529 U. S. 460 (2000), forecloses the reading of Rule 15(c)(l)(C)(ii) we adopt today. We disagree. In that case, Adams USA, Inc. (Adams), had obtained an award of attorney's fees against the corporation of which Donald Nelson was the president and sole shareholder. After Adams became concerned that the corporation did not have sufficient funds to pay the award, Adams sought to amend its pleading to add Nelson as a party and simultaneously moved to amend the judgment to hold Nelson responsible. The District Court granted both motions, and the Court of Appeals affirmed. We reversed, holding that the requirements of due process, as codified in Rules 12 and 15 of the Federal Rules of Civil Procedure, demand that an added party have the opportunity to respond before judgment is entered against him. *Id.,* at 465-467. In a footnote explaining that relation back does not deny the added party an opportunity to respond to the amended pleading, we noted that the ease did not arise under the "mistake clause" of Rule 15(c):4 "Respondent Adams made no such mistake. It knew of Nelson's role and existence and, until it moved to amend its pleading, *552chose to assert its claim for costs and fees only against [Nelson's company]." *Id.,* at 467, n. 1.

Contrary to respondent's claim, *Nelson* does not suggest that Rule 15(c)(l)(C)(ii) cannot be satisfied if a plaintiff knew of the prospective defendant's existence at the time she filed her original complaint. In that case, there was nothing in the initial pleading suggesting that Nelson was an intended party, while there was evidence in the record (of which Nelson was aware) that Adams sought to add him only after learning that the company would not be able to satisfy the judgment. *Id.,* at 463-464. This evidence countered any implication that Adams had originally failed to name Nelson because of any "mistake concerning the proper party's identity," and instead suggested that Adams decided to name Nelson only after the fact in an attempt to ensure that the fee award would be paid. The footnote merely observes that Adams had originally been under no misimpression about the function Nelson played in the underlying dispute. We said, after all, that Adams knew of Nelson's "role" as well as his existence. *Id.,* at 467, n. 1. Read in context, the footnote in *Nelson* is entirely consistent with our understanding of the Rule: When the original complaint and the plaintiff's conduct compel the conclusion that the failure to name the prospective defendant in the original complaint was the result of a fully informed decision as opposed to a mistake concerning the proper defendant's identity, the requirements of Rule 15(c)(l)(C)(ii) are not met. This conclusion is in keeping with our rejection today of the Court of Appeals' reliance on the plaintiff's knowledge to deny relation back.

B

The Court of Appeals offered a second reason why Kr up-ski's amended complaint did not relate back: Krupski had unduly delayed in seeking to file, and in eventually filing, an amended complaint. 330 Fed. Appx., at 895. The Court of Appeals offered no support for its view that a plaintiff's dila*553tory 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)(lM2). 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). *Foman* v. *Davis,* 371 U. S. 178, 182 (1962). 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. Cf. 6A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1498, pp. 142-143, and nn. 49-50 (2d ed. 1990 and Supp. 2010).

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 *55415(c)(l)(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. Cf. *Leonard* v. *Parry,* 219 F. 3d 25, 29 (CA1 2000) ("[P]ost-filing events occasionally can shed light on the plaintiff's state of mind at an earlier time" and "can inform *a defendant's* reasonable beliefs concerning whether her omission from the original complaint represented a mistake (as opposed to a conscious choice)"). The plaintiff's postfiling conduct is otherwise immaterial to the question whether an amended complaint relates back.5

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(e)(l)(C)(ii). The District Court held that Costa Crociere had "constructive notice" of Krupski's complaint within the Rule 4(m) period. App. to Pet. for Cert. 15a-17a. 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, App. 23, and also indicated (mistakenly) that Costa Cruise performed those roles, *id.,* at 23-27, Costa Crociere should have known, within the Rule 4(m) period, that it was not named as a *555defendant 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 Croeiere 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 Croeiere. Brief for Respondent 18. 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. *Id.,* at 13-14. 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 Croeiere 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 Croeiere in the first instance.6 Nothing in *556Krupski'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 Cro-ciere are related corporate entities with very similar names; "erociera" 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 Cro-ciere's activities. Cf. *Morel* v. *DaimlerChrysler AG,* 565 F. 3d 20, 27 (CA1 2009) (where complaint conveyed plaintiffs' attempt to sue automobile manufacturer and erroneously named the manufacturer as Daimler-Chrysler Corporation instead of the actual manufacturer, a legally distinct but related entity named DaimlerChrysler AG, the latter should have realized it had not been named because of plaintiffs' mistake); *Goodman* v. *Praxair, Inc.,* 494 F. 3d 458, 473-475 (CA4 2007) (en banc) (where complaint named parent company Praxair, Inc., but described status of subsidiary company Praxair Services, Inc., subsidiary company knew or should have known it had not been named because of plaintiff's mistake). 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, App. to Pet. for Cert. 25a, 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 *557Crociere'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 oh 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.

[…]

5

Similarly, we reject respondent's suggestion that Rule 15(c) requires a plaintiff to move to amend her complaint or to file and serve an amended complaint within the Rule 4(m) period. Rule 15(c)(l)(C)(i) simply requires that the prospective defendant has received sufficient "notice of the action" within the Rule 4(m) period that he will not be prejudiced in defending the case on the merits. The Advisory Committee Notes to the 1966 Amendment clarify that "the notice need not be formal." Advisory Committee's 1966 Notes 122.

[…]

Justice Scalia,

concurring in part and concurring in the judgment.

I join the Court's opinion except for its reliance, *ante,* at 550-551, 554, n. 5, 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. *Tome* v. *United States,* 513 U. S. 150, 167-168 (1995) (Scalia, J., concurring in part and concurring in judgment).

5.20 Worthington v. Wilson

Richard WORTHINGTON, Plaintiff-Appellant/Cross-Appellee, v. Dave WILSON and Jeff Wall, Defendants-Appellees, and Village of Peoria Heights, Defendant/Cross-Appellant.

Nos. 92-2273, 92-2425.

United States Court of Appeals, Seventh Circuit.

[…]

Before MANTON and ROVNER, Circuit Judges, and PELL, Senior Circuit Judge.

MANION, Circuit Judge.

In his 42 U.S.C. § 1983 complaint, Richard Worthington claimed that while being arrested the arresting officers purposely injured him. When he filed suit on the day the statute of limitations expired, he named "three unknown named police officers" as defendants. Worthington later sought to amend the complaint to substitute police officers Dave Wilson and Jeff Wall for the unknown officers. The district court concluded that the relation back doctrine of Fed. R.Civ.P. 15(c) did not apply, and dismissed the - amended complaint. […]We affirm.

I.

On February 25, 1989, Richard Worthing-ton was arrested by a police officer in the Peoria Heights Police Department. At the time of his arrest, Worthington had an injured left hand, and he advised the arresting officer of his injury. According to Worthing-ton's complaint, the arresting officer responded by grabbing Worthington's injured hand and twisting it, prompting

Worthington to push the officer away and tell him to "take it easy." A second police officer arrived at the scene, and Worthington was wrestled to the ground and handcuffed. The police officers then hoisted Worthington from the ground by the handcuffs, which caused him to suffer broken bones in his left hand.

Exactly two years later, on February 25, 1991, Worthington filed a five-count complaint in the Circuit Court of Peoria County, Illinois, against the Village of Peoria Heights and "three unknown named police officers," stating the above facts and alleging that he was deprived of his constitutional rights in violation of 42 U.S.C. § 1983. Counts one *1255through three of the complaint named the police officers in their personal and official capacities, and alleged a variety of damages. Counts four and five named the Village of Peoria Heights, and alleged that it was liable for the police officers' conduct based on the doctrine of respondeat superior.

The Village removed the action to federal court and sought dismissal under Fed. R.Civ.P. 12(b)(6) for the reason that respondeat superior was not a valid basis for imposing liability against it under § 1983. At a hearing on the motion to dismiss, Worthing-ton voluntarily dismissed his claims against the Village and obtained leave to file an amended complaint. The Village thereafter moved for sanctions against Worthington and his counsel under Fed.R.Civ.P. 11. In the motion, the Village argued that Worthing-ton's attempt to state a § 1983 claim against it on the basis of respondeat superior was contrary to *Monell v. Department of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), and therefore in violation of Rule 11.

On June 17, 1991, Worthington filed an amended complaint in which he substituted as the defendants Dave Wilson and Jeff Wall, two of the twelve or so members of the Peoria Heights Police Department, for the "unknown named police officers" who arrested him on February 25, 1989. Wilson and Wall moved to dismiss the amended complaint primarily on grounds that Illinois' two-year statute of limitations expired, […], and that the amendment did not relate back to the filing of the original complaint under Rule 15(c). Worthington responded to this motion, and a hearing was conducted before a magistrate judge on October 31, 1991.

On December 19, 1991, the magistrate judge recommended that Wilson's and Wall's motion to dismiss and the Village's motion for sanctions should be granted. Worthing-ton filed objections to these recommendations, to which the defendants responded.

On March 17, 1992, the district judge held a hearing on the objections to the magistrate judge's recommendations. Prior to the hearing, the district judge notified the parties that Rule 15(e), on which Wilson and Wall based their argument, had been amended effective December 1, 1991, and asked them to address the effect of this amendment on the motion to dismiss.

On April 27,1992, the district judge granted Wilson's and Wall's motion to dismiss the amended complaint under revised Rule 15(c) and denied the Village's motion for sanctions. […]Worthington appeals this dismissal. The Village cross-appeals the denial of sanctions.

II.

Rule 15(c) was amended to provide broader "relation back" of pleadings when a plaintiff seeks to amend his complaint to change defendants. Rule 15(c) as amended December 1, 1991, provides, in pertinent part:

> An amendment of a pleading relates back to the date of the original pleading when (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or (2) 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 pleadings, or (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(j) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

Prior to this amendment, the standard for relation back under Rule 15(c) was set out in *Schiavone v. Fortune, 477* U.S. 21, 106 S.Ct. 2379, 91 L.Ed.2d 18 (1986):

> The four prerequisites to a 'relation back' amendment under Rule 15(c) are: (1) the basic claim must have arisen out of the conduct set forth in the original pleading; *1256(2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense; (3) that party must or should have known that, but for a mistake concerning identity, the action would have been brought against it; and (4) the second and third requirements must have been fulfilled within the proscribed limitations period.

Id. at 29, 106 S.Ct. at 2384.

The Advisory Committee Notes to amended Rule 15(c) indicate that the amendment repudiates the holding in *Schiavone* that notice of a lawsuit's pendency must be given within the applicable statute of limitations period. The Advisory Committee stated:

> An intended defendant who is notified of an action within the period allowed by [Rule 4(j)] for service of a summons and complaint may not under the revised rule defeat the action on account of a defect in the pleading with respect to the defendant's name, provided that the requirements of clauses (A) and (B) have been met. If the notice requirement is met within the [Rule 4(j)] period, a complaint may be amended at any time to correct a formal defect such as a misnomer or mis-identification.

[…]

In the order amending Rule 15(c), the Supreme Court expressed its intention that "insofar as just and practicable," the amendment governs cases pending in the district courts on December 1, 1991.[…]

In this case, Wilson and Wall did not know of Worthington's action before the limitations period expired, as was required by *Schia-vone,* but they were aware of its pendency within the extra 120 days provided by new Rule 15(c). *Worthington,* 790 F.Supp. at 833. Since the amendment was decisive to the issue of "notice," the district judge retroactively applied new Rule 15(c), finding it "just and practicable" to do so. *Id.* at 833-34. We have no need to consider the retro-activity of amended Rule 15(c) as it might apply in this case because Worthington's amended complaint did not relate back under either the old or new version of Rule 15(c).

Both versions of Rule 15(c) require that the new defendants "knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party." In *Wood v. Worachek,* 618 F.2d 1225 (7th Cir.1980), we construed the "mistake" requirement of Rule 15(c):

> A plaintiff may usually amend his complaint under Rule 15(c) to change the theory or statute under which recovery is sought; or to correct a misnomer of plaintiff where the proper party plaintiff is in court; or to change the capacity in which the plaintiff sues; or to substitute or add as plaintiff the real party interest; or to add additional plaintiffs where the action, as originally brought, was a class action. Thus, amendment with relation back is generally permitted in order to correct a misnomer of a defendant where the proper defendant is already before the court and the effect is merely to correct the name under which he is sued. But a new defendant cannot normally be substituted or added by amendment after the statute of limitations has run.
>
> Rule 15(c)(2) [current Rule 15(e)(3)] permits an amendment to relate back only where there has been an error made concerning the identity of the proper party and where that party is chargeable with knowledge of the mistake, but it does not permit relation back where, as here, there is a lack of knowledge of the proper party. Thus, in the absence of a mistake in the identification of the proper party, it is irrelevant for the purposes of Rule 15(c)(2) [current Rule 15(c)(3)] whether or not the purported substitute party knew or should have known that the action would have been brought against him.

Id. at 1229 & 1230 (citation omitted).[…] The record shows that there was no mistake concerning *1257the identity of the police officers. At oral argument, counsel for Worthington indicated that he did not decide to file suit until one or two days before the statute of limitations had expired. At that point, neither Worthington nor his counsel knew the names of the two police officers who allegedly committed the offense. Thus, the complaint was filed against "unknown police officers." Because Worthington's failure to name Wilson and Wall was due to a lack of knowledge as to their identity, and not a mistake in their names, Worthington was prevented from availing himself of the relation back doctrine of Rule 15(c).

Worthington argues that the amended complaint should relate back based on the district judge's proposed reading of Rule 15(c) as not having a separate "mistake" requirement. The district judge construed the word "mistake" to mean "change the party or the naming of the party." *W[…]*. This construction, however, ignores the continuing vitality of Wood's holding which interprets the "mistake" requirement under the old version of Rule 15(c). That holding remains unaffected by the 1991 amendment to Rule 15(c).

Worthington argues alternatively that équitable tolling should bar Wilson and Wall from asserting a statute of limitations defense because the officers fraudulently concealed their identity from him.[…]Worthington concedes that he only mentioned the tolling argument obliquely in his pleadings. The district judge raised the tolling argument *sua sponte* at the hearing on the motion to dismiss. This appeal is the first time that the parties have had an opportunity to fully brief the tolling argument, so it is not waived. *[…]*

Under Illinois law, a plaintiff who alleges fraudulent concealment to toll the statute of limitations must set forth affirmative acts or words by the defendants which prevented him from discovering their identity. *[…]*. "Mere silence of the defendant

and the mere failure on the part of the plaintiff to learn of a cause of action do not amount to fraudulent concealment." *Id.* […]Wor-thington states that he "was in too much pain to think clearly and seek the names of the officers immediately"; that "law enforcement avoided revealing the names of the arresting officers by offering [him] a very generous plea bargain before the discovery process even began"; that he accepted the plea bargain, "[c]onfident that the names could be learned by other means"; and, that the " 'other means' turned out to be completely fruitless" because the police department "completely stonewalled" his attempts to uncover Wilson's and Wall's names. These statements negate any claim of fraudulent concealment. They do not establish that either Wilson or Wall concealed his identity from Worthington. Nor do they establish that the Peoria Heights Police Department engaged in any conduct designed to deceive Worthington. The statements suggest that the failure to name Wilson and Wall was due to Worthington's own lack of diligence in learning their identity.

On cross-appeal, the Village argues that Rule 11 sanctions were warranted against Worthington's counsel and should have been imposed. In denying Rule 11 sanctions, the district judge stated:

> ... [T]his court is without power to sanction [Worthington's lawyer's] conduct in this instance. While Rule 11 would authorize sanctions for such a filing in this court, it does not authorize sanctions for a pleading initially filed in state court which is later removed to federal court. [_]. The first complaint, which contained the reference to respondeat superior, was filed in Peoria County Circuit Court and is therefore outside the reach of this court's sanction power under Rule 11. The amended complaint, which was filed in this court, contained no reference to responde-at superior. The Defendants' motion for sanctions is accordingly denied.

[…] As the district judge recognized, *1258he was not authorized to sanction counsel for a pleading filed prior to removal of the case to federal court. *[…]*

III.

We conclude that the amendment adding Wilson and Wall failed to satisfy the "mistake" requirement of Rule 15(c). As a result, relation back was precluded, and Worthing-ton's complaint was time-barred under Illinois law. Furthermore, Rule 11 did not authorize sanctions against Worthington's counsel for his state court pleadings in a removed case.

Affirmed.

5.21 Notes and Questions on Amendments and Relation Back

A farmer owns a pig. The pig is a prize pig, and has distinctive markings. One day the farmer goes out to the pigpen and the pig is missing. The gate to the pigpen is ajar – maybe the pig somehow pushed it open, maybe someone else opened the gate and took the pig. Either way, no pig. A couple of days later the farmer sees his pig in the pigpen of his neighbor. No question – it's the same pig.

The farmer files a lawsuit in federal court (oddly, there is diversity jurisdiction, as his neighbor is just across the state line and this is a very valuable pig), bringing a common law claim for wrongful possession of a pig.

Two weeks later he learns that the farmer he sued, Farmer Brown, is just an employee of the agribusiness company that owns the farm, and we wants to add the agribusiness company. The statute of limitations has not run. He amends the complaint to

add the agribusiness company. In so doing, he makes a mistake and sues SwineCo Incorporated Inc., when he should have sued a subsidiary, SwineCorp Incorporated Inc.. The complaint is filed on the proper party, which is fully aware of the suit and aware that they are the intended target. He also adds as a defendant "John Doe," an unknown party that he claims helped steal the pig.

A year later, the statute of limitations has run. At this time, he wants to amend the complaint to add SwineCorp Incorporated Inc. and drop SwineCo Incorporated Inc.. He also wishes to add a claim for injunctive relief, so his pig might be returned, and also wishes to add a statutory claim arising under state law for Tortious Possession of Pig.

At this time, the farmer also wishes to add as an additional defendant an employee of SwineCorp, Farmer Green (also diverse), who he claims should also be individually liable. He claims that Farmer Green is the John Doe he wished to sue earlier, and shows that Farmer Green was fully aware of the suit.

Finally, the farmer has concluded that for years Swinecorp has been releasing pollutants onto his property. The statute of limitations for this expired after he filed his first complaint but before the filing of this complaint.

Please analyze.

5.22 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.

5.23 Rule 11 and the Duty of Attorneys to Be Truthful

Rule 11 In Context. At the very beginning of the course we noted that litigation takes place in an ethical context. Every action that litigators take must comply with the ethical rules governing those who practice in US courts. Because the US adversarial system entrusts much of the litigation process to the lawyers, it only can function when lawyers fulfill their ethical duties. Rule 11 is an example of how these ethical duties are brought to bear.

You may have wondered when we covered the pleading requirements of *Twombly* and *Iqbal* why attorneys do not simply assume the necessary facts and plead them, hoping to find evidence to support their claims later. After all, in *Twombly*, the plaintiffs' attorneys presumably expected that if allowed discovery they would eventually find evidence that a agreements had been made. Why not just plead that and hope to find the facts as the case proceeds?

Rule 11, and the greater ethical duty it is based on that requires lawyers to deal truthfully with other parties and the court, provides the answer. If a party makes a factual assertion, they cannot simply be hoping that it is so. They must have done the work to be able to support it, even at the pleading stage.

The signing of a document covered by Rule 11(b) certifies that the lawyer has made an investigation reasonable under the circumstances and (1) that the document is not presented for an improper purpose, (2) that any legal claims are based on existing law or a nonfrivolous argument for an extension or change in the law, (3) that factual allegations have evidentiary support (or likely will when she has a chance for further investigation, with specific disclosure that this exception is being relied upon) and (4) that denials of factual allegations have evidentiary support (or, as above, likely will when she has a chance for further investigation).

Rule 11 does not operate in a vacuum. It is one of many devices courts can use to discipline or sanction attorneys for acting in ways that violate their ethical duties. These other sanctions can be brought to bear on the same kinds of conduct that might be reached by rule 11. For example, courts have long been held to have "inherent power" to discipline those who practice before them, and this can be used as well as rule 11. In addition, courts can report attorneys to the state disciplinary authorities, dismiss the lawsuit or enter orders affecting it, hold lawyers in contempt of court, or even report lawyers for criminal prosecution. While, in theory, judges should exhaust the explicit powers of Rule 11 before turning to their less well-defined inherent powers, in practice judges don't always clarify which of their many possible sources of authority they are relying upon when imposing discipline. See *Wright & Miller* Section 1336 ("[I]n many cases, sanctions are imposed by a federal court without any specification of the governing authority that has been employed by the district judge.")

Rule 11 is also not the only disciplinary rule included in the federal rules. Rule 11 does not apply to discovery violations, which are covered separately by provisions in rules 26 and rule 37, which we will cover later.

Objective Standard. Rule 11 involves an objective standard, not a subjective standard. Put differently, the test is not whether the attorney made factual assertions she knew to be false. The issue is whether after "an inquiry reasonable under the circumstances" the factual contentions have evidentiary support. It is no defense that the attorney sincerely believed the assertions to be true if there is no evidentiary support, and especially if there was no inquiry reasonable under the circumstances.

Legal Assertions. You may notice that the standard for legal assertions is somewhat different. Lawyers can argue legal arguments that contradict existing law. This reflects the rule making power of common law courts. The evolution of the law would be impeded if litigants could not argue for changes in the law. Think, for example, of whether the series of ground-breaking cases that led to *Brown v. Board of Education* could have developed as they did if attorneys were subject to sanctions for making arguments at odds with currently settled law.

Safe Harbor. Rule 11 provides a safe harbor for litigants that is designed in part to spare courts the burden of resolving rule 11 skirmishes between the parties. Rule 11(c)(2) requires the motion to be served under Rule Five as other motions are served, but not to be filed with the court until a 21 day period has passed. During that period the party may cure the problem, by amending the filed materials so as to be proper or in some cases by voluntarily dismissing the lawsuit or dropping the claim. If that happens the moving party cannot pursue sanctions. The judge also can initiate rule 11 sanctions, and is not bound by 21

day waiting period. However, a judge may not impose monetary sanctions unless it issued a show cause order under Rule 11(c)(3)before voluntary dismissal of or settlement of the claims.

Who Can Be Sanctioned. Sanctions may be imposed upon the attorney who signed the papers, but they also may be imposed upon that attorney's law firm. When a party represents itself pro se without an attorney, sanctions may be imposed directly upon the litigant. This is not an infrequent remedy against serial pro se litigants who file multiple inconsequential cases.

Types of Sanctions. The form of sanctions are effectively limited only by the imagination of the trial judge. Sanctions can include monetary sanctions, which normally are paid into the court but on occasion can be paid to the opposing party to compensate them for attorneys' fees and other losses occasioned by the improper filings. Sanctions can take other forms, such as requiring the attorney to undergo continuing legal education, which often has a mandated ethical component, or to require the attorney to issue an apology to the other side. In some cases individual lawyers have been required to notify every attorney in their firm of the sanction imposed against them. In one case an attorney was forbidden to practice in the federal district court at issue in the future unless accompanied by another attorney from the lawyer's firm. The court can also impose sanctions that have an effect on the handling of the case such as deeming certain matters to be admitted or waived and not allowing them to be raised again in the course of the litigation.

Coverage. Rule 11 covers not just pleadings but also motions and other papers filed with the court. It does not, however, reach discovery disputes, which are handled under separate rules. Rule 11 does apply in full to answers. You may recall from our discussion of Twiqbal that courts are divided on whether the Iqbal standard should apply to pleading facts sufficient to support an answer, but regardless of whether Iqbal applies Rule 11 requires that any facts only be pleaded or answers asserted after reasonable inquiry under the circumstances. Rule 11 also applies to motions. Rule 11 also imposes a continuing obligation with regard to assertions made early in the case. It is a violation of Rule 11 to continue to assert factual claims that a lawyer knows or should know cannot be sustained.

Party Verification. Rule 11 requires papers to be signed by an attorney unless there is no attorney. In other systems of rule, including in some states, sometimes the litigants themselves are required to verify the facts and papers filed before the courts. In general this is not the practice followed under in the federal rules, but there are two exceptions. Rule 23.1 and Rule 65(b) require litigant verification under specialized circumstances. Rule 23.1 applies to derivative actions, and Rule 65 (b) applies to the facts relied upon in a motion for temporary restraining order, which sometimes are issued before the other party has an opportunity to contest the facts. In these cases, despite requiring verification by litigants, courts generally allow the reliance of litigants upon their attorneys when the specialized knowledge of the attorneys bears upon the verification.

5.24 Star Mark Management, Inc. v. Koon Chun Hing Kee Soy & Sauce Factory, Ltd.

STAR MARK MANAGEMENT, INC., A New York Corporation, Great Mark Corporation, A New York Corporation, Jimmy Zhan, Individually and on Behalf of Star Mark Management, Inc. and Great Mark Corporation, aka Yi Q. Zhan, Plaintiffs, Law Offices of Bing Li, LLC, Bing Li, Appellants-Cross-Appellees, v. KOON CHUN HING KEE SOY & SAUCE FACTORY, LTD., A Company Organized under the Laws of Hong Kong, Defendant-Appellee-Cross-Appellant.

United States Court of Appeals, Second Circuit.

Decided: June 13, 2012.

Before: KATZMANN, CHIN, Circuit Judges, and ROSENTHAL, District Judge.

PER CURIAM:

In this case, the district court (Matsumoto, *J.)* imposed sanctions of $10,000 in fees and costs pursuant to Fed.R.Civ.P. 11 against plaintiffs (collectively, "Star Mark") and their attorneys-, Bing Li, Esq., and his firm, Law Offices of Bing Li, LLC (together, "Li"), in favor of defendant Koon Chun Hing Kee Soy & Sauce Factory, Ltd. ("Koon Chun"). Li appeals, contending that the district court erred in its application of Rule 11. Koon Chun cross-appeals, contending that the district court should have awarded substantially more than $10,000. Koon Chun also moves to sanction Li for filing a purportedly frivolous appeal. We affirm. We also deny the motion for additional sanctions.

BACKGROUND

In 2004, Koon Chun sued Star Mark in the Eastern District of New York for trademark infringement based on Star Mark's sale of counterfeit versions of Koon Chun's hoisin sauce, a sweet and spicy sauce used in Chinese cuisine both as an ingredient in cooking and as a condiment. The district court (Bianco, *J.)* granted partial summary judgment to Koon Chun, finding Star Mark liable for trademark and trade dress infringement. *See Koon Chun Hing Kee Soy & Sauce Factory, Ltd. v. Star Mark Mgmt., Inc.,* No. 04-CV-2293 (JFBXSMG), 2007 WL 74304, at **8-11 (E.D.N.Y. Jan. 8, 2007). The parties proceeded to litigate the issues of willfulness and damages.

At a status conference in May 2007, Star Mark — represented by Li — asked for leave to amend its answer and add counterclaims seeking, *inter alia,* cancellation of Koon Chun's mark on the theory that Koon Chun's use of the word "hoisin" — which translates to "seafood" — -was deceptive because the sauce did not contain seafood. *174The magistrate judge (Gold, /.)2 expressed skepticism about the proposed claims. He said that while he had no authority to prohibit Star Mark from filing a motion for leave to amend, he would consider imposing sanctions if the motion were made and he deemed sanctions appropriate. Star Mark elected not to file its motion and instead asserted the claims in a new lawsuit, this action below. Again, Li represented Star Mark.

The remaining claims in the first lawsuit were tried. The magistrate judge found that the Star Mark infringement was willful and awarded damages and costs. We affirmed. *See Koon Chun Hing Kee Soy & Sauce Factory, Ltd. v. Star Mark Mgmt., Inc.,* 409 Fed.Appx. 389 (2d Cir. 2010).

In the meantime, the parties proceeded with the litigation of this action. On January 9, 2008, Koon Chun's counsel sent Li a letter requesting that Star Mark withdraw the complaint and threatening to file a Rule 11 motion. Attached to the letter was a proposed Rule 11 notice of motion, which listed six grounds for Koon Chun's assertion that the lawsuit was frivolous.

Although the notice of motion referred to a memorandum of law and two affidavits, no such documents were attached to the notice of motion. The letter, however, contained citations to legal authorities.

Star Mark did not withdraw the complaint. Koon Chun moved for judgment on the pleadings dismissing the complaint pursuant to Fed.R.Civ.P. 12(c) and for sanctions under 28 U.S.C. § 1927 and Rule 11. The new notice of motion listed four grounds for Koon Chun's assertion that the lawsuit was frivolous. Three of these grounds were among the six listed in Koon Chun's earlier notice of motion, attached to the letter sent to Li. The fourth ground— no evidence of fraud — was part of the request for sanctions under § 1927. In a thorough and carefully-considered memorandum and order filed September 8, 2009, the district court (Matsumoto, *J.)* granted both motions. *Star Mark Mgmt., Inc. v. Koon Chun Hing Kee Soy & Sauce Factory, Ltd.,* No. 07-CV-3208 (KAM)(SMG), 2009 WL 2922851 (E.D.N.Y. Sept. 8, 2009). The district court granted the motion for sanctions under Rule 11, not under § 1927. *Id.* at *15.

The district court referred the issue of the amount of fees and costs to the magistrate judge, who recommended an award against Star Mark and Li of $105,037.02 in fees and costs. In an order filed September 30, 2010, the district court accepted and adopted the magistrate judge's recommendations, but reduced the award to a total of $10,000 for fees and costs "based upon the showing of financial hardship by plaintiffs and their attorney." *Star Mark Mgmt., Inc. v. Koon Chun Hing Kee Soy & Sauce Factory, Ltd.,* No. 07-CV-3208 (KAMXSMG), 2010 WL 3924674, at *6 (E.D.N.Y. Sept. 30, 2010). Koon Chun moved for reconsideration, and the district court denied the motion by order entered November 23, 2010.

These cross-appeals followed.

DISCUSSION

We discuss (1) Li's appeal from the district court's imposition of sanctions, (2) Koon Chun's cross-appeal as to the amount of the sanctions awarded, and (3) Koon Chun's motion to sanction Li for filing a purportedly frivolous appeal.

*175I. The Appeal

In his appeal, Li raises two principal issues: (a) whether the service of an informal warning letter with a notice of Rule 11 motion, as opposed to a formal motion, satisfies the safe harbor requirement of Fed.R.Civ.P. 11(c)(2); and (b) whether the district court abused its discretion in concluding that plaintiffs' claims were frivolous.

We review an award of Rule 11 sanctions for abuse of discretion. *Lawrence v. Rickman Grp. of CT LLC,* 620 F.3d 153, 156 (2d Cir.2010) (per curiam). "An 'abuse of discretion' occurs when a district court 'base[s] its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence, or render[s] a decision that cannot be located within the range of permissible decisions.' " *Kiobel v. Millson,* 592 F.3d 78, 81 (2d Cir.2010) (quoting *Sims v. Blot,* 534 F.3d 117, 132 (2d Cir.2008)) (alterations in original).

A. *The Safe Harbor Provision*

Rule 11 provides, in pertinent part:

> 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.

Fed.R.Civ.P. 11(c)(2).

The advisory committee note explains:

> To stress the seriousness of a motion for sanctions and to define precisely the conduct claimed to violate the rule, the revision provides that the "safe harbor" period begins to run only upon service Of *the motion.* In most cases, however, counsel should be expected to give informal notice to the other party, whether in person or by a telephone call or letter, of a potential violation before proceeding to prepare and serve a Rule 11 motion.

Id. advisory committee's notes to 1993 Amendments (emphasis added).

Rule 11 and principles of due process require that "the subject of a sanctions motion be informed of: (1) the source of authority for the sanctions being considered; and (2) the specific conduct or omission for which the sanctions are being considered so that the subject of the sanctions motion can prepare a defense." *Schlaifer Nance & Co. v. Estate of Warhol,* 194 F.3d 323, 334 (2d Cir.1999). "Indeed, only conduct explicitly referred to in the instrument providing notice is sanctionable." Id. (citation omitted); accord *Storey v. Cello Holdings, L.L.C.,* 347 F.3d 370, 389 (2d Cir.2003).

The safe-harbor provision is a strict procedural requirement. *Perpetual Sec., Inc. v. Tang,* 290 F.3d 132, 142 n. 4 (2d Cir.2002); *see also Hadges v. Yonkers Racing Corp.,* 48 F.3d 1320, 1327-29 (2d Cir.1995). An informal warning in the form of a letter without service of a separate Rule 11 motion is not sufficient to trigger the 21-day safe harbor period. *L.B. Foster Co. v. Am. Piles, Inc.,* 138 F.3d 81, 89-90 (2d Cir.1998) (request for sanctions in letter without separate service of motion did not comply with Rule ll's requirement that sanctions motion be made separately); *Gal v. Viacom Int'l, Inc.,* 403 F.Supp.2d 294, 309 (S.D.N.Y.2005) ("[T]he plain language of the rule states explicitly that service of the motion itself is required to begin the safe harbor clock — the rule says nothing about the use of letters."); *accord, Roth v. Green,* 466 F.3d 1179, 1191-93 (10th Cir.2006); *Gordon v. Unifund CCR Partners,* 345 F.3d 1028, 1029-30 (8th *176Cir.2003); *Radcliffe v. Rainbow Constr. Co., 254* F.3d 772, 789 (9th Cir.2001). *But see Nisenbaum v. Milwaukee Cnty.,* 333 F.3d 804, 808 (7th Cir.2003) (party's "letter" or "demand" sent to opposing counsel constituted substantial compliance with safe harbor provision).

Here, however, Koon Chun' did more than send a Rule 11 letter — it attached to its letter a copy of its notice of motion for sanctions. After waiting the requisite 21 days, Koon Chun filed its sanctions motion — which included as grounds for Rule 11 sanctions several of those listed in the earlier notice — with the district court. Li nonetheless argues that Koon Chun failed to comply with the procedural requirements of Rule 11(c)(2) because it failed to serve a "formal fully supported motion," Appellant's Br. at 21, *i.e.,* without "any supporting legal and factual materials," Appellant's Reply Br. at 1.

We hold, in the circumstances here, that Koon Chun met the procedural requirements of the safe harbor provision of Rule 11(c)(2) by serving its notice of motion for Rule 11 sanctions with its January 9, 2008, letter, even though it did not serve at that time supporting affidavits or a memorandum of law.

First, Koon Chun complied literally with the requirements of the rule, as it served its notice of motion more than 21 days before it filed the motion with the district court; the motion was made separately from any other motion; and the notice of motion described the specific conduct that allegedly violated Rule 11(b). Fed. R.Civ.P. 11(c)(2).

Second, while Li contends that Koon Chun did not serve supporting papers such as a memorandum of law or affidavits, Rule 11(c)(2) requires only the service of "[a] motion" or "[t]he motion." *See id.* It does not require the service of a memorandum of law or affidavits, nor does it use the words "formal fully supported motion." *See Ideal Instruments, Inc. v. Rivard Instruments, Inc.,* 243 F.R.D. 322, 339 (N.D.Iowa 2007) ("Rule 11 says nothing about requiring service of the *brief* in support of a Rule 11 motion to trigger the twenty-one day 'safe harbor.' "). While at least one district court in this Circuit has suggested that only "a fully supported motion" satisfies the safe harbor requirement, *see Carruthers v. Flaum,* 450 F.Supp.2d 288, 306 (S.D.N.Y.2006), that is not what Rule 11 requires. We decline Li's invitation to read into the rule a requirement that a motion served for purposes of the safe harbor period must include supporting papers such as a memorandum of law and exhibits. The motion for Rule 11 sanctions filed with the district court rested on substantially the grounds set forth in the earlier notice of motion, undercutting the argument that the motion did not comply with the safe harbor requirement. The additional ground listed in the filed motion — no evidence of fraud — was part of Koon Chun's separate request for sanctions under § 1927, which is not subject to the safe harbor requirement.

Third, while motions usually are accompanied by a memorandum of law and exhibits, the issue here is not whether Koon Chun satisfied the district court's local rules or a judge's individual practices, but whether it satisfied Rule ll's safe harbor provision. Indeed, the district court accepted the motion. Moreover, under the federal rules, a motion need only: "(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." Fed.R.Civ.P. 7(b)(1). A "motion" can take different forms, and it is distinct from a memorandum of law or affidavit. The drafters of the rule surely understood this distinction *177when crafting the safe harbor requirement.

Finally, Koon Chun complied with the spirit of Rule 11 as it gave notice that it would be seeking sanctions under Rule 11 and identified six reasons why it believed Rule 11 had been violated. We reject Li's contention that he was not able to make an independent, professional judgment as to whether to withdraw the offending pleading "without being given any opportunity to see the movant's legal arguments, affidavits and exhibits." Appellant's Reply Br. at 4. Koon Chun's notice of motion gave Star Mark and Li notice of the alleged sanctionable conduct, and Li thus had the opportunity to determine whether there was a non-frivolous basis for the pleading. Here, Li made that very professional judgment, informing Koon Chun (in response to its earlier notice of motion) that none of its points had any merit.

To require that a party go through the expense of preparing a fully supported motion with a memorandum of law and exhibits would undermine one of the main purposes of the safe harbor provision, *ie.,* "to reduce, if not eliminate, the unnecessary expenditure of ... adversary resources." *Lawrence,* 620 F.3d at 158. The purpose of the provision is not to cause the party opposing a frivolous filing to incur costs merely to have the filing withdrawn, but to give the opponent notice and an opportunity to consider withdrawing the filing without the court's involvement. There is no question that Li had such notice and opportunity.

Accordingly, we hold that the safe harbor requirement was satisfied here.

B. *Rule 11 Sanctions*

An attorney may be subject to sanctions under Rule 11 for presenting frivolous claims in a pleading. Fed. R.Civ.P. 11(b)(2) and (c). "[T]he standard for triggering the award of fees under Rule 11 is objective unreasonableness and is not based on the subjective beliefs of the person making the statement." *Storey,* 347 F.3d at 387 (citation and internal quotation marks omitted). With respect to legal contentions, "[t]he operative question is whether the argument is frivolous, i.e., the legal position has 'no chance of success,' and there is 'no reasonable argument to extend, modify or reverse the law as it stands.' " *Fishoff v. Coty Inc.,* 634 F.3d 647, 654 (2d Cir.2011) (quoting *Morley v. Ciba-Geigy Corp.,* 66 F.3d 21, 25 (2d Cir.1995)).

On appeal, Li challenges each basis of the district court's dismissal on the merits. As for the district court's conclusion that his claims were barred by *res judicata* and collateral estoppel, Li argues that the magistrate judge's sanctions warning in the first action constituted a "procedural bar" to raising claims against Koon Chun. Li asserts that his contention was an arguable extension of *Pike v. Freeman,* 266 F.3d 78 (2d Cir.2001), in which we suggested that "showing that the applicable procedural rules did not permit assertion of the claim in question in the first action of course also suffices to show that the claim is not barred in the second action" under *res judicata. Id.* at 91. This argument is utterly without merit. A judge's warning that a proposed filing appears meritless and may subject that party and/or counsel to sanctions is, plainly, not a procedural rule precluding that party from bringing the filing. Here, the magistrate judge expressly informed Li that he had no authority to prevent him from moving to amend his clients' answer, stated that he was making no final decision as to whether sanctions would be appropriate, and noted on the docket sheet that Li could move to amend the answer at any time deemed appropriate. Furthermore, *178the magistrate judge directed Li to "look at the law," App. at 76, reminding him that he had an independent obligation to determine if the proposed claims had merit, and pointed out to Li that his own clients had been found to sell hoisin sauce, suggesting that Li's contentions that Koon Chun was deceiving consumers and mislabeling its products with the term "hoisin" were specious at best.

Moreover, Star Mark's claims of abandonment and material alteration clearly lacked foundation substantially for the reasons discussed by the district court in its well-reasoned decision. *See Star Mark Mgmt.,* 2009 WL 2922851, at *12. Li's contention that Koon Chun had deceived consumers with its hoisin sauce label because the term "hoisin" translates to seafood when there was no seafood in the sauce is without any support. Indeed, as the magistrate judge pointed out to Li, the fact that Koon Chun's product name translates to "seafood sauce" but does not contain seafood does not make the product misleading because many sauces are not named after their ingredients, but are named after the foods they accompany. "Steak sauce," for example, does not contain steak; it is a condiment for steak.

In sum, Li has failed to show that the district court abused its discretion in concluding that the action was frivolous. Nor has he shown that the district court abused its discretion in deciding to impose monetary sanctions. The district court aptly noted that it was "difficult for the court to envision a stronger case for the imposition of Rule 11 sanctions premised on the filing of a frivolous complaint than the instant action." *Id.* at *14.3

II. The Cross-Appeal

In its cross-appeal, Koon Chun challenges the district court's imposition of sanctions as being too lenient. It principally raises three issues. First, it contends that the district court committed legal error in failing to consider its request for sanctions under

28 U.S.C. § 1927 and in only imposing sanctions under Rule 11. Second, it argues that the district court erred in ruling on its motion for reconsideration that Li had not acted in bad faith. Third, it argues that, in any case, the amount of monetary sanctions imposed on Li was too low, especially given that Li had the ability to pay the amount initially recommended by the magistrate judge.

Turning first to whether the district court erred in not considering Koon Chun's request for sanctions under 28 U.S.C. § 1927, while the standard for triggering sanctions under Rule 11 is "objective unreasonableness," *Margo v. Weiss,* 213 F.3d 55, 65 (2d Cir.2000), to impose sanctions under § 1927, the court must make a finding of "conduct constituting or akin to bad faith," *In re 60 E. 80th St. Equities, Inc.,* 218 F.3d 109, 115 (2d Cir. 2000) (citation and internal quotation marks omitted). Here, Koon Chun argues that, the district court abused its discretion in failing to consider whether to award § 1927 sanctions simply because it awarded Rule 11 sanctions. However, in its order denying Koon Chun's motion for reconsideration, the district court explained why it declined to impose sanctions under § 1927. Specifically, the district court found "insufficient facts to conclude, with the required high degree of factual specificity, that Li acted to harass, delay, or for other improper purposes, and/or in bad faith, warranting Section 1927 sanctions." *179*Star Mark Mgmt., Inc. v. Koon Chun Hing Kee Soy & Sauce Factory, Ltd.,* No. 07-CV-3208 (KAM)(SMG), 2010 WL 3924674, at *5 (E.D.N.Y. Sept. 30, 2010) (citing *Dow Chem. Pac. Ltd. v. Rascator Maritime S.A.,* 782 F.2d 329, 344 (2d Cir. 1986) ("[W]e have declined to uphold awards under the bad-faith exception absent both clear evidence that the challenged actions are entirely without color and [are taken] for reasons of harassment or delay or for other improper purposes." (alteration in original) (internal quotation marks omitted))).

Koon Chun then argues that the district court erred in concluding that Bing Li had not acted in bad faith. It contends that Li only commenced the second action (as opposed to filing counterclaims in the first action) to avoid being sanctioned by the magistrate judge. As the district court found, "Star Mark could have raised these claims as affirmative defenses and counterclaims in the First Action. There was nothing preventing litigation of these claims in the First Action, other than Star Mark's conscious choice to abandon litigation of these claims in that action in favor of filing a new action." *Star Mark Mgmt.,* 2009 WL 2922851, at *13. Of course, even if Li acted foolishly in commencing the second action, we cannot say that the district court abused its discretion in finding insufficient evidence that Li's actions were "entirely without color and [were taken] for reasons of harassment or delay or for other improper purposes." *See Dow Chem. Pac.,* 782 F.2d at 344 (citation and internal quotation marks omitted). Accordingly, we conclude that the district court did not err in failing to sanction Li pursuant to 28 U.S.C. § 1927.

Finally, Koon Chun argues that the monetary sanctions imposed were too low even under Rule 11. Specifically, it contends that the district court erred in considering financial hardship rather than inability to pay. "[G]iven the underlying purpose of sanctions — to punish deviations from proper standards of conduct with a view toward encouraging future compliance and deterring further violations — it lies well within the district court's discretion to temper the amount to be awarded against an offending attorney by a balancing consideration of his ability to pay." *Oliveri v. Thompson,* 803 F.2d 1265, 1281 (2d Cir.1986). Because we do not think there is any meaningful difference between "financial hardship" and "inability to pay," we cannot conclude that the district court applied the improper standard in lowering the sanctions award. Koon Chun further argues that the financial information submitted by Li is questionable and insufficient to demonstrate an inability to pay. Given that the district court's broad discretion to lower a sanctions award based on inability to pay, however, we cannot say that the district

court abused its discretion in lowering the sanctions amount to $10,000 based on Li's submissions. Moreover, as the district court noted in its denial of Koon Chun's motion for reconsideration, in fashioning the ultimate sanctions award, the district court "considered not only plaintiffs' and Li's ability to pay, but also 'the limited purposes of Rule 11 sanctions' when it concluded that a reduced sanction award was appropriate and sufficient for deterrence in this case." *Star Mark Mgmt., Inc. v. Koon Chun Hing Kee Soy & Sauce Factory, Ltd.,* No. 07-CV-3208 (KAM)(SMG), 2010 WL 4878955, at *2 (E.D.N.Y. Nov. 23, 2010). Accordingly, we reject Koon Chun's arguments on cross-appeal and affirm the judgment of the district court.

III. Koon Chun's Motion for Sanctions

We turn to Koon Chun's motion for sanctions against Bing Li for the *180filing of a frivolous appeal. "If a court of appeals determines that an appeal is frivolous, it may ... award just damages and single or double costs to the appellee." Fed. R.App. P. 38. "Rule 38 sanctions may include the granting of reasonable attorneys' fees to the party forced to defend the frivolous appeal." *In re 60 E. 80th St Equities,* 218 F.3d at 118-19 (citation and internal quotation marks omitted). Although Bing Li's appeal is meritless, it is rare that a case will warrant sanctions under Rule 38 and, here, we cannot conclude that the arguments raised on appeal rise to the level of frivolousness. *See In re 60 E. 80th St Equities,* 218 F.3d at 119 (noting that this Court has often required "a clear showing of bad faith" in addition to frivolousness).

CONCLUSION

For the foregoing reasons, the judgment of the district court is hereby AFFIRMED and appellee's motion for sanctions under Rule 38 is hereby DENIED.

2

. After Judge Bianco referred all issues as to willfulness and damages to Magistrate Judge Gold, the parties consented to have the case assigned for all purposes to the magistrate judge.

3

. This is not the first time Li has been sanctioned for misconduct. *See, e.g., New Pac. Overseas Grp. (USA) Inc. v. Excal Int'l Dev. Corp., 99* Civ. 2436(DLC), 99 Civ. 3581, 2000 WL 377513, at *10 (S.D.N.Y. Apr. 12, 2000).

5.25 Pleading Conclusion

Farmer Brown owns a pig. The pig is a prize pig, and has distinctive markings. One day the farmer goes out to the pigpen and the pig is missing. The gate to the pigpen is ajar and there is no pig. A couple of days later the farmer sees his pig in the pigpen of his neighbor, Farmer Huang. No question – it's the same pig. The farmer has not sold or given the pig away.

The farmer files a complaint. In count one he bases his claim on a common law doctrine that requires the defendant to have wrongfully entered the plaintiff's premises and removed something of value. In the other count he bases his claim on the federal Return Your Neighbor's Pig Act which requires the return of errant swine by the owner of any premises where such pig is held, no matter how obtained. In both cases he alleges only the facts in the first paragraph above.

Assume that defendant files a motion to dismiss. In support of this motion Farmer Huang attaches a public record that shows that the pigpen in which the prize pig now resides does not belong to him, but to SwineCo Inc, of which he is just an employee.

Please Analyze.

Assume now that Farmer Brown files an amended complaint (the court has given leave). In the amended complaint he names SwineCo Inc. as well as Farmer Huang. He additionally alleges a conspiracy involving SwineCo Inc., Huang, and various as yet to be named parties. In the new complaint he adds as a factual allegation that in furtherance of this conspiracy Huang entered his pigpen late at night, wearing something that functioned like the invisibility cloak in the Harry Potter books, and took the pig. (He bases this on a statement Huang made to a mutual friend, "Sure, I stole the pig, and wore my Harry Potter invisibility cloak when I did it! Stupid moron who thinks that pig is his.") SwineCo Inc and Huang are served, but the unknown parties are, of course, not served. Two days later the statute of limitations expires. Brown then learns that he misnamed SwineCo Inc because he included a period after the Inc. He seeks to amend with the correct spelling. He also seeks to add Farmer Green, whom he claims was one of the conspirators and who he claims was in fact present in the pig pen in another invisibility cloak on the night Huang allegedly took the pig.

Please analyze.

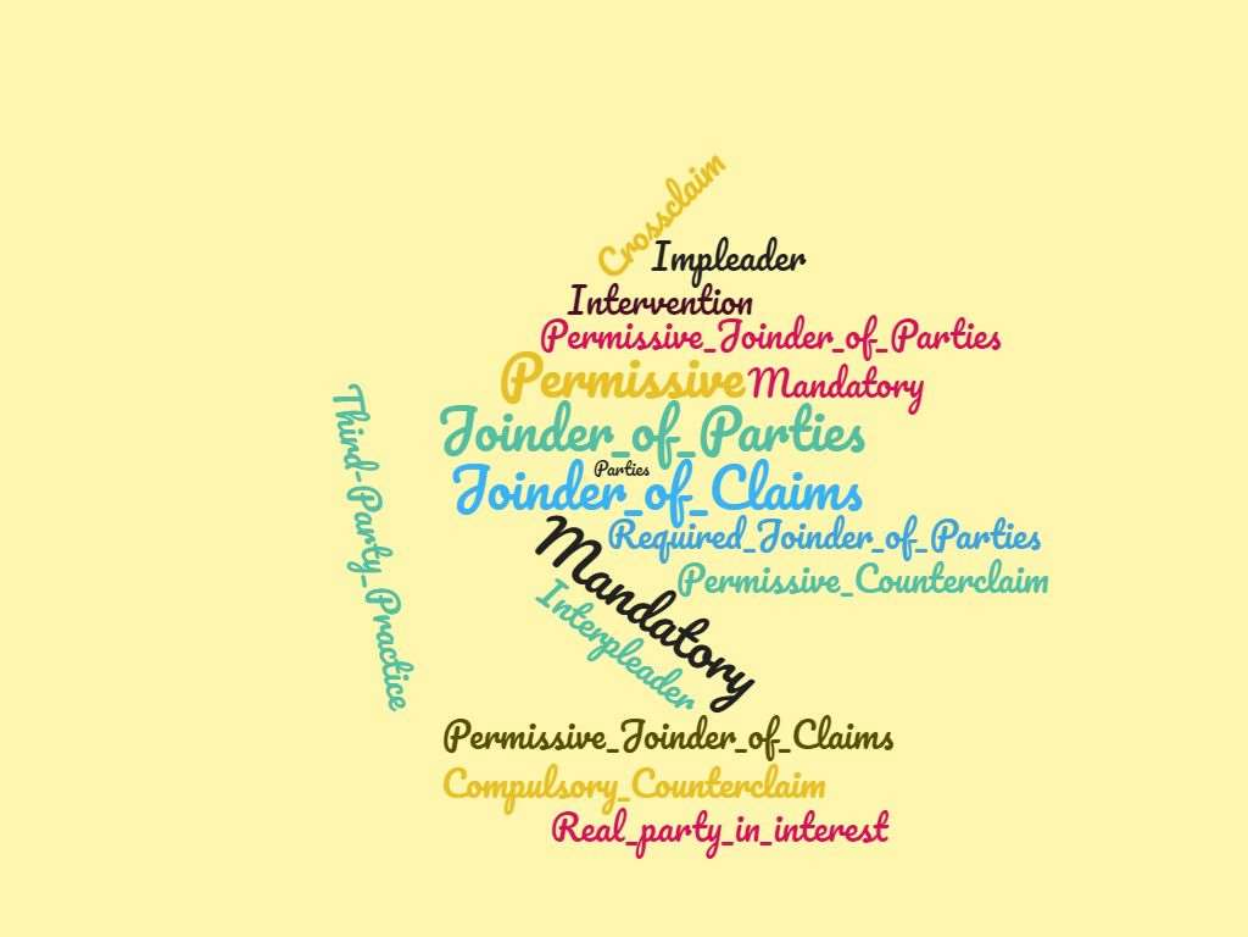
Assume the SwineCo Inc and Farmer Huang file an answer. In this answer they deny Farmer Brown's specific allegation in the complaint that the pig in question is Farmer Brown's pig, claiming that it is instead an identical sibling. They have no evidence to support that allegation and plead no specific facts in support of that argument. Neither in motions nor in the answer have they asserted insufficient service of process or insufficient process as defenses. After the answer has been served, counsel decides that they should have asserted those defenses, and seek leave of court to amend the answer to include them.

Please analyze.

We next turn to joinder. Which claims and which parties can be included in a lawsuit? As with pleading, this involves fundamental design choices that systems of procedure must make.

6 Joinder

WordCloud



6.1 Joinder in U.S. Federal Court - The Rules

Please read the following carefully.

Rule 13. Counterclaim and Crossclaim

https://www.law.cornell.edu/rules/frcp/rule_13

Rule 14. Third-Party Practice

https://www.law.cornell.edu/rules/frcp/rule_14

Rule 17. Plaintiff and Defendant; Capacity; Public Officers

https://www.law.cornell.edu/rules/frcp/rule_17

(We won't tall much about Rule 17)

Rule 18. Joinder of Claims

https://www.law.cornell.edu/rules/frcp/rule_18

Rule 19. Required Joinder of Parties

https://www.law.cornell.edu/rules/frcp/rule_19

Rule 20. Permissive Joinder of Parties

https://www.law.cornell.edu/rules/frcp/rule_20

Rule 21. Misjoinder and Nonjoinder of Parties

https://www.law.cornell.edu/rules/frcp/rule_21

Rule 22. Interpleader

https://www.law.cornell.edu/rules/frcp/rule_22

Rule 24. Intervention

https://www.law.cornell.edu/rules/frcp/rule_24

6.2 Joinder in U.S. Federal Court - The Tools

Idea behind liberal joinder – efficiency. Systems of procedure can embody different choices about what can and should be contained in a single lawsuit. The approach taken by the common law writs, for example, was to severely limit what can be included to a single claim. The federal rules take a very different approach. They support bringing in one lawsuit all claims related to a set of facts.

In allowing broad joinder of claims and parties the federal rules pursue a goal of efficiency. Rather than splitting litigation over one incident into piecemeal litigation, the federal rules support and to some extent require bringing all the claims together for resolution at the same time.

This approach has advantages and costs. The goal of efficiency is indeed served by allowing witness testimony and exhibits to bear on multiple claims against multiple parties. On the other hand, the complexity of litigation that is allowed by the federal rules has costs of its own. Juries may struggle to keep track of how evidence bears on multiple counts, and keeping straight the varying legal standards that might be applied to a single set of facts can also be a challenge. Complexity also can arise in pretrial proceedings, as both discovery and motion practice are complicated by sorting through the many different kinds of claims that can be brought.

Nonetheless, the federal rules have firmly embraced liberal joinder of claims and parties. While you should bring your systems engineer mindset to bear on whether you agree this is a good idea, we also need to work through how the system established under the federal rules operates.

Mandatory and Compulsory – Litigant Choice. One aspect of the federal rules is the degree to which bringing claims into the same lawsuit is forced by mandatory joinder rules or merely allow by permissive joinder rules. This encompasses not just the rules themselves, but also doctrines that operate aside from the rules..

One of those doctrines is claim preclusion, also known as *res judicata*. Claim preclusion operates to prevent relitigation of the same claim over and over again. Put simply if you bring a lawsuit and lose – or win – you cannot bring exactly that claim again in hopes of the different and better result. Back in the days of the common law writs, claim preclusion barred relitigation of the same writ. At the same time, pleading under the writs allowed coming back to court with a different writ if the claim was barred because the wrong writ had been asserted.

Today, that is not the rule. Today, any claim arising from the same transaction or occurrence that could have been brought at the time the original lawsuit was brought will be barred under the doctrine of claim preclusion. For our purposes here, this means that as a practical matter litigants are not only permitted but effectively required to bring any causes of action relating to a transaction or occurrence or lose them forever. We will return to the issue of claim preclusion later in the course, but for now you can think of claim preclusion as akin to a rule that requires claimants to bring all claims arising from the same transaction or occurrence or lose them.

A similar rule operates both under the doctrine of claim preclusion and under the rules with regard to counterclaims. Rule 13 covers counterclaims, and divides them into mandatory and permissive counterclaims. Mandatory counterclaims are those that arise from the same transaction or occurrence as the plaintiff's claim. Rule 13 a requires that these counterclaims be brought in the federal action or lost forever. Put differently, a defendant cannot choose to file a separate action asserting what might be mandatory counterclaims, nor can the defendant save the counterclaim for use later. A use it here and now or lose it rule applies.

Other claims that might be brought are permissive. For example, neither plaintiffs nor defendants are not required to bring in the same action any unrelated claims they may have, but they may bring those claims (assuming subject matter jurisdiction, personal jurisdiction, and venue). A defendant may bring as a permissive counterclaim any claim she has against the plaintiff, regardless of whether or not it is related in any way to the plaintiff's claim against the defendant. (Note, as we will discuss below, that the other elements of selecing a proper courts must still be established).

Cross-claims are also permissive. A cross-claim is a claim that one defendant has against another defendant or that one plaintiff has against another plaintiff. As we will see, the first such cross-claim needs to arise from the same transaction or occurrence as an original claim by the plaintiff. Even though such a cross claim is related to the overall litigation, the cross claimant can choose to file it in another location or at a later time.

Also not mandatory are claims where a party seeks to implead another. In some cases, the defendant might be able to claim that if it is liable, another party is liable to it. We saw such a claim in the *Asahi* case where the tire manufacturer impleaded the manufacturer of the valve on the tire. While impleading is permitted, it is not required, and can be pursued as a separate action.

Permissive Joinder also applies to joinder of parties. In general, a claimant is not required to join in the action every potentially liable defendant. There are some cases where party is considered under rule 19 to be both necessary and indispensable, but in the average run-of-the-mill case where there are multiple, potentially liable defendants, the plaintiff can choose which one or ones it chooses to pursue.

Again, bring your systems engineer eye to the issue of mandatory and permissive joinder of claims and parties. From a system standpoint, when does it make sense to require claims and parties to be joined in a single action whether or not the parties prefer it, and when does it make sense to allow them to make their own decisions?

Overlap with PJ, SMJ, Venue. An important thing to remember about joinder of claims and parties is that the federal rules only apply is that the federal rules do not displace or set aside the other doctrines that govern

where and how a case may be brought. These requirements still apply. For each claim, personal jurisdiction, venue, and subject matter jurisdiction must be established.

For counterclaims, plaintiffs have been held unable to object to venue or personal jurisdiction. This may be seen as a kind of waiver, as plaintiff did choose the initial forum. Subject matter jurisdiction is an absolute requirement for all claims.

Be able to fill in the following chart.

der of Claims ce & FRCP No.	Definition?	Who Uses? (P , D or both?)	Elements?	Mandatory?
8a (the "kitchen sink"				
3(g) sclaims				
13(a) pulsory terclaims				
13(b) issive counterclaims				
20(a) oinder				

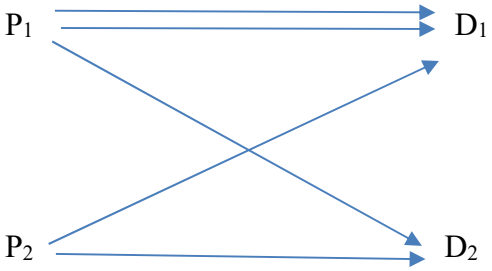
3(h) oinder				
4a & b arty claim/ impleader				

Joinder of Claims. Rule 18(a) allows a party bringing a claim to add to it any claim, related or unrelated, that it might have against the other party. There are no subject matter limitations. Subject matter jurisdiction must be established for the claim, though, and venue and personal jurisdiction when brought by a plaintiff.

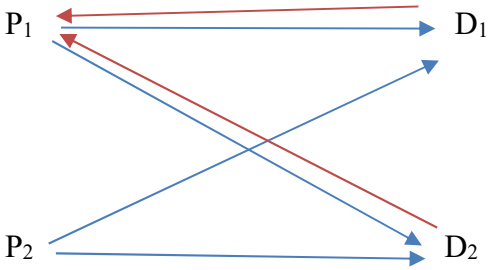
Joinder of Parties. The joinder of parties rule is broad, but not as open ended as joinder of claims. Rule 20 provides two tests, both of which must be met. Parties may join as plaintiffs if they assert claims "arising out of the same transaction, occurrence, or series of transactions or occurrences" and there is "any question of law or fact common to all plaintiffs" that will arise in the action. A nearly identical rule applies to joinder of defendants. If you stop to think through these two tests, it is hard to imagine a party whose potential presence arises from the same set of circumstances that would not be joinable. Note that this rule is permissive, not mandatory, and for a variety of reasons (e.g., preserving subject matter jurisdiction, only presenting defendants with deep pockets to the jury) a plaintiff might decide not to include certain defendants. For similar reasons a plaintiff might or might not choose to proceed with co-plaintiffs.

Development of a Lawsuit: The following charts attempt to give a visual depiction of how a lawsuit might develop and become more complicated at the joinder rules are employed.

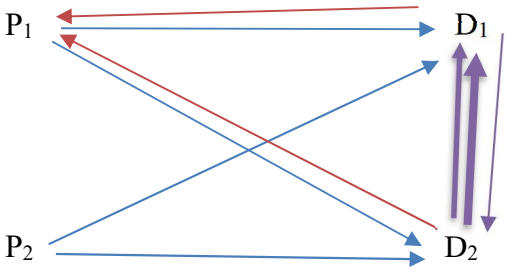
P1 and P2 bring claims against D1 and D2. P1's claims against D1 are unrelated to each other, but the first arises from the same transaction or occurrence as the claims against D2. P2's claims against D1 and D2 will require resolution of "questions of law or fact" related to P1's first claim against D1.



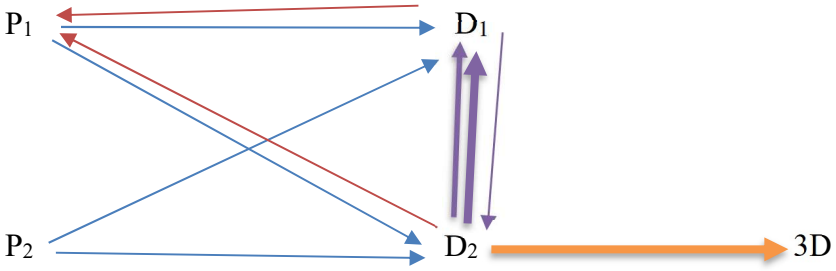
D1 and D2 bring counterclaims against P1. D1's claim is related and hence mandatory, D2s is completely unrelated and hence permissive.



D2 brings cross claims against D1. One arises from the same transaction or occurrence; one does not. D1 counterclaims back against D2 with a claim unrelated to either of D2's claims.



D2 now impleads 3D, claiming that if he owes money to P2, 3D owes money to him.



Remember that for each claim you must establish subject matter jurisdiction, and will be expected to do so in any exam we give in this course. The applicability of venue and personal jurisdiction become murkier in practice, and we won't test on that.

Claims by Plaintiff. Rule 18(a) allows the plaintiff to bring "as many claims as it has" against any defendant. As we saw, the Rules do not require that additional claims be brought, but as noted we will see when we get to claim preclusion that the plaintiff effectively must assert or lose every claim that arises from the same circumstances. With regard to defendants, as we saw in the brief discussion of joinder of parties, the plaintiff is not quite so unconstrained, but Rule 20 is broad enough to allow the plaintiff to bring as defendants pretty much any defendant where there is a connection between the claims against that defendant and the other defendants in the case. The plaintiff is not required by either the Rules or any other doctrine to join any defendants so long as they are not the sort required under Rule 19, and as we will see the sort required under Rule 19 is a much smaller group than those who might also be liable. The plaintiff may also file claims against other plaintiffs as a cross claim so long as the initial crossclaim meets the relatedness test in Rule 13. Remember also that the plaintiff can turn into a third party defendant upon assertion of a counterclaim or crossclaims from other plaintiffs, and in that circumstance the rules applying to defendants apply to the plaintiff to the extent she is a defendant. Remember that for all claims the requirements of personal jurisdiction, venue, and subject matter jurisdiction must be met aside from the rules.

Claims by Defendant. The range of claims by a defendant is also quite broad. First, she must assert or lose mandatory counterclaims, and may assert permissive counterclaims. For all claims, subject matter jurisdiction must be established. Venue and personal jurisdiction are generally viewed as waived with regard to claims against the plaintiff, and we won't in this class look at the exceptional or theoretical case. The defendant may also assert crossclaims against other defendants so long as the first crossclaim asserted meets the relatedness test of Rule 13. Again, subject matter jurisdiction must be met. Cross claims are permissive, not mandatory,

although counterclaims to a crossclaim can be mandatory, same as other crossclaims. Defendants can also 'implead' third parties that it claims are liable to it if it is liable to the plaintiff. Remember that for each claim there must be a basis for federal subject matter jurisdiction.

Pro Mnemonic Tip. If the joinder device involved begins with a C (such counterclaim or crossclaim) it is between parties already in the case. If it begins with the letter I (such as impleader or intervention) it involves bringing a new party into the case.

Now we will consider the various rules one at a time.

Rule 13. Counterclaim and Crossclaim. Counterclaims come in two varieties – compulsory and permissive. In general, if a claim arises out of the transation or occurrence that underlies the plaintiff's claim, it is a compulsory counterclaim. The exceptions are if it is the subject of an action that predated the plaintiff's claim, if it requires adding a party over whom the court cannot get jurisdiction, or if the original claim was in rem or quasi in rem and the counterclaim would not be. The consequences of a counterclaim being compulsory are simple – if not brought, it cannot be brought in a different action. Permissive counterclaims are all counterclaims that are not mandatory.

Let's see how this works. Perry Plaintiff sues Don Defendo claiming a breach of contract relating to Plaintiff's of a million widgets to Defendo. Plaintiff claims that Defendo has only paid part of the purchase price. Defendo has two potential counterclaims. One would assert that the widgets were defective and that not only should Defendo not pay, but that he is entitled to get back the money he did pay plus special damages incurred because he was unable to deliver the widgets to his customers. The other arises from a sale of woodgets two years before, and which has no factual overlap with widget transaction. Whether or not Defendo likes the forum Plaintiff has selected, he must bring the widget counterclaim as a compulsory counterclaim. The other claim he may bring as a permissive counterclaim (and may choose to in order to consolidate his claims against Plaintiff or to increase his settlement leverage) or he can bring it in a separate court at a different time. What happens if Defendo fails to bring the widget claim as a compulsory counterclaim but files it in a different court? It will be dismissed because it should have been brought as a compulsory counterclaim.

Crossclaims are claims between two parties on the same side of the case – for example, between two plaintiffs or between two defendants. The first crossclaim requires a connection to the plaintiff's claims. It is allowed only "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." Once that claim is filed, however, Rule 18 kicks in and additional unrelated claims can be joined, and the party sued must respond with compulsory counterclaims and may respond with permissive counterclaims.

Rule 14. Third-Party Practice. Students often get confused about impleader. It is important to understand that impleader addresses a particular kind of situation, and does not provide a vehicle for bringing in all kinds of third parties, even if an argument can be made that they are the truly liable party. Look at the rule. It allows a defendant to bring in a defendant who "is or may be liable to it for all or part of the claim against it." That does not mean "may be liable instead." We saw an example of impleader in the *Asahi* case. The plaintiff sued the manufacturer of the motorcycle tire. The manufacturer of the motorcycle tire concluded – without necessarily admitting – that if there was a problem with the motorcycle tire, it was because the valve on the tire failed. The valve manufacturer was then impleaded on the theory that it should pay to the tire manufacturer all or part of the damages the tire manufacturer had to pay to the plaintiff. This was the part of the litigation that was still alive when the Supreme Court addressed the personal jurisdiction issues. Other common applications include guarantors and indemnitors (if I am held liable you promised to make me whole) and insurers. Note that the defendant/third party plaintiff does not have to admit liability to the original plaintiff but can bring in the third

party defendant in case liability is established. Note also the key point – it must involve liability by the third party defendant to the original defendant/third party plaintiff related to the original claim.,

So, imagine a case where Perry Plaintiff is suing Don Defendo for an automobile accident in which he claims Defendo veered onto the sidewalk and ran him down. Defendo now wishes to implead Arnie Insurer who has insured Defendo against claims relating to his automobile driving, but has refused to defend this lawsuit. That would be a proper impleader. On the other hand, assume that Defendo wishes to implead Danny Driver, based on a claim that it was Driver, not Defendo, who actually struck Plaintiff. That would not be a proper impleader. Do you see why?

Rule 17. Plaintiff and Defendant; Capacity; Public Officers. Under the common law, actions had to be brought in the name of the party holding the ultimate legal right. Assignees, for example, could not sue in their own names. This led to contortions in pleading, and was abandoned under the pleading codes and also in equity. This rule carries forward the choice by the codes and equity to look not at nominal holders of rights but at the party – such as an assignee – actually affected. The party actually holding the right should be the party in the caption asserting or defending the claim. We won't spend any more time on this rule.

Rule 18. Joinder of Claims. Rule 18(a) is very straightforward – so far as pleading goes, a plaintiff can bring any claim it has against a defendant. The same applies to those asserting counterclaims or crossclaims.

Rule 19. Required Joinder of Parties. Rule 19 can be difficult. A rule 19 situation arises when there is a potential party not joined in the lawsuit (Absentee) and someone argues that Absentee really, really needs to be part of the lawsuit. In a typical Rule 19 situation neither the plaintiff (who could have joined anyone who meets the standards of Rule 20, assuming SMJ) or Absentee (who could have intervened, assuming SMJ) really want Absentee to be in the lawsuit. Rule 19 first sets out a three part test. The test is of the either-or type, where meeting the standards of any one of the three parts of the test makes the Absentee a party to be joined if feasible. These tests are whether the party can give full relief without Absentee being joined, whether some interest of Absentee may be impaired if Absentee is not joined, or if failure to join Absentee can lead to multiple or inconsistent obligations (as in, an order from a different court ordering the defendant to do give to Party X an object that the first court might order the Defendant to give to Party Y).

Imagine that Student A brings a lawsuit to order Evil Professor to deliver to her the Magic Water Bottle of Shenzhen, which Evil Professor took from the desk of Student Absentee and which Absentee is known to claim ownership of. Would Absentee's interest be impaired if the court orders the bottle delivered to Student A? Possibly. Might Evil Professor face inconsistent obligations if in a different suit Absentee obtains an order directing the that water bottle be delivered to her? Absolutely.

The first part is the easy part. Now let's assume that the party to be joined cannot be joined – there is no personal jurisdiction or venue or inclusion of Absentee would destroy subject matter jurisdiction. The question then is whether to dismiss the lawsuit or to proceed without Absentee. The rule sets out a four part test to help the court work through that issue. We will read a case applying that rule so hold tight.

Rule 20. Permissive Joinder of Parties. As the name of the rule suggests, Rule 20 allows but does not require joinder of parties. The test is two part – same transaction or occurrence plus a common question of law or fact. As noted above, for a number of reasons parties might choose not to join all permissible parties. For example, a defendant who would destroy federal subject matter jurisdiction can be left out. Similarly, a defendant who has no money may not be joined because the plaintiff does not want a verdict returned against a judgment proof defendant. Similar logic applies to co-plaintiffs. A plaintiff might want a very sympathetic co-plaintiff to be part of the same lawsuit; on the other hand, plaintiff might not want to be joined in a lawsuit with a co-plaintiff the presence of whom will in some way undercut the narrative plaintiff wants to present.

While plaintiff gets to choose whom to join, the plaintiff's choice is not always the final word. First, in some cases, parties can be brought in under Rule 19. In addition, under Rule 24 parties can choose to join the lawsuit as defendants or plaintiffs through intervention.

Rule 21. Misjoinder and Nonjoinder of Parties. Rule 21 is another example of the Federal Rules trying to allow flexibility, and avoiding having results dictated by formalities rather than the ultimate merits. Under the common law, mistakes in joinder could lead to dismissal of a suit. Rule 21 gives the court power to deal flexibly so as to get the right array of parties before the court. As with Rule 17, we will not spend any more time on this.

Rule 22. Interpleader. Imagine you are walking down the street and there it is in front of you - The Magic Water Bottle of Shenzhen. In order to make sure it is not accidentally destroyed or discarded, you pick it up and carry it home. That said, you know it is not yours and you are happy to deliver it to its rightful owner. Imagine, though, that the issue of the rightful owner is not self-evident. Professor Evil steps forward and claims he owns it because he took it from Student Aas punishment for the student not paying attention in class. Student A in turn asserts that Professor Evil had no right to take it and she is the true owner because Student B had given it to her when they were dating. Now imagine that Student B shows up and says that he had loaned, not given, the Magic Water Bottle of Shenzhen to Student A and demands that it be returned to him. What are you to do? Alternatively, imagine InsurCo has contractually agreed to provide $1,000,000 in insurance to BigCo. Now imagine that a typhoon hits the factory of BigCo, causing a release of BigCo's latest production run of AI powered robot watchdogs, who run loose in the town biting people, leading to well more than $1,000,000 in damages.BigCo also has 1,000,000 in damages to its plant. InsurCo agrees that it owes the $1,000,000 under the policy, but doesn't know who should get it.

In both cases, interpleader is the answer. The asset is placed in the custody of the court, and an interpleader action is used to determine who gets it.

Interpleader can get complicated because it comes in both statutory and a Federal Rules version. For our purposes, it's enough that you know that this kind of procedural option exists; we will not spend time examing the fine points of how it works.

Rule 24. Intervention. Think back to our discussion under Rule 19. What if, instead of being forced to join the lawsuit, Absentee hears about it and wants to join? Rule 24 provides the means. Intervention as of right resembles Rule 19 I some respects. Setting aside intervention based on a statute, a party may intervene as of right when "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." If that fails, a party may intervene with the permission of the court. Note how permissive Rule 24 is. If the court approves, it only takes one "common question of law or fact" for intervention to be proper.

6.3 M.K. v. Tenet

M.K. et al., Plaintiffs, v. George TENET, Director, Central Intelligence Agency, et al., Defendants.

No. CIV.A. 99-0095(RMU).

United States District Court, District of Columbia.

July 30, 2002.

*135 *MEMORANDUM OPINION*

Granting the Plaintiffs' Motion to Amend the Complaint; Denying the Defendants' Motion to Sever

URBINA, District Judge.

I. INTRODUCTION

Employees of the United States Central Intelligence Agency ("CIA") brought this as-yet-uncertified class action against that agency, that agency's director, George Tenet, and 30 unnamed "John and Jane Does" (collectively "the defendants"). In a four-count amended complaint, six plaintiffs allege that the CIA violated the Privacy Act of 1974, as amended, 5 U.S.C. § 552a ("Privacy Act"), and several of their constitutional rights. In a proposed second amended complaint, which is a subject of this memorandum opinion, 15 plaintiffs altogether[1] allege that the CIA obstructs the plaintiffs' efforts to obtain assistance of counsel, thereby causing an invasion of privacy among other alleged violations of the Constitution. Additionally, the proposed second amended complaint states that beginning in 1997, the defendants' policy and practice associated with the alleged obstruction of counsel violates the Privacy Act. Furthermore, the plaintiffs claim that the defendants' alleged practice of obstruction of counsel violates Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000 *et seq* ("Title VII"). Before the court is the plaintiffs' motion to amend the complaint with their proposed second amended complaint pursuant to Federal Rule of Civil Procedure 15, and the defendants' motion to sever the claims of the six existing plaintiffs pursuant to Federal Rule of Civil Procedure 21. After consideration of the parties' submissions and the relevant law, the court grants the plaintiffs' motion to amend the complaint and denies the defendants' motion to sever.

II. BACKGROUND

A. Factual Background

On January 13, 1999, plaintiffs M.K. and Evelyn M. Conway filed the complaint initiating the present action. On April 12, 1999, the plaintiffs filed an amended complaint adding M.D.E., R.B., Grace Tilden, Vivian Green, and George D. Mitford as plaintiffs.[2] By order dated August 4, 1999, the court approved the voluntary dismissal without prejudice of plaintiff Green's claims. Order dated August 4, 1999. By order dated March 3, 2000, the court approved the voluntary dismissal without prejudice of plaintiff M.D.E.'s claims. Order dated March 3, 2000. On November 30, 2001, the plaintiffs filed a proposed second amended complaint adding *136J.T., J.B., C.B., P.C., P.C.I., C. Lynn, Nathan (P), Elaine Livingston (P), and Betty E. Ya-les (P) as nine new plaintiffs.[3] Second Am. Compl. ("2d Am. Compl") at 2 n. 2. The court identifies the six existing plaintiffs as M.K., Conway, Tilden, R.B., C.T., and Mitford. Beginning in 1997 and continuing to the present, the plaintiffs claim that the defendants' acts and omissions in denying the plaintiffs access to effective assistance of counsel violate the plaintiffs' rights under the First, Fourth, Fifth, and Ninth Amendments of the United States Constitution, the Privacy Act, and Title VII.2d Am. Compl. 1111 2-5, 444. Specifically, the nine new plaintiffs, in addition to the six existing plaintiffs, allege in the second amended complaint that the defendants' September 4, 1998 notice entitled "Access to Agency Facilities, Information, and Personnel by Private Attorneys and Other Personal Representatives" deprives the plaintiffs' counsel access to "official information" pertaining to the plaintiffs' employment matters. *Id.* 1123. The defendants' invocation of the September 4, 1998 notice has allegedly resulted in a denial of the plaintiffs' access to CIA documents, policies, procedures, and regulations, thereby preventing counsel from effectively advising the plaintiffs of their rights. *Id.* The plaintiffs claim that the defendants have "willfully and intentionally failed to maintain accurate, timely, and complete records pertaining to the plaintiffs in their personnel, security, and medical files so as to ensure fairness to [the] plaintiffs, thus failing to comply with 5

U.S.C. § 552a(e)(5) [of the Privacy Act]." Am. Compl. 11116. What follows are the six existing plaintiffs' factual allegations relating to the inaccuracy of the records in question.

Plaintiff M.K. complains of a letter of reprimand placed in her personnel file in April 1997, which concerns her responsibility for the loss of top-secret information contained on laptop computers sold at an auction. *Id.* 111115, 116a. Plaintiff Conway complains of a finding by the CIA Human Resources Staff or Personnel Evaluation Board concerning her ineligibility for foreign assignment. *Id.* HH23, 116b. Plaintiff Conway additionally avers that the CIA notified her of this finding in March 1997. *Id.* 1123.

Plaintiff C.T. complains of a Board of Inquiry determination that she was not qualified for the position she held with the CIA. *Id.* H1167, 116e. This Board of Inquiry convened after "early 1998." *Id.* 111166-67. Plaintiff Mitford complains of receiving two negative Performance Appraisal Reports and two negative "spot reports" on unspecified dates in 1997, allegedly based on false information. *Id.* 111181, 116g. Plaintiff R.B. complains of inaccurate counter-intelligence and polygraph information contained in his file. *Id.* H 116f. Plaintiff R.B.'s last polygraph exam took place in February 1996. *Id.* H 76. Plaintiff Tilden makes no allegations relating to Count IV of the amended complaint ('Violation of the Privacy Act").

B. Procedural History

On March 24, 1999, the defendants filed a motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1), (2), (3), and (6). On March 23, 2000, this court issued a Memorandum Opinion and supplemental order granting in part and denying in part the defendants' motion to dismiss. *M.K v. Tenet,* 99 F.Supp.2d 12 (D.D.C.2000); Order dated Mar. 23, 2000. On April 20, 2001, the defendants filed a "motion for reconsideration" of that ruling pursuant to Federal Rule of Civil Procedure 54(b), seeking to dismiss the plaintiffs' remaining due process and Privacy Act claims. On November 30, 2001, the plaintiffs filed a motion for leave to file the second amended complaint along with the proposed second amended complaint. On December 3, 2001, this court issued a Memorandum Opinion and supplemental order granting in part and denying in part the defendants' motion for reconsideration under Rule 54(b). *M.K v. Tenet,* 196 F.Supp.2d 8 (D.D.C.2001); Order dated Dec. 3, 2001. On December 4, 2001, this court set out the parties' filing deadlines in its "Initial Scheduling and Procedures Order." Order dated Dec. 4, 2001. On January 2, 2002, the defendants filed their instant motion to sever the claims of the six existing plaintiffs pursuant to Federal Rule of Civil Procedure 21. On *137March 6, 2002, the plaintiffs filed a certificate of notification informing the CIA and the court of the 30 Doe defendants' identities. For the reasons that follow, the court grants the plaintiffs' motion to amend the complaint and denies the defendants' motion to sever.

III. ANALYSIS

A. Legal Standard for a Motion to Amend

Federal Rule of Civil Procedure 15(a) provides that a "party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served____" Fed. R. Civ. P. 15(a). Once a responsive pleading is filed, "a party may amend the party's pleading only by leave of the court or by written consent of the adverse party; and leave shall be freely given when justice so requires." *Id.; see also Foman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). The D.C. Circuit has held that for a trial court to deny leave to amend is an abuse of discretion unless the court provides a sufficiently compelling reason, such as "undue delay, bad faith, or dilatory motivef,] ... repeated failure to cure deficiencies by [previous]

amendments [or] futility of amendment." *Firestone v. Firestone,* 76 F.3d 1205, 1208 (D.C.Cir.1996) (quoting *Foman,* 371 U.S. at 182, 83 S.Ct. 227). The court may also deny leave to amend the complaint if it would cause undue prejudice to the opposing party. *Foman,* 371 U.S. at 182, 83 S.Ct. 227. In sum, a district court has wide discretion in granting leave to amend the complaint.

A court may deny a motion to amend the complaint as futile when the proposed complaint would not survive a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss. *James Madison Ltd. v. Ludwig,* 82 F.3d 1085, 1099 (D.C.Cir.1996) (internal citations omitted). When a court denies a motion to amend a complaint, the court must base its ruling on a valid ground and provide an explanation. *Id.* "An amendment is futile if it merely restates the same facts as the original complaint in different terms, reasserts a claim on which the court previously ruled, fails to state a legal theory, or could not withstand a motion to dismiss." 3 Moore's Federal Practice § 15.15[3] (3d ed.2000).

B. Legal Standard for Severance

Claims against different parties can be severed for trial or other proceedings under Federal Rules of Civil Procedure 20(b), 21, and 42(b). *In re Vitamins Antitrust Litig.,* 2000 WL 1475705, at 16-17, 2000 U.S. Dist. LEXIS 7397, at * 74 (D.D.C.2000) (Hogan, J.). Specifically, Federal Rule of Civil Procedure 21 governs the misjoinder of claims. *Brereton v. Communications Satellite Corp.,* 116 F.R.D. 162 (D.D.C.1987) (Richey, J.) (holding that an appropriate remedy for mis-joinder is severance of claims brought by the improperly joined party). Rule 21 provides, in relevant part:

> Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

Fed. R. Crv. P. 21. In determining whether the parties are misjoined, the joinder standard of Federal Rule of Civil Procedure 20(a) applies. Rule 20(a) provides, in relevant part:

> All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in ■ respect of or arising out of the same transaction, occurrence or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action.

The purpose of Rule 20 is to promote trial convenience and expedite the final resolution of disputes, thereby preventing multiple lawsuits, extra expense to the parties, and loss of time to the court as well as the litigants appearing before it. *Anderson v. Francis I. duPont & Co.,* 291 F.Supp. 705, 711 (D.Minn.1968). The determination of a motion to sever is within the discretion of the trial court. *In re Nat'l Student Marketing Litig.,* 1981 WL 1617, at *10 (D.D.C.1981) *138(Parker, J.); *Bolling v. Mississippi Paper Co.,* 86 F.R.D. 6, 7 (N.D.Miss.1979).

There are two prerequisites for joinder under Rule 20(a): (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) a question of law or fact common to all of the parties must arise in the action. *Mosley v. Gen. Motors Corp.,* 497 F.2d 1330, 1333 (8th Cir.1974). "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." *Id.*

Additionally, "the court should consider whether an order under Rule 21 would prejudice any party, or would result in undue delay." *Id.; see also Brereton,* 116 F.R.D. at 163 (stating that Rule 21 must be read in conjunction with Rule 42(b), which allows the court to sever claims in order to avoid prejudice to any party). The court may also consider whether severance will result in less jury confusion. *Henderson v. AT & T Corp.,* 918 F.Supp. 1059, 1063 (S.D.Tex.1996) (directing in part that the claims of former employees from separate offices, which alleged various combinations of race, age, and national origin discrimination be severed because the claims were "highly individualized" and would be "extraordinarily confusing for the jury"); *but see In re Vitamins Antitrust Litig.,* 2000 WL 1475705, at 17, 2000 U.S. Dist. LEXIS 7397, at *75-76 (stating that courts "consistently deny motions to sever where [the] plaintiffs allege that [the] defendants have engaged in a common scheme or pattern of behavior" (citing *Brereton,* 116 F.R.D. at 164)).

C. The Court Grants the Plaintiffs' Motion to Amend the Complaint

The plaintiffs ask this court for leave to file their second amended complaint in order "to address deficiencies found by the [c]ourt and to avail themselves of favorable intervening precedent," referring to the D.C. Circuit's decision in *Jacobs v. Schiffer,* 204 F.3d 259 (D.C.Cir.2000).4 Pis.' Mot. at 2, 5. The plaintiffs state that the D.C. Circuit's decision in *Jacobs* supports the plaintiffs' claim that the defendants have violated the plaintiffs' First Amendment rights by not allowing the plaintiffs to disclose to their attorneys government documents that are available to the plaintiffs.5 *Jacobs,* 204 F.3d *139at 261; Pis.' Mot. at 5. Additionally, the plaintiffs seek to "address subsequent arguments raised by [the][d]efendants in their [m]otion for [reconsideration filed on April 20, 2001, and to add additional claims and [plaintiffs, all related through [the][d]efen-dants' pattern and practice of obstruction of counsel." Pis.' Mot. at 2. Also, the plaintiffs seek to expand their allegations of the defendants' violations of their right to effective assistance of counsel under the First Amendment to a "wide range of wrongful conduct," as compared to the "plaintiffs' initial allegations that the defendants merely refused to provide access to government documents." *Id.* at 5.

The defendants challenge the plaintiffs' proposed amendment asserting that the plaintiffs' "factually diverse" claims are unrelated to each other. Defs.' Opp'n at 1-2. Specifically, the defendants argue that "neither the existing six plaintiffs nor the proposed nine plaintiffs have alleged claims factually in common with one another." *Id.* According to the defendants, the "wide range of wrongful conduct" that the plaintiffs allege in their proposed second amended complaint arises out of "unique sets of facts and circumstances, involving completely different types of [a]gency actions, proceedings or personnel matters, such as employment terminations, revocations of security clearances, forced resignations, disciplinary proceedings, failure to obtain promotions ... and retaliation." *Id.* The plaintiffs' proposed second amended complaint, however, cites to numerous obstruction-of-counsel situations, including denying counsel access to requested CIA policies, procedures, and documents upon request. 2d Am. Compl. 111124-27, 36-37, 64. Additionally, the plaintiffs allege that when they requested the presence of counsel, the defendants failed to accommodate that request and attempted to restrict the plaintiffs' access to counsel. *Id.* HH59, 62, 65.

The defendants counter that they would suffer "undue prejudice" if the court grants the plaintiffs' motion to amend. Defs.' Opp'n at 6 (citing *Atchinson v. District of Columbia,* 73 F.3d 418, 425 (D.C.Cir.1996) (quoting *Foman,* 371 U.S. at 182, 83 S.Ct. 227)). The defendants further assert that the burden on the defendants "against fifteen substantially different sets of facts and

legal arguments in one case far outweighs any practical benefit that might accrue from considering" the eases of the six existing plaintiffs and the nine new plaintiffs. *Id.*

1. The Plaintiffs Have Not Repeatedly Failed to Cure Deficiencies by Previous Amendments

The plaintiffs seek leave to amend their complaint to address prior deficiencies[6] named by the court in its March 2000 Memorandum Opinion and to avail themselves of intervening legal precedent. Pis.' Mot. at 5. As such, the court deems these justifications reasonable and concludes that the deficiencies that the plaintiffs seek to address are not "repeated failure[s] to cure deficiencies by amendments previously allowed." *Foman,* 371 U.S. at 182, 83 S.Ct. 227.

In determining whether undue prejudice will result, however, the D.C. Circuit has suggested that the court consider whether amendment of a complaint would require additional discovery. *Atchinson,* 73 F.3d at 426 (citing *Alley v. Resolution Trust Corp.,* 984 F.2d 1201, 1208 (D.C.Cir.1993) (remanding the case for the district court to allow amendment where the plaintiffs assured the court of appeals that additional discovery would be unnecessary)). If additional discovery will result, then this factor may weigh negatively on the plaintiffs' instant motion to *140amend the complaint. *Id.* The plaintiffs point out that the ease at bar has yet to enter the discovery stage. Pis.' Reply at 1-2. The defendants, however, fear the potential burdens associated with excessive discovery and argue that the "myriad claims presented by each plaintiff and the number of defendants" in the second amended complaint would make it "incredibly burdensome to prepare an answer, conduct discovery, or file a dis-positive motion." Defs.' Opp'n at 26. Furthermore, the defendants argue that "discovery in a case that essentially challenges and finds fault with nearly every [ajgency proceeding and practice would be unmanageable, particularly where the business of the defendant is national security and intelligence gathering." *Id.* at 28. But the defendants misconstrue the additional discovery factor as one that discourages discovery altogether. In a ease such as this in which discovery has yet to occur, it would defy logic to deny the plaintiffs an opportunity to amend the complaint on the basis that additional discovery will result. While it is conceivable that a great deal of discovery may result from the addition of new claims, 30 defendants, and nine plaintiffs in the proposed second amended complaint, this does not constitute evidence of undue prejudice to deny the plaintiffs' instant motion. *Teachers Retirement Bd. v. Fluor Corp.,* 654 F.2d 843, 856 (2d Cir.1981) (stating that the plaintiffs did not unduly prejudice the defendants because the plaintiffs requested leave to amend when no trial date was set by the court and the defendants had not filed a motion for summary judgment).

2. The Plaintiffs' Proposed Second Amended Complaint Satisfies Rule 8's Requirements

The defendants challenge the plaintiffs' proposed second amended complaint under Federal Rule of Civil Procedure Rule 8, stating that the plaintiffs' pleading "is not a pleading [that] [the] defendants can reasonably answer or that can reasonably be expected to control discovery." Defs.' Opp'n at 26. In Atchinson, the D.C. Circuit stated that Rule 8(a)(2) requires that a complaint include "a short and plain statement of the claim showing that the pleader is entitled to relief." 73 F.3d at 421. Additionally, Rule 8(e) states that "each averment of a pleading shall be simple, concise, and direct" and further instructs courts to construe "all pleadings ... to do substantive justice." Fed. R. Civ. P. 8(e); *Atchinson,* 73 F.3d at 421. Accordingly, "under the Federal Rules, the purpose of pleading is simply to 'give the defendant fair notice of what the plaintiffs claim is and the grounds upon which it rests,' not to state in detail the facts underlying the complaint." *Id.* (citing *Conley v. Gibson,* 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); *Sinclair v. Kleindienst,* 711 F.2d 291, 293 (D.C.Cir.1983)).

In this case, the plaintiffs' first amended complaint was 44 pages in length compared to the plaintiffs' proposed 219-page second amended complaint. *Compare* Am. Compl. *to* 2d Am. Compl. Although the defendants insist that the court should strike the plaintiffs' proposed second amended complaint, the defendants fail to point out any specific Rule 8 violations. Defs.' Opp'n at 27. Stating only that the second amended complaint is a "detailed and lengthy pleading," the defendants also cite to several cases where courts have denied amendment on a variety of distinguishable grounds. *Id.* at 26-27 (citations omitted).7

The court concludes that the length of the plaintiffs' proposed second amended complaint is reasonable, considering that the plaintiffs have added new claims, new plaintiffs, and new defendants. In the plaintiffs' second amended complaint, each of the 15 plaintiffs' individual averments are approximately 12 pages in length, while the remainder of the second amended complaint requests several forms of relief and alleges common questions of law and fact. 2d Am.

*141Compl. til 14-555. While the plaintiffs certainly could "state [in less] detail the facts underlying" their claims, the court notes that most of the individual paragraphs of then-proposed second amended complaint are "simple, concise, and direct." Fed. R. Civ. P. 8(e); *Atchinson,* 73 F.3d at 421. For example, in stating facts to construe her privacy act claim, plaintiff Tilden states in the second amended complaint that:

> [o]n or about August 8, 2000, [p]laintiff Tilden reviewed her CIA Office of Medical Services ("OMS") file and first learned that it omit[t]ed a favorable psychological evaluation performed on her in 1993, which determined [that] she was fit for overseas assignment. Upon inquiry, OMS advised her to examine her medical file to locate the psychological evaluation.

2d Am. Compl. H157. Moreover, the court follows Rule 8(e)'s mandate that courts must construe "all pleadings ... to do substantive justice." Fed. R. Civ. P. 8(e); *Atchinson,* 73 F.3d at 421. In doing so, the court determines that there is no basis for the defendants' Rule 8 challenge.

Indeed, to bar the plaintiffs from amending their complaint would contravene Rule 15(a)'s underlying policy of granting leave to amend freely as justice requires. *Foman,* 371 U.S. at 182, 83 S.Ct. 227. This is not to say that in every instance, the court must allow the requested amendment, but to conclude otherwise in this case would positively bar the plaintiffs from asserting claims that may prove meritorious. Besides, as stated earlier, the case has yet to enter the discovery phase, which distinguishes this case from other cases where amendment is sought after discovery has started or closed. *Atchinson,* 73 F.3d at 426 (citing *Williamsburg Wax Museum v. Historic Figures, Inc.,* 810 F.2d 243, 247-48 (D.C.Cir.1987) (affirming a district court's denial of leave to amend more than seven years after the filing of the initial complaint because new discovery was necessary)); *Alley,* 984 F.2d at 1208.

D. The Court Denies the Defendants' Motion to Sever the Claims of the Six Existing Plaintiffs

The court now addresses the defendants' instant motion to sever. In the defendants' view, the plaintiffs' obstruction-of-counsel claim consists of "a series of unrelated, isolated grievances, unique to each plaintiff, each of which would have to be decided on its own set of law and facts, and each potentially presenting a 'novel' constitutional claim." Defs.' Reply at 1 (quoting *M.K.,* 99 F.Supp.2d at 30). Thus, the defendants ask this court to sever the claims of the six existing plaintiffs8 under Federal Rule of Civil Procedure 21. Defs.' Mot. at 5, 8. By the same token, the defendants ask the court to deny the plaintiffs' proposed Rule 20 join-der of the nine new plaintiffs and the 30 new "Doe" defendants. Defs.' Mot. at 3.

The plaintiffs, however, argue that the court should not sever the six existing plaintiffs because both prongs of Rule 20(a)'s join-der requirement are satisfied. The court need not extensively address the joinder of the six existing plaintiffs' new claims because the court is convinced that under the unrestricted joinder provision of Federal Rule of Civil Procedure 18, such joinder of new claims is possible. 3 Moore's Federal Practice § 21.02[1] (3d ed.2000). To wit, it suffices to state that "Rule 18 permits the claimant to join all claims the claimant may have against the defendant regardless of transactional relatedness." *Id.* As such, the court focuses its analysis on the Rule 20 joinder issue raised by the defendants.

The plaintiffs cite to the first prong of Rule 20(a), also known as the "transactional test," and argue that the defendants' acts and omissions pertaining to the plaintiffs' obstruction-of-counsel claims are "logically related" events that the court can regard as "arising out of the same transaction, occurrence or series of transactions or occurrences." Fed. R. Civ. P. 20(a); Pls.' Reply at 10 (quoting *Mosley,* 497 F.2d at 1333). In *142citing to *Mosley,* the plaintiffs assert that "all 'logically related' events entitling a person to institute a legal action against another generally are regarded as comprising a transaction or occurrence." *Mosley,* 497 F.2d at 1330 (citing 7 C. Wright, Federal Practice & Procedure § 1653 at 270 (1972 ed.)); Pis.' Reply at 15.

The court agrees with the plaintiffs' assertion that "logically related" events may consist of an alleged "consistent pattern of ... obstruction of security-cleared counsel by [the] [defendants." 2d Am. Compl. 11 430. Specifically, each of the existing plaintiffs allege that they were injured by the defendants through employment-related matters, such as retaliation, discrimination, and the denial of promotions and overseas assignments. 2d Am. Compl. ITU 36-37, 64-65, 129-30, 132-33, 140, 142,148-49, 154,156, 176-77, 190, 200, 209-12, 221, 224, 229-30, 232. After each employment dispute began, each of the plaintiffs or the plaintiffs' counsel sought access to employee and agency records. *Id.* The defendants, however, denied and continue to deny the plaintiffs and/or their counsel access to the plaintiffs' requested information. *Id.* As such, without this relevant information, the plaintiffs cannot effectively prepare or submit administrative complaints to the defendants or attempt to seek legal recourse through the applicable Title VII discrimination, Privacy Act, or First, Fifth, and Seventh Amendment claims. *Id.* The court concludes that the alleged repeated pattern of obstruction of counsel by the defendants against the plaintiffs is "logically related" as "a series of transactions or occurrences" that establishes an overall pattern of policies and practices aimed at denying effective assistance of counsel to the plaintiffs. *Mosley,* 497 F.2d at 1331,1333; Pis.' Reply at 16. In this case, each plaintiff alleges that the defendants' policy and practice of obstruction of counsel has damaged the plaintiffs. *Id.* Further, each plaintiff requests declaratory and injunctive relief. 2d Am. Compl. 11465. Thus, the court determines that each plaintiff in this case has satisfied the first prong of Rule 20(a). Fed. R. Civ. P. 20(a); *see also Mosley,* 497 F.2d at 1331, 1333.

Turning to the second prong of Rule 20(a), the plaintiffs aver that each of their claims are related by a common question of law or fact. FED. R. CIV. P. 20(a); Pis.' Reply at 15. Specifically, one question of law or fact that is common to each of the six existing plaintiffs is whether the defendants' September 4, 1998 notice restricting the plaintiffs' counsel from accessing records intruded on the plaintiffs' substantial interest in freely discussing their legal rights with their attorneys. *Jacobs,* 204 F.3d at 265 (quoting *Martin,* 686 F.2d at 32); 2d Am. Compl. ¶ 23. Indeed, the question of law or fact that is common to all may be whether the "defendants have engaged in a common scheme or pattern of behavior" that effectively denies the plaintiffs' legal right to discuss their claims with their counsel. Fed. R. Civ. P. 20(a); *In re Vitamins Antitrust Litig.,* 2000 WL 1475705, at 17, 2000 U.S. Dist. LEXIS 7397, at *75-76; *Brereton,* 116 F.R.D. at 164. The plaintiffs also allege that the defendants' policy or practice of obstruction of counsel "is implemented through [a] concert of action among CIA management and the Doe

Defendants," who are now named in the second amended complaint. Pis.' Reply at 16; 2d Am. Compl. 1111547-52. In light of the aforementioned common questions of law and fact, the court concludes that the plaintiffs meet the second prong of Rule 20(a). Fed. R. Civ. P. 20(a).

The court need not stop here in its Rule 20(a) analysis. Indeed, it appears that there exists a further basis supporting the plaintiffs' position challenging severance; Each plaintiff alleges common claims under the Privacy Act. Pis.' Reply at 22. Specifically, the plaintiffs' second amended complaint alleges that the defendants "maintained records about the plaintiffs in unauthorized systems of records in violation of § 552a(e)(4) of the Privacy Act" and that the defendants "failed to employ proper physical safeguards for records in violation of § 552a(e)(10) of the Privacy Act." *Id.;* 2d Am. Compl. HH 472, 477. The plaintiffs also allege that the defendants wrongfully denied the plaintiffs and plaintiffs' counsel access to records in violation of § 552a(d)(l) of the Privacy Act and "illegally maintained specific records describing their First Amendment activities in violation of § 552a(e)(7) of the Privacy Act." 2d Am. *143Compl. 1111444, 489, 508-17; Pis.' Reply at 22. Furthermore, the plaintiffs' first amended complaint contains similar allegations. Through their alleged Privacy Act violations, the plaintiffs are united by yet another "question of law or fact" that is common to each of them. FED. R. CIV. P. 20(a). Accordingly, the court concludes that the plaintiffs satisfy the second prong of Rule 20(a) and, thus, the court denies the defendants' motion to sever.

On a final note, in denying the defendants' motion to sever, the court defers to the policy underlying Rule 20, which is to promote trial convenience, expedite the final determination of disputes, and prevent multiple lawsuits. *Mosley,* 497 F.2d at 1332. Indeed, the Supreme Court addressed this important policy in *United Mine Workers of America v. Gibbs,* 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966), stating that "[ujnder 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." *Id.* at 724, 86 S.Ct. 1130. In accordance with *Gibbs,* the court believes that the joinder or non-severance of the six existing plaintiffs and their new claims under Rule 20(a) will promote trial convenience, expedite the final resolution of disputes, and act to prevent multiple lawsuits, extra expense to the parties, and loss of time to the court and the litigants in this case. *Gibbs,* 383 U.S. at 715, 86 S.Ct. 1130; *Anderson,* 291 F.Supp. at 711. For this added reason, the court denies the defendants' motion to sever.

IV. CONCLUSION

For all of the foregoing reasons, the court grants the plaintiffs' motion to amend and denies the defendants' motion to sever. An order directing the parties in a manner consistent with this Memorandum Opinion is separately and contemporaneously issued this *30th* day of July 2002.

ORDER

Granting the Plaintiffs' Motion to Amend the Complaint; Denying the Defendants' Motion to Sever

For the reasons stated in this court's Memorandum Opinion separately and eon-temporaneously issued this *30th* day of July 2002, it is

ORDERED that the plaintiffs' motion for leave to file the second amended complaint is GRANTED; and it is

FURTHER ORDERED that the defendants' motion to sever is DENIED; and it is

ORDERED that the defendants file a response to the plaintiffs' second amended complaint within 60 days from the date of this order.

SO ORDERED.

[…]

6.4 Smuck v. Hobson

Carl C. SMUCK, a Member of the Board of Education of the District of Columbia, Appellant, v. Julius W. HOBSON et al., Appellees. Carl F. HANSEN, Superintendent of Schools of the District of Columbia, Appellant, v. Julius W. HOBSON et al., Appellees. Nos. 21167, 21168.
United States Court of Appeals District of Columbia Circuit.
Argued June 26, 1968.
Decided Jan. 21, 1969.

[…]

BAZELON, Chief Judge, joined by LEVENTHAL and ROBINSON, Circuit Juáges, in Part I; and by McGOWAN, LEVENTHAL and ROBINSON, Circuit Judges, in Parts II, III, and IV:

These appeals challenge the findings of the trial court that the Board of Education has in a variety of ways violated the Constitution in administering the District of Columbia schools.1 Among the facts that distinguish this case from the normal grist of appellate courts is the absence of the Board of Education as an appellant. Instead, the would-be appellants are Dr. Carl F. Hansen, the resigned superintendent of District schools, who appeals in his former official capacity and as an individual; Carl C. Smuck, a member of the Board of^. Education, who appeals in that capacity; and the parents of certain school children who have attempted to intervene in order to register on appeal their "dissent" from the order below.

*177The school board's decision not to appeal inevitably adds a quality of artificiality to any proceedings in this Court. But the importance of the constitutional issues as stake requires an examination of whether these appellants should, despite the absence of the protagonist at trial, be given their day in a higher court. Moreover, our reluctance to review an order unchallenged by the principal defendant below is in some measure tempered by the fact that the present appointed school board has been superseded by a new Board of Education elected last fall.2 The most fundamental considerations demand that this new board should have the fullest discretion permitted by the Constitution to reshape educational policy within the District. This Court cannot ignore the importance of assuring that the new school board should not be strait jacketed by. an order not rooted in constitutional requirements. We conclude that the parents were prop-/ erly allowed to intervene of right in order to appeal those provisions of the decree which curtail the freedom of the school board to exercise its discretion in deciding upon educational policy.

Taking up the contentions advanced by the parents, our disposition is as follows: In Part II of this opinion we consider and reject certain procedural objections. In Part III we affirm on the merits those parts of the District Court's decree that relate to pupil bussing, optional zones and faculty integration. In Part IV we conclude that the District Court's rulings on the track system and on certain aspects of pupil assignment do not materially limit the discretion of the School Board, and that

accordingly the parents lack standing to challenge the factual and legal bases underlying these provisions of the decree — a disposition that imports no view by this Court on the merits of the objections tendered by the parents on these issues.

I. Standing to Appeal

The Board of Education, as a corollary of its decision to accept the order below, directed Dr. Hansen not to appeal. Nevertheless, after his resignation was submitted and accepted by the board, Dr. Hansen noted his appeal as Superintendent of Schools. Whatever standing he might have possessed to appeal as a named defendant in the original suit, however, disappeared when Dr. Hansen left his official position.3 Presumably because he was aware of this, he subsequently moved to intervene under Rule 24(a) of the Rules of Civil Procedure in order to appeal as an individual. Although the trial judge found several reasons why such intervention should be denied, the motion was granted "in order to give the Court of Appeals an opportunity to pass on the intervention questions raised here * * *."4 We agree with the reasoning of the trial court as to Dr. Hansen rather than with its result. The original decision was not a personal attack upon Dr. Hansen, nor did it bind him personally once he left office. And while it may or may not be true that but for the decision Dr. Hansen would still be Superintendent of Schools, the fact is that he did resign. He does not claim that a reversal or modification of the order by this Court would make his return to office likely. Consequently, the supposed impact of the decision upon his tenure is irrelevant insofar as an appeal is concerned, since a reversal would have no effect. Dr. Hansen thus has no "interest relating to the property or transaction which is the subject of the action" sufficient for Rule 24(a), and intervention is therefore unwarranted.

We also find that Mr. Smuck has no appealable interest as a member of the Board of Education. While he was in that capacity a named defendant, the *178Board of Education was undeniably the principal figure and could have been sued .alone as a collective entity. Appellant Smuck had a fair opportunity to participate in its defense, and in the decision not to appeal. Having done so, he has no separate interest as an individual in the litigation.5 The order directs the board to take certain actions. But since its decisions are made by vote as a collective whole, there is no apparent way in which Smuck as an individual could violate the decree and thereby become subject to enforcement proceedings.

The motion to intervene by the parents presents a more difficult problem requiring a correspondingly more detailed examination of the requirements for intervention of right. As amended in 1966, Rule 24(a) (2) permits such intervention

> when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Before its recent amendment Rule 24 (a) contained two subdivisions requiring the petitioner to be "bound by a judgment in the action" or "so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof." 6 As the trial judge pointed out in his decision to grant intervention to the parents, under the pre-amendment cases the task of defining what constitutes an "interest" was typically "subsumed in the questions of whether the petitioner would be bound or of what was the nature of his property interest." 7 The 1966 amendments were designed to eliminate the scissoring effect whereby a petitioner who could show "inadequate representation" was thereby thrust against the blade that he would therefore not be "bound by a judgment," and

to recognize the decisions which had construed "property" so broadly as to make surplusage of the adjective.8 In doing so, the amendments made the question of what constitutes an "interest" more visible without contributing an answer. The phrasing of Rule 24(a) (2) as amended parallels that of Rule 19(a) (2) concerning joinder. But the fact that the two rules are entwined does not imply that an "interest" for the purpose of one is precisely the same as for the other.9 The occasions upon which a petitioner should be allowed to intervene under Rule 24 are not necessarily limited to those situations when the trial court should compel him to become a party under Rule 19. And while the division of Rule 24(a) and (b) into "Intervention of Right" and "Permissible Intervention" might superficially suggest that only the latter involves an exercise of discretion by the court, the contrary is clearly the case.10

The effort to extract substance from the conclusory phrase "interest" or "le-v gaily protectable interest" is of limited promise. Parents unquestionably have a sufficient "interest" in the education of their children to justify the initiation of a lawsuit in appropriate circumstances*17911, as indeed was the case for the plaintiff-appellee parents here. But in the context of intervention *j* the question is not whether a lawsuit should be begun, but whether already initiated litigation should be extended to include additional parties.) The 1966 amendments to Rule 24(a) have facilitated this, the true inquiry, by eliminating the temptation or need for tangential expeditions in search of "property" or someone "bound by a judgment." It would be unfortunate to allow the inquiry to be led once again astray by a myopic fixation upon "interest." Rather, as Judge Leventhal recently concluded for this Court, "[A] more instructive approach is to let our construction be guided by the policies behind the 'interest' requirement. * * * [T]he 'interest' test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process."12

The decision^ whether intervention of right is warranted thus involves an accommodation between two potentially conflicting *goalsjJ~"lo* achieve judicial v economies of scale by resolving related issues in a single lawsuit, ándito prevent the single lawsuit from becoming fruitlessly complex or unending. Since this •task will depend upon the contours of the particular controversy, general rules and past decisions cannot provide *uni-"* formly dependable guides.13 The Supreme Court, in its only full-dress examination of Rule 24(a) since the 1966 amendments, found that a gas distributor was entitled to intervention of right although its only "interest" was the economic harm it claimed would follow from an allegedly inadequate plan for divestiture approved by the Government in an antitrust proceeding.14 While conceding that the Court's opinion granting intervention in Cascade Natural Gas Corp. v. El Paso Natural Gas Co. "is certainly susceptible of a very-, broad reading," the trial judge here would distinguish the decision on the ground that the petitioner "did show a strong, direct economic interest, for the new company [to be created by divestiture] would be its sole supplier."15 Yet while it is undoubtedly true that *"Cascade* should not be read as a carte blanche for intervention by anyone at any time," 16 there is no apparent reason why an "economic interest" should always be necessary to justify intervention. The goal of "disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process" may in certain circumstances be met by allowing parents whose only "interest" is the education of their children to intervene. In determining whether such circumstances are present, the first requirement of Rule 24(a) (2), that of an "interest" in the transaction, may be a less useful point of departure than the second and third requirements, that the applicant may be impeded in protecting his interest by the action and that his interest is not adequately represented by others.

This does not imply that the need for an "interest" in the controversy should or can be read out of the rule. But the requirement should be viewed as a prerequisite rather than relied upon as a determinative criterion for intervention. *180«'If barriers are needed to limit extension of the right to intervene, the criteria , of practical harm to the applicant and the adequacy of representation by others are better suited to the task. If those requirements are met, the nature of his "interest" may play a role in determining the sort of intervention which should be allowed — whether, for example, he should be permitted to contest all issues, and whether he should enjoy all the prerogatives of a party litigant.17

Both courts and legislatures have recognized as appropriate the concern for their children's welfare which the parents here seek to protect by intervention.18 While the artificiality of an appeal without the Board of Education cannot be ignored, neither can the importance of the constitutional issues decided below. The relevance of substantial and unsettled questions of law has been recognized in allowing intervention to perfect an appeal.19 And this Court has noted repeatedly, "obviously tailored to fit ordinary civil litigation, [the provisions of Rule 24] require other than literal application in atypical cases."20 We conclude that the interests asserted by the intervenors are sufficient to justify an examination of whether the two remaining requirements for intervention are met.

Rule 24(a) as amended requires not that the applicant would be "bound" by a judgment in the action, but only that "disposition of the action may as a practical matter impair or impede his ability to protect that interest." In Nuesse v. Camp21 this Court examined a motion by a state commissioner of banks to intervene under the new Rule 24(a) in a suit brought by a state bank against the United States Comptroller of Currency. The plaintiff claimed that the defendant would violate the National Bank Act22 if he approved the application of a national bank to open a new branch near the plaintiff's office. The intervenor feared an interpretation of the statute which would stand as precedent in any later litigation he might initiate. The Court, agreeing, concluded that "under this new test *stare decisis* principles may in some cases supply the practical disadvantage that warrants intervention as of right."23 But if a decision interpreting a statute against the applicant's contentions would so handicap him in pursuing a subsequent lawsuit as to justify intervention, the appellants in this case would face a hopeless task in a later suit. The intervening parents assert that the Board of Education should be free tp make policy decisions concerning such matters as pupil and faculty assignments without the constraints imposed by the decision below. If allowed to intervene, they hope to show that the past practices condemned by the trial court did not violate the Constitution and hence that the decree should be vacated. Should succeed, the Board of Education wiHrl.fpfv' deed be freed of certain constraints upon its exercise of discretion in establishing educational policy. But if the right to intervene is denied and the decision below becomes final, there is no apparent way for the parents to pursue their in*181terests in a subsequent lawsuit. True, they could assert that the new policies adopted by the Board of Education in compliance with the order below are unconstitutional. But this would be a sterner. challenge than they would face as intervenors here,: although the new policies might not be constitutionally required, they might also not be unconstitutional. Indeed, the very premise for the intervenors' attack on the trial court decision is that school authorities can exercise wide discretion without encountering affirmative constitutional duties or negative prohibitions. While the scope of this discretion is uncertain, its existence is not: some policies may be constitutionally permissible, and hence immune to attack in a fresh lawsuit, which are not constitutionally required. Since this is so, the intervenors have borne their burden to show that their interests would "as a practical matter" be affected by a final disposition of this case without appeal.

The remaining requirement for intervention is that the applicant not be adequately represented by others. No question is raised here but that the Board of Education adequately represented the intervenors at the trial below; the issue rather whether the parents were '■fMPguately represented by the school decision not to appeal. The presumed good faith of the board in reaching this decision is not conclusive. "[B]ad faith is not always a prerequisite to intervention," 24 nor is it necessary that the interests of the intervenor and his putative champion already a party be "wholly 'adverse.' " 25 As the conditional wording of Rule 24(a) (2) suggests in permitting intervention "unless the applicant's interest is adequately represented by existing parties," "the burden [is] on those opposing intervention to show the adequacy of the existing representation." 26 In this case, the interests of the parents who wish to intervene in order to appeal do not coincide with those of the Board of Education. The school board represents all parents within the District. The intervening appellants may have more parochial interests centering upon the education of their own children. While they cannot of course ask the Board to favor their children unconstitutionally at the expense of others, they like other parents can seek the adoption of policies beneficial to their own children. Moreover, considerations of publicity, cost, and delay may not have the same weight for the parents as for the school board in the context of a decision to appeal. And the Board of Education, buffeted as it like other school boards is by conflicting public demands, may possibly have less interest in preserving its own untrammeled discretion than do the parents. It is not necessary to accuse the board of bad faith in deciding not to appeal or of a lack of vigor in defending the suit below in order to recognize that a restrictive court order may be a not wholly unwelcome haven.

The question of adequate representation when a motion is made for intervention to appeal is related to the question of whether the motion is timely. To a degree it may well be true that a "strong showing" is required to justify intervention after judgment.27 But by the same token a failure to appeal may be one factor in deciding whether representation by existing parties is adequate.28 As the opinion of the trial court in granting intervention demon*182strates, the leading cases in which intervention has been permitted following a judgment tend to involve unique situations.29 The very absence of any precedent involving the same or even closely analogous facts requires a close examination of all the circumstances of this case. We conclude that the inter-venor-appellants here have shown a sufficiently serious possibility that they were not adequately represented in the decision not to appeal.

Our holding that the appellants would be practically disadvantaged by a decision without appeal in this case and that they are not otherwise adequately represented necessitates a closer scrutiny of the precise nature of their interest and the scope of intervention that should accordingly be granted. The parents who seek to appeal do not come before this court to protect the good name of the Board of Education. Their interest is not to protect the board, or Dr. Hansen, from an unfair finding. Their asserted interest is rather the freedom of the school board — and particularly the new school board recently elected30 — to exercise the broadest discretion constitutionally permissible in deciding upon educational policies. Since this is so, their interest extends only to those parts of the order which can fairly be said to impose restraints upon the Board of Education. And because the school board is not a party to this appeal, review should be limited to those features of the order which limit the discretion of the old or new board.

II. Procedural Issues

~~Two additional procedural contentions raised by the appellants require attention. The first concerns the severance for trial by a three-judge district court under 28 U.S.C. § 2282 (1964) of the first cause .of action stated in the six-count complaint originally~~

filed by the plaintiff-appellees. The appellants argue that since a three-judge court was required for the first count, which challenged the constitutionality of the then-existing statutory regime by which the judges of the United *States* District Court appointed the members of the Board of Education,[31] the remaining five counts had likewise to be submitted to a three-judge court although they challenged not the statute but only the school board's policies. We find the argument without merit for the reasons outlined by the author of this opinion in denying a motion by the defendants below to expand the jurisdiction of the three-judge court to include counts two through six.[32] The appellants rely chiefly upon Florida Lime & Avocado Growers v. Jacobsen[33] and Zemel v. Rusk.[34] In both those cases, however, the Supreme Court interpreted all of the contentions raised to constitute attacks upon the statutes involved. Success on any score would in each case have prevented enforcement of the statute. In this case, on the other hand, counts two through six were directed only at policies of the Board of Education. The success of the plaintiff-appellees did not and could not call into question the authority of the school board to carry out the responsibilities entrusted to it by the underlying statute, which the three-judge court had meanwhile found constitutional in dismissing count one.[35]

The appellants also contend that the trial judge erred in failing to recuse himself in response to the motion for voluntary displacement filed by the defendants below on the fourteenth day of trial. The motion was supported by exhibits con*183sisting of an article by the trial judge dealing with legal remedies for de facto segregation,[36] an excerpt from the trial transcript purportedly showing that the trial judge had prejudged the merits of the defendants prospective motion for judgment, and articles and editorials in various newspapers and magazines commenting upon the supposed predilections of the trial judge in dealing with the questions of law involved in the case.

Even assuming that the motion satisfied the requirements for an affidavit of bias or prejudice under 28 U.S.C. § 144, (1964),[37] there is serious doubt that it was timely. The allegedly improper remarks from the bench — which were in any event of nugatory importance at most — had occurred more than two weeks before. The law review article had been published more than a year before. Since the defendants suggested no "good cause * * * for [their] failure to file it" at the commencement of trial, as the statute requires, we have small difficulty concluding that the trial judge acted properly in denying the motion when , made in the midst of a lengthy trial.[38]

III. Affirmance on the Merits of Rulings Relating to Optional Zones, Faculty Integration and Pupil Bussing

The trial court entered a seven-part decree at the conclusion of its lengthy opinion. Its provisions settle under five headings;

> (1) *General:* The defendants were "permanently enjoined from discriminating on the basis of racial or economic status in the operation of the District of Columbia school system;"
>
> (2) *Optional Zones:* The defendants were directed to abolish specified optional zones in which pupils could choose which of two schools they wished to attend.
>
> (3) *Faculty Integration:* The defendants were directed (a) to provide for substantial faculty integration in all District schools immediately, and (b) to file with the court a plan for full faculty integration in the future;
>
> (4) *Pupil Assignment:* The defendants were directed (a) to provide transportation for volunteering pupils from overcrowded schools east of Rock Creek Park to schools with excess capacity west of the park, and

(b) to submit to the court a long-range plan of pupil assignment to alleviate racial imbalance among District schools; and

(5) *Ability Grouping:* The defendants were directed to abolish the "track system." 39

The general requirement that the\ Board of Education not discriminate on racial or economic grounds is, of course, no more than declaratory of basic constitutional requirements. The school-board's freedom of discretion which the intervenor-appellants seek to protect is therefore not improperly impaired by that part of the order.

As for the optional zones, the trial court found on the basis of a case-by-case evaluation that they had been created in areas where changing residential patterns within the District resulted in white enclaves where normal application of the neighborhood school policy would assign white children to predominantly black schools. 40 These findings are not clearly erroneous, since the trial court's finding that discriminatory intent underlay these zones is supported by the record. 41 The elimination of these optional zones is therefore a clearly appropriate remedy for the segregation flowing from these optional zones. The *184Board of Education has filed a report of compliance, not yet acted upon by the trial court, stating that all optional zones, including some not mentioned in the opinion of the trial judge, have been abolished.

Those parts of the decree dealing with faculty integration also are premised upon a finding of discriminatory intent. Specifically, the trial court concluded that although black teachers were hired and promoted without bias, "an intent to segregate has played a role in one or more of the stages of teacher assignment." 42 Indeed, the appellants do not challenge the holding that the Boatfi of Education has an affirmative duty to integrate the faculty and administrative personnel of the District schools. 43 Their sole contention is that the "mandatory injunction" requiring compulsory reassignments of present teachers was improper. In so arguing the appellants rely on the belief of Dr. Hansen that such transfers would engender "resentment" among teachers, thereby aggravating the District's already severe problem in attracting qualified teachers, and the recommendation advanced in the task force study of District schools, commonly called the Passow Report, 44 that other devices such as recruitment of new teachers and voluntary transfers of existing teachers should be employed.

We do not read the opinion below to contain any such "mandatory injunction." The actual decree requires only substantial teacher integration immediately and a long-range plan for full faculty integration. In discussing the action that will be necessary to achieve integration, the opinion does note that in addition to such steps as color-conscious assignments of incoming teachers, "this court * * * has no doubt that a substantial reassignment of the present teachers, including tenured staff, will be mandatory." 45 Admittedly these words are ambiguous as to whether compulsory reassignments will at some future date be made mandatory by the court or whether the trial court simply believed that the school board in order to comply with the requirement of eventual full integration will be forced to make mandatory reassignments. But since the actual decree speaks only of integration, and in doing so carefully distinguishes between the need for substantial integration immediately and the long-term requirement for full integration, we believe that the ambiguity should be resolved in favor of the latter construction.

That being so, the words of the opinion reduce to a mere prediction which may be proved incorrect by the success of other tactics in achieving integration. We note that the school board has filed reports detailing the present progress toward faculty integration and its long-term plans to achieve integration. The long-term plan does not include mandatory reassignments, and has not been acted upon by the trial court. The school board has in that report outlined the difficulties of radically shuffling

present teachers about the District. In evaluating its arguments, we are confident that the trial judge will assign due weight to the proper considerations of teacher qualifications and the reluctance of teachers residing close to their present schools to travel long distances to a new assignment. Thus we do not construe the decree to preclude consideration of the plight, referred to in the *Passow Report,* *185of teachers who have previously performed at a satisfactory level in the school system but who do not have requisite ability and background for teaching disadvantaged students.46 At the same time, regardless of the opinions of Dr. Hansen and the authors of the *Pas-sow Report,* we point out the obvious: racial prejudice on the part of teachers, who are employees of the government, is not a valid justification for continued segregation.

In its most recent term the Supreme Court has made clear that at this late date the remedy for segregatory practices must be prompt. "The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*." 47 This does not preclude a proper regard for the administrative difficulties of transition to a new day. It does preclude procrastination rooted in racial feelings.

The trial court also ordered the Board of Education to provide transportation for volunteering children in overcrowded schools east of Eock Creek Park to schools with excess capacity west of the park and directed the board to file a long-term plan for pupil assignment "complying with the principles announced in the court's opinion." 48 In doing so the court specifically did not attack the neighborhood school policy in view of its wide use throughout the country and the .absence of "segregatory design" in its application in Washington 49 The trial judge did, however, find a notable inequality of resources and facilities between predominantly black schools and those with a greater admixture of whites.50 The court also examined in detail the repeated findings by the Supreme Court and others that racially segregated schools harm the black child.51

While suggesting that the continuing vestiges of unconstitutional faculty segregation might support the requirement of short-term pupil bussing,52 the trial court premised this part of its order on the finding that the school board had not shown that the cost of providing such transportation justified the denial of equal educational opportunity resulting from overcrowded and predominantly black schools.53 Since Dr. Hansen testified in favor of bussing at the pupil's expense to relieve overcrowding, the appellánts travel a fine line in arguing that the mere requirement for payment of transportation costs by the school board improperly restrains its freedom of discretion. Indeed, the appellants may well have conceded away their , argument in agreeing that overcrowded conditions in some schools cannot justify the failure of the Board of Education to provide kindergartens for all students if it provides them for any.54

Opinions may differ as to the source and magnitude of differences between the educational opportunities offered by various District schools. But when the differentiating factor is as clear as overcrowding versus excess capacity, we agree with the trial court that transportation to level out pupil density can fairly be required of the school board.

*186IV. Determination that District Court's Rulings in Long-Range Pupil Assignment and Track System Do Not Limit School Board's Discretion to Pursue Educational Goals and to Provide Ability Grouping and that Accordingly Parents Lack Standing to Challenge Underlying Factual and Legal Bases of These Provisions of the Decree

We conclude that the long-range plan of pupil assignment required by the order of the trial court does not trammel the discretion of the school board. The opinion does direct the board to consider such alternatives as educational parks and the Princeton plan.55 But in the absence of a more specific order this part of the directive is merely precatory. The demonstrated

inequalities among Washington schools justifies an order requiring the School Board to consider alternative policies; we cannot believe that the freedom of action the intervenor-appellants seek to protect for the Board of Education need include the freedom to stand pat without engaging in further re-evaluation of assignment policies.

The opinion of the trial court also states,

> Where because of the density of residential segregation or for other reasons children in certain areas, particularly the slums, are denied the benefits of an integrated education, the court will require that the plan include compensatory education sufficient at least to overcome the detriment of segregation and thus provide, as nearly as possible, equal educational opportunity to all schoolchildren.56

Even aside from the feelings of inferiority engendered by black schools, there is no doubt that education in a ghetto school can fatally limit a child's horizons and fail to prepare him for constructive participation in society. Residential patterns and the heavy concentration of black children in the District public schools may defy the best efforts of the Board of Education to achieve racially balanced schools while these factors persist57 The long run solution may lie in more broadly based school district extending--beyond.'.the borders of theJ District. But such a development is beyond the pale of judicial action. Appellants could have no cause to object to any efforts of the Board of Education to enlist the voluntary cooperation of other school districts. Similarly we cannot see that appellants would have cause, while we still have black schools within the District, or for that matter at any time, to complain about the making of special efforts to prepare disadvantaged students to find their place in a wider world. And we see no realistic basis for saying that the references by the District Court to the need for such efforts operates in fact to curtail the School Board's discretion.

What appellants seek is assurance that a neighborhood school approach may be maintained by the Board. The decree permits retention of the neighborhood school approach where it does not result in relative overcrowding or other inequality of facilities.

Any other comments in the opinion that may be taken as favoring abandonment of the neighborhood school approach have standing only as suggestions advanced for consideration by the Board. The Board has also received suggestions, in the *Passow Report,* for decentralization of the school program into subsystems, with eight community superintendents, and "that the schools be transformed into community schools, collecting and offering the variety of services and opportunities its neighborhood needs." We are not to be taken as approving or disapproving either of *187these general philosophies. On this appeal this Court is concerned only with the provisions of the decree containing orders that something be done or stop-péd — and it is our view that these provisions do not improperly encroach on the Board's statutory discretion.

The last provision of the decree below to be considered is the order that the "track system" be abolished. Behind that curt directive lies a welter of facts and conflicting opinions. In theory, the "track system" like any procedure for ability grouping sought to classify students according to their "ability," whether present or potential, and to provide the education best suited to the needs of each individual child. And since any such system is inevitably fallible, the procedure must make adequate provision for review and reassignments. Unfortunately, as the *Passow Report* concluded, "[T]he tracking system was as often observed in the breach as it was in the adherence to any set of basic tenets." 58 The trial court concluded that the excessively rigid separation of students in different classrooms made each track a largely self-contained world; that the education provided

in the lower tracks was so watered-down as to be more fairly described as warehousing than as remedial education; that an excessive reliance upon intelligence tests standardized to white middle-classed norms made initial classifications erratic and irrational in terms of the professed goals of the system; and that the schools slighted their duty to encourage students to "cross-track" in individual course selections and to review track assignments in order to make reassignments where initial error or later developments made this appropriate.59

The appellants challenge these findings as well as their constitutional significance if valid. And indeed it would be little less than amazing if such an extended analysis of this complex problem produced a limpid pool of unassailable facts. In some cases, as the words of the *Passow Report* suggest, the difficulty lies in the gulf that may separate theory and practice. Thus, the trial court accepted the "general proposition that tests are but one factor in programming students,"60 but went on to conclude that this single factor played a disproportionate role. A keystone of this analysis was the reasoning that while teachers play a major part in the assignment decision, their evaluations of the student will be markedly influenced by his reported test scores. This conviction is certainly shared by many, but, resting as it does in part on beliefs concerning human nature and the pressures of time which beset teachers like judges, the proposition cannot be demonstrated beyond cavil.

Another difficulty lurking in the fact-finding process is the absence of an accepted yardstick to measure the performance of an ability grouping system. In some cases statistics are ineluctably ambiguous in their import — the fact that only a small percentage of pupils are reassigned may indicate either general adequacy of initial assignments or inadequacy of review. Superintendent Hansen himself appreciated the importance of care in initial assignments and timely reevaluation. When funds became available the school administration improved the track system by providing for the study by a clinical psychologist, referred to by the District Court, of 1,272 students assigned or about to be assigned to the "special academic" or "basic" track. This study revealed almost two-thirds to have been improperly classified.61 The track system was duly changed so as to require that a psychologist participate prior to assignment *188of any child to the "basic" track. The track system, in short, was not static or frozen, but rather a program in flux, which underscores the reality that discontinuance of this system as it happened to exist at a moment in time was not coercive or inhibiting of the school board's discretion in the way feared by the appellants.

The *Passow Report* also made an exhaustive analysis of the operation of the "track system" and like the trial court criticized many aspects of it.62 This Court would face a difficult task were it necessary to stack each finding of the trial court against the comparable findings of the *Passow Report*. Indeed it may be that the District Court would have made different findings — though possibly it would have entered the same judgment — if the *Passow Report* had been published and made part of the record prior to the issuance of the findings instead of being added to the file and record by a supplementary order.

The decision of this case does not call on us to undertake any formidable survey or analysis. There are, indeed, a number of contentions we do not find it necessary to consider, and we think it appropriate to state so clearly, in order to obviate avoidable misunderstanding of the scope and purport of our ruling in this sensitive area. We do not find it necessary to resolve appellants' broad legal contentions.63 Nor do we find it necessary to rule on appellants' intermediate legal contentions.64 Certainly we do not find it necessary to plunge into a sea of factual contentions and difficult issues of educational policy, such as (a) considering the proper balance, in tailoring educational programs to the ability of the individual student, between the practical need to group children by measurement of presently demonstrated ability and the simultaneous need to assure all

students an opportunity to realize their educational potential, (b) considering to what extent verbal tests may be utilized, either as valid predictors of school success, or as indicators of the gaps in skills that must be filled if minority children are to emerge from poverty backgrounds and become effective participants in contemporary American life, and (c) considering to what extent verbal tests must be adjusted or supplemented in the light of available indicators of educational ability not dependent on existing verbal skills.

The intervenors come before this Court only to protect the freedom of the Board of Education to exercise the widest discretion in setting educational policies within the District. The order under challenge directs only that the "track system" be abolished. Moreover, in doing so, the trial court specifically "assumed that * * * [ability] grouping can be reasonably related to the purposes of public education."65 In compliance with the decree the "track system" as such has been abolished for more than a year. Both the opinion below and the *Passow Report* indicate that changes were continually being made in the process of ability grouping in District *189schools before the decision below was delivered.66 In light particularly of the detailed recommendations made in the *Passow Report* for change in procedures for ability grouping, we have little if any basis for assuming that the scope of the board's reevaluation would be materially affected by the judicial directive to abolish the "track system." We cannot believe, for example, that appellants would gainsay the simple proposition that a board whose attention was called to problems of the track system — whether by observations of the trial judge, quite apart from any decree, or by the *Passow Report,* or by other sources — could hardly be expected to sit by without making substantial efforts to upgrade the performance of those children whose present verbal skills were low but who had the innate capacity to respond to substantial efforts.

The ruling of the District Court permitting intervention to appellant-parents was prescient, especially in view of the spirit of the Supreme Court's ruling of Flast v. Cohen.67 The case is unique, there is a clear controversy, and illumination of the issues is in the public interest. The spirit of Flast v. Cohen likewise enjoins us to confine the issues considered on the merits upon this intervention to those issues that have a realistic nexus to the interests and concerns of the appellants as parents of school children, white and black. This Court's ruling is consistent with and not in derogation of the realistic and understandable concerns of the parents that there be adequate scope for ability groupings' in the administration of the school system. The District Court made it clear, and in any event this Court's opinion makes it clear, that the decree permits full scope for such ability grouping.

This Court's disposition is not to be taken as in any way indicating indifference to the expressed concern of appellants that the school board be able to exercise discretion in pursuing the goals of both quality and equality in educational opportunity without restraint attributable to an assertedly unlawful decree. The District Court's decree must be taken to refer to the "track system" as it existed at the time of the decree. It merits reiteration, and it is perfectly clear from the record, that neither the school board nor Superintendent Hansen were satisfied with the track system as it was or desired a freeze in its features. They were aware of the need for changes, and sought necessary funds. Of paramount importance is the fact that the school administration allocated substantial funds for commissioning the *Passow Report.* The significance of that report as a likely prime mover energizing other changes was apparent from the start and can hardly be controverted.

Therefore, the provision of the decree below directing abolition of the track system will not be modified. We conclude that this directive does not limit the discretion of the school board with full recognition of the need to permit the school board

latitude in fashioning and effectuating the remedies for the ills of the District school system. This need for according scope and flexibility is heightened by the circumstance that in 1968 the District of Columbia had its first opportunity to elect a school board. This is an area in which Congress has entrusted to the Board of Education — now an elected board — "the control of the public schools of the District of Columbia,"68 and provided that this board "shall determine all questions of general policy relating to the schools."69 As we have already noted appellants cannot realistically deny that the elected board will wish to address itself to all deficiencies in public education, and to take into account all perti*190nent analyses, whether in the comments of legislative staffs, the District Court's opinion, the *Passow Report,* perhaps future studies, etc. The problems are complex, and the board's exploration will undoubtedly be extensive. The exploration must be conducted consistently with constitutional requirements, and these in turn are dependent on manageable standards. The simple decree enjoining the "track system" does not interpose any realistic barrier to flexible school administration by a school board genuinely committed to attainment of more quality and equality of educational opportunity. If the District Court should impose an undue restraint on the school board's efforts to improve quality and equality of educational opportunity, such action would, of course, be subject to expeditious correction by this court.

As construed by this opinion, the order entered by the trial court does not require modification to meet any of the challenges that intervenors have standing to raise. However, in view of the change in composition of the school board following from the recent election, it seems appropriate at this juncture to enter an order of remand, rather than a simple *affirmance,* to make doubly clear that the plans heretofore filed in this cause by the prior board do not foreclose the new board from evolving new programs and orders pertaining to administration of the schools.

So ordered.

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6.5 Provident Tradesmens Bank & Trust Co. v. Patterson

PROVIDENT TRADESMENS BANK & TRUST CO., ADMINISTRATOR *v.* PATTERSON, ADMINISTRATOR, et al.

No. 28.

Argued November 6-7, 1967.

Decided January 29, 1968.

104*Avram O. Adler* argued the cause for petitioner. With him on the brief were *Abraham E. Freedman, J. Willi-son Smith* and *Bayard M. Graf.

***Norman Paul Harvey* argued the cause and filed a brief for respondents.**

Mr. Justice Harlan

delivered the opinion of the Court.

This controversy, involving in its present posture the dismissal of a declaratory judgment action for nonjoinder of an "indispensable" party, began nearly 10 years ago with a traffic accident. An automobile owned by Edward Dutcher, who was not present when the accident occurred, was being driven by Donald Cionci, to whom Dutcher had given the keys. John

Lynch and John Harris were passengers. The automobile crossed the median strip of the highway and collided with a truck being driven by Thomas Smith. Cionci, Lynch, and Smith were killed and Harris was severely injured.

Three tort actions were brought. Provident Trades-mens Bank, the administrator of the estate of passenger Lynch and petitioner here, sued the estate of the driver, Cionci, in a diversity action. Smith's administratrix, and Harris in person, each brought a state-court action against the estate of Cionci, Dutcher the owner, and the estate of Lynch. These Smith and Harris actions, for unknown reasons, have never gone to trial and are still pending. The Lynch action against Cionci's estate was settled for $50,000, which the estate of Cionci, being penniless, has never paid.

Dutcher, the owner of the automobile and a defendant in the as yet untried tort actions, had an automobile liability insurance policy with Lumbermens Mutual Casualty Company, a respondent here. That policy had an upper limit of $100,000 for all claims arising out of a *105single accident. This fund was potentially subject to two different sorts of claims by the tort plaintiffs. First, Dutcher himself might be held vicariously liable as Cionci's "principal"; the likelihood of such a judgment against Dutcher is a matter of considerable doubt and dispute. Second, the policy by its terms covered the direct liability of any person driving Dutcher's car with Dutcher's "permission."

The insurance company had declined, after notice, to defend in the tort action brought by Lynch's estate against the estate of Cionci, believing that Cionci had not had permission and hence was not covered by the policy. The facts allegedly were that Dutcher had entrusted his car to Cionci, but that Cionci had made a detour from the errand for which Dutcher allowed his car to be taken. The estate of Lynch, armed with its $50,000 liquidated claim against the estate of Cionci, brought the present diversity action for a declaration that Cionci's use of the car had been "with permission" of Dutcher. The only named defendants were the company and the estate of Cionci. The other two tort plaintiffs were joined as plaintiffs. Dutcher, a resident of the State of Pennsylvania as were all the plaintiffs, was not joined either as plaintiff or defendant. The failure to join him was not adverted to at the trial level.

The major question of law contested at trial was a state-law question. The District Court had ruled that, as a matter of the applicable (Pennsylvania) law, the driver of an automobile is presumed to have the permission of the owner. Hence, unless contrary evidence could be .introduced, the tort plaintiffs, now declaratory judgment plaintiffs, would be entitled to a directed verdict against the insurance company. The only possible contrary evidence was testimony by Dutcher as to restrictions he had imposed on Cionci's use of the automobile. The two estate plaintiffs claimed, however, that *106under the Pennsylvania "Dead Man Rule" Dutcher was incompetent to testify on this matter as against them. The District Court upheld this claim. It ruled that under Pennsylvania law Dutcher was incompetent to testify against an estate if he had an "adverse" interest to that of the estate. It found such adversity in Dutcher's potential need to call upon the insurance fund to pay judgments against himself, and his consequent interest in not having part or all of the fund used to pay judgments against Cionci. The District Court, therefore, directed verdicts in favor of the two estates. Dutcher was, however, allowed to testify as against the live plaintiff, Harris. The jury, nonetheless, found that Cionci had had permission, and hence awarded a verdict to Harris also.

Lumbermens appealed the judgment to the Court of Appeals for the Third Circuit, raising various state-law questions.1 The Court of Appeals did not reach any of these issues. Instead, after reargument *en banc,* it decided, 5-2, to reverse on two alternative grounds neither of which had been raised in the District Court or by the appellant.

The first of these grounds was that Dutcher was an indispensable party. The court held that the "adverse interests" that had rendered Dutcher incompetent to testify under the Pennsylvania Dead Man Rule also required him to be made a party. The court did not consider whether the fact that a verdict had already been rendered, without objection to the nonjoinder of Dutcher, affected the matter. Nor did it follow the provision of Rule 19 of the Federal Rules of Civil Procedure that findings of "indispensability" must be based on" *107stated pragmatic considerations. It held, to the contrary, that the right of a person who "may be affected" by the judgment to be joined is a "substantive" right, unaffected by the federal rules; that a trial court "may not proceed" in the absence of such a person; and that since Dutcher could not be joined as a defendant without destroying diversity jurisdiction the action had to be dismissed.

Since this ruling presented a serious challenge to the scope of the newly amended Rule 19, we granted cer-tiorari. 386 U. S. 940. Concluding that the inflexible approach adopted by the Court of Appeals in this case exemplifies the kind of reasoning that the Rule was designed to avoid, we reverse.

I.

The applicable parts of Rule 19 read as follows:

> "Rule 19. Joinder of Persons Needed for Just Adjudication
>
> "(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, *108or, in a proper case, an involuntary plaintiff. If. the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.
>
> "(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a) (l)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder."

We may assume, at the outset, that Dutcher falls within the category of persons who, under § (a), should be "joined if feasible." The action was for an adjudication of the validity of certain claims against a fund. Dutcher, faced with the possibility of judgments against him, had an interest in having the fund preserved to cover that potential liability. Hence there existed, when this case went to trial, at least the possibility that a judgment might impede Dutcher's ability to protect his interest, or lead to later relitigation by him.

The optimum solution, an adjudication of the permission question that would be binding on all interested persons, was not "feasible," however, for Dutcher could not be made a defendant without destroying diversity. Hence the problem was the one to which Rule 19 (b) *109appears to address itself: in the absence of a person who "should be joined if feasible," should the court dismiss the action or proceed without him? Since this problem emerged for the first time in the Court of Appeals, there were also two subsidiary questions. First, what was the effect, if any, of the failure of the defendants to raise the matter in the District Court? Second, what was the importance, if any, of the fact that a judgment, binding on the parties although not binding on Dutcher, had already been reached after extensive litigation? The three questions prove, on examination, to be interwoven.

We conclude, upon consideration of the record and applying the "equity and good conscience" test of Rule 19 (b), that the Court of Appeals erred in not allowing the judgment to stand.

Rule 19 (b) suggests four "interests" that must be examined in each case to determine whether, in equity and good conscience, the court should proceed without a party whose absence from the litigation is compelled.2 Each of these interests must, in this case, be viewed entirely from an appellate perspective since the matter of joinder was not considered in the trial court. First, the plaintiff has an interest in having a forum. Before the trial, the strength of this interest obviously depends upon whether a satisfactory alternative forum exists.3 *110On appeal, if the plaintiff has won, he has a strong additional interest in preserving his judgment. Second, the defendant may properly wish to avoid multiple litigation, or inconsistent relief, or sole responsibility for a liability he shares with another. After trial, however, if the defendant has failed to assert this interest, it is quite proper to consider it foreclosed.4

Third, there is the interest of the outsider whom it would have been desirable to join. Of course, since the outsider is not before the court, he cannot be bound by the judgment rendered. This means, however, only that a judgment is not res *judicata* as to, or legally enforceable against, a nonparty.5 It obviously does not mean either (a) that a court may never issue a judgment that, in practice, affects a nonparty or (b) that (to the contrary) a court may always proceed without considering the potential effect on nonparties simply because they are not "bound" in the technical sense.6 Instead, as Rule 19 (a) expresses it, the court must consider the extent to which the judgment may "as a practical matter impair or impede his ability to protect" his interest in the subject matter. When a case has reached the appeal stage the matter is more complex. The judgment ap*111pealed from may not in fact affect the interest of any outsider even though there existed, before trial, a possibility that a judgment affecting his interest would be rendered.7' When necessary, however, a court of appeals should, on its own initiative, take steps to protect the absent party, who of course had no opportunity to plead and prove his interest below.8

Fourth, there remains the interest of the courts and the public in complete, consistent, and efficient settlement of controversies. We read the Rule's third criterion, whether the judgment issued in the absence of the nonjoined person will be "adequate," to refer to this public stake in settling disputes by wholes, whenever possible, for clearly the plaintiff, who himself

chose both the forum and the parties defendant, will not be heard to complain about the sufficiency of the relief obtainable against them. After trial, considerations of efficiency of course include the fact that the time and expense of a trial have already been spent.

Rule 19 (b) also directs a district court to consider the possibility of shaping relief to accommodate these four interests. Commentators had argued that greater attention should be paid to this potential solution to a joinder stymie,9 and the Rule now makes it explicit that *112a court should consider modification of a judgment as an alternative to dismissal.10 Needless to say, a court of appeals may also properly require suitable modification as a condition of affirmance.

Had the Court of Appeals applied Rule 19's criteria to the facts of the present case, it could hardly have reached the conclusion it did. We begin with the plaintiffs' viewpoint. It is difficult to decide at this stage whether they would have had an "adequate" remedy had the action been dismissed before trial for non-joinder: we cannot here determine whether the plaintiffs could have brought the same action, against the same parties plus Dutcher, in a state court. After trial, however, the "adequacy" of. this hypothetical alternative, from the plaintiffs' point of view, was obviously greatly diminished. Their interest in preserving a fully litigated judgment should be overborne only by rather greater opposing considerations than would be required at an earlier stage when the plaintiffs' only concern was for a federal rather than a state forum.

Opposing considerations in this case are hard to find. The defendants had no stake, either asserted or real, in the joinder of Dutcher. They showed no interest in joinder until the Court of Appeals took the matter into its own hands. This properly forecloses any interest of theirs, but for purposes of clarity we note that the insurance company, whose liability was limited to $100,000, had or will have full opportunity to litigate each claim on that fund against the claimant involved. Its only concern with the absence of Dutcher was and is to obtain a windfall escape from its defeat at trial.

*113The interest of the outsider, Dutcher, is more difficult to reckon. The Court of Appeals, concluding that it should not follow Rule 19's command to determine whether, as a practical matter, the judgment impaired the nonparty's ability to protect his rights, simply quoted the District Court's reasoning on the Dead Man issue as proof that Dutcher had a "right" to be joined:

> " 'The subject matter of this suit is the coverage of Lumbermens' policy issued to Dutcher. Depending upon the outcome of this trial, Dutcher may have the policy all to himself or he may have to share its coverage with the Cionci Estate, thereby extending the availability of the proceeds of the policy to satisfy verdicts and judgments in favor of the two Estate plaintiffs. Sharing the coverage of a policy of insurance with finite limits with another, and thereby making that policy available to claimants against that other person is immediately worth less than having the coverage of such policy available to Dutcher alone. By the outcome in the instant case, to the extent that the two Estate plaintiffs will have the proceeds of the policy available to them in their claims against Cionci's estate, Dutcher will lose a measure of protection. Conversely, to the extent that the proceeds of this policy are not available to the two Estate plaintiffs Dutcher will gain.... It is sufficient for the purpose of determining adversity [of interest] that it appears clearly that the measure of Dutcher's protection under this policy of insurance is dependent upon the outcome of this suit. That being so, Dutcher's interest in these proceedings is adverse to the interest of

> the two Estate plaintiffs, the parties who represent, on this record, the interests of the deceased persons in the matter in controversy.' " 11

*114There is a logical error in the Court of Appeals' appropriation of this reasoning for its own quite different purposes: Dutcher had an "adverse" interest (sufficient to invoke the Dead Man Rule) because he would have been *benefited* by a ruling *in favor of* the insurance company; the question before the Court of Appeals, however, was whether Dutcher was *harmed* by the judgment *against* the insurance company.

The two questions are not the same. If the three plaintiffs had lost to the insurance company on the permission issue, that loss would have ended the matter favorably to Dutcher. If, as has happened, the three plaintiffs obtain a judgment against the insurance company on the permission issue, Dutcher may still claim that as a nonparty he is not estopped by that judgment from relitigating the issue. At that point it might be argued that Dutcher should be bound by the previous decision because, although technically a nonparty, he had purposely bypassed an adequate opportunity to intervene. We do not now decide whether such an argument would be correct under the circumstances of this case. If, however, Dutcher is properly foreclosed by his failure to intervene in the present litigation, then the joinder issue considered in the Court of Appeals vanishes, for any rights of Dutcher's have been lost by his own inaction.

If Dutcher is not foreclosed by his failure to intervene below, then he is not "bound" by the judgment against the insurance company and, in theory, he has not been harmed. There remains, however, the practical question whether Dutcher is likely to have any need, and if so will have any opportunity, to relitigate. The only possible threat to him is that if the fund is used to pay judgments against Cionci the money may in fact have disappeared before Dutcher has an opportunity to *115assert his interest. Upon examination, we find this supposed threat neither large nor unavoidable.

The state-court actions against Dutcher had lain dormant for years at the pleading stage by the time the Court of Appeals acted. Petitioner asserts here that under the applicable Pennsylvania vicarious liability law there is virtually no chance of recovery against Dutcher. We do not accept this assertion as fact, but the matter could have been explored below. Furthermore, even in the event of tort judgments against Dutcher, it is unlikely that he will be prejudiced by the outcome here. The potential claimants against Dutcher himself are identical with the potential claimants against Cionci's estate. Should the claimants seek to collect from Dutcher personally, he may be able to raise the permission issue defensively, making it irrelevant that the actual monies paid from the fund may have disappeared: Dutcher can assert that Cionci did not have his permission and that therefore the payments made on Cionci's behalf out of Dutcher's insurance policy should properly be credited against Dutcher's own liability. Of course, when Dutcher raises this defense he may lose, either on the merits of the permission issue or on the ground that the issue is foreclosed by Dutcher's failure to intervene in the present case, but Dutcher will not have been prejudiced by the failure of the District Court here to order him joined.

If the Court of Appeals was unconvinced that the threat to Dutcher was trivial, it could nevertheless have avoided all difficulties by proper phrasing of the decree. The District Court, for unspecified reasons, had refused to order immediate payment on the Cionci judgment. Payment could have been withheld pending the suits against Dutcher and relitigation (if that became necessary) by him. In this Court, furthermore, counsel for *116petitioner represented orally that the tort plaintiffs would accept a limitation of all claims to the amount of the insurance policy. Obviously such a compromise could have been

reached below had the Court of Appeals been willing to abandon its rigid approach and seek ways to preserve what was, as to the parties, subject to the appellant's other contentions, a perfectly valid judgment.

The suggestion of potential relitigation of the question of "permission" raises the fourth "interest" at stake in joinder cases — efficiency. It might have been preferable, at the trial level, if there were a forum available in which both the company and Dutcher could have been made defendants, to dismiss the action and force the plaintiffs to go elsewhere. Even this preference would have been highly problematical, however, for the actual threat of relitigation by Dutcher depended on there being judgments against him and on the amount of the fund, which was not revealed to the District Court. By the time the case reached the Court of Appeals, however, the problematical preference on efficiency grounds had entirely disappeared: there was no reason then to throw away a valid judgment just because it did not theoretically settle the whole controversy.

II.

Application of Rule 19 (b)'s "equity and good conscience" test for determining whether to proceed or dismiss would doubtless have led to a contrary result below. The Court of Appeals' reasons for disregarding the Rule remain to be examined.12 The majority of the *117court concluded that the Rule was inapplicable because "substantive" rights are involved, and substantive rights are not affected by the Federal Rules. Although the *118court did not articulate exactly what the substantive rights are, or what law determines them, we take it to have been making the following argument: (1) there is a category of persons called "indispensable parties"; (2) that category is defined by substantive law and the definition cannot be modified by rule; (3) the right of a person falling within that category to participate in the lawsuit in question is also a substantive matter, and is absolute.13

With this we may contrast the position that is reflected in Rule 19. Whether a person is "indispensable," that is, whether a particular lawsuit must be dismissed in the absence of that person, can only be determined in the context of particular litigation.14 There is a large category, whose limits are not presently in question, of persons who, in the Rule's terminology, should be "joined if feasible," and who, in the older terminology, were called either necessary or indispensable parties. Assuming the existence of a person who should be joined if feasible, the only further question arises when joinder is not possible and the court must decide whether to dismiss or to proceed without him. To use the familiar but confusing terminology, the decision to proceed is a decision that the absent person is merely "necessary" while the decision to dismiss is a decision that he is "indispensable." 15 The *119decision whether to dismiss *(i. e.,* the decision whether the person missing is "indispensable") must be based on factors varying with the different cases, some such factors being substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests. Rule 19 does not prevent the assertion of compelling substantive interests; it merely commands the courts to examine each controversy to make certain that the interests really exist. To say that a court "must" dismiss in the absence of an indispensable party and that it "cannot proceed" without him puts the matter the wrong way around: a court does not know whether a particular person is "indispensable" until it has examined the situation to determine whether it can proceed without him.

The Court of Appeals concluded, although it was the first court to hold, that the 19th century joinder cases in this Court created a federal, common-law, substantive right in a certain class of persons to be joined in the corresponding lawsuits.16 At the least, that was not the *120way the matter started. The joinder problem first arose in equity and in the earliest case giving rise to extended discussion the problem was the relatively simple one of the inefficiency of litigation involving only some of

the interested persons. A defendant being sued.by several cotenants objected that the other cotenants were not made parties. Chief Justice Marshall replied:

> "This objection does not affect the jurisdiction, but addresses itself to the policy of the Court. Courts of equity require, that all the parties concerned in interest shall be brought before them, that the matter in controversy may be finally settled. This equitable rule, however, is framed by the Court itself, and is subject to its discretion. . . . [B]eing introduced by the Court itself, for the purposes of justice, [the rule] is susceptible of modification *121for the promotion of those purposes. ... In the exercise of its discretion, the Court will require the plaintiff to do all in his power to bring every person concerned in interest before the Court. But, if the case may be completely decided as between the litigant parties, the circumstance that an interest exists in some other person, whom the process of the Court cannot reach . . . ought not to prevent a decree upon its merits." 17

Following this case there arose three cases, also in equity, that the Court of Appeals here held to have declared a "substantive" right to be joined. It is true that these cases involved what would now be called "substantive" rights. This substantive involvement of the absent person with the controversy before the Court was, however, in each case simply an inescapable fact of the situation presented to the Court for adjudication. The Court in each case left the outsider with no more "rights" than it had already found belonged to him. The question in each case was simply whether, given the substantive involvement of the outsider, it was proper to proceed to adjudicate as between the parties.

The first of the cases was *Mallow* v. *Hinde,* 12 Wheat. 193, in which, in essence, the plaintiff sought specific performance of a contract to convey land, but sought it not against his vendor (who could not be joined) but against a person who claimed through an entirely different chain of title. The Court saw that any declaration of rights between the parties before it would either purport (incorrectly) to determine the validity of plaintiff's contract with his grantor, or would decide nothing. The Court said, in language quoted here by the Court of Appeals:

> "In this case, the complainants have no rights separable from, and independent of, the rights of *122persons not made parties. The rights of those not before the Court lie at the very foundation of the claim of right by the plaintiffs, and a final decision cannot be made between the parties litigant without directly affecting and prejudicing the rights of others not made parties. . . .
>
> "We do not put this case upon the ground of jurisdiction, but upon a much broader ground . . . . We put it on the ground that no Court can adjudicate directly upon a person's right, without the party being either actually or constructively before the Court." 18

Nothing in this language is inconsistent with the Rule 19 formulation, or otherwise suggests that lower courts are expected to proceed without examining the actual interest of the non joined person. As the Court explicitly stated, there is no question of "jurisdiction" and there can be no binding adjudication of a person's rights in the absence of that person. Rather, the problem under the circumstances was that the substantive involvement of the grantor was such that in his absence there was nothing for the Court to decide.

The second case relied upon by the Court of Appeals, *Northern Indiana R. Co.* v. *Michigan Central R. Co.,* 15 How. 233, presents a different aspect of joinder. There suit was brought for an injunction against construction *123by defendant of a railroad that it was under contract to a non joined outsider to build. Thus the plaintiff was seeking equitable relief that would, in practice, abrogate the contractual rights of a nonparty. Among the unpleasant possibilities entailed by proceeding was the likelihood that the defendant might find itself subject to directly conflicting injunctive orders. The Court ruled that,

> ". . . in a case like the present, where a court cannot but see that the interest of the New Albany Company must be vitally affected, if the relief prayed by the complainants be given, the court must refuse to exercise jurisdiction in the case, or become the instrument of injustice." 19

Again, the Court of Appeals' reliance on this language to show that in *any* case where an outsider "may be affected" it is necessarily unjust to proceed, is altogether misplaced: the Court in *Northern Indiana R. Co.* simply found that there would be injustice in proceeding given the particular factual and legal situation before it. Neither Rule 19, nor we, today, mean to foreclose an examination in future cases to see whether an injustice is being, or might be, done to the substantive, or, for that matter, constitutional, rights of an outsider by proceeding with a particular case. In this instance, however, no such examination was made below, and no such injustice appears on the record here.

The most influential of the cases in which this Court considered the question whether to proceed or dismiss in the absence of an interested but not joinable outsider is *Shields* v. *Barrow,* 17 How. 130, referred to in the opinion below. There the Court attempted, perhaps unfortunately, to state general definitions of those per*124sons without whom litigation could or could not proceed. In the former category were placed

> "Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties." 20

The persons in the latter category were

> "Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." 21

These generalizations are still valid today, and they are consistent with the requirements of Rule 19, but they are not a substitute for the analysis required by that Rule. Indeed, the second *Shields* definition states, in rather different fashion, the criteria for decision announced in Rule 19 (b). One basis for dismissal is *125prejudice to the rights of an absent party that *"cannot"* be avoided in issuance of a' final decree. Alternatively, if the decree can be so written that it protects the interests of the absent persons, but as so written it leaves the controversy so situated that the outcome may be inconsistent with "equity and good conscience," the suit should be dismissed.

The majority of the Court of Appeals read *Shields* v. *Barrow* to say that a person whose interests "may be affected" by the decree of the court is an indispensable party, and that all indispensable parties have a "substantive right" to have suits dismissed in their absence. We are unable to read *Shields* as saying either. It dealt only with persons whose interests must, unavoidably, be affected by a decree and it said nothing about substantive rights.22 Rule 19 (b), which the Court of Appeals dismissed as an ineffective attempt to change the substantive rights stated in *Shields,* is, on the contrary, a valid statement of the criteria for determining whether to proceed or dismiss in the forced absence of an interested person. It takes, for aught that now appears, adequate account of the very real, very substantive claims to fairness on the part of outsiders that may arise in some cases. This, however, simply is not such a case.

III.

The Court of Appeals stated a second and distinct ground for reversing the District Court and ordering dismissal of the action. It will be recalled that at the *126time the present declaratory judgment action came to trial two tort actions were pending in the state courts. In one, the estate of the deceased truck driver, Smith, was suing the estate of Cionci, as tortfeasor, plus Dutcher, on the theory that Cionci was doing an errand for him at the time of the accident, plus Lynch's estate, on the theory that Lynch had been in "control" of Cionci. Harris, the injured passenger, was suing the same three defendants on the same theories in a separate action. The Court of Appeals concluded that since these actions "presented the mooted question as to the coverage of the policy," the issue presented in the present proceeding, the District Court should have declined jurisdiction in order to allow the state courts to settle- this question of state law.

We believe the Court of Appeals decided this question incorrectly. While we reaffirm our prior holding that a federal district court should, in the exercise of discretion, decline to exercise diversity jurisdiction over a declaratory judgment action raising issues of state law when those same issues are being presented contemporaneously to state courts, *e. g., Brillhart* v. *Excess Ins. Co.,* 316 U. S. 491, we do not find that to be the case here.

This issue, like the joinder issue, was not raised at trial. While we do not now declare that a court of appeals may never on its own motion compel dismissal of an action as an unwarranted intrusion upon state adjudication of state law, we do conclude that, this being a discretionary matter, the existence of a verdict reached after a prolonged trial in which the defendants did not invoke the pending state actions should be taken into consideration in deciding whether dismissal is the wiser course.

It can hardly be said that Lynch's administrator, the plaintiff and petitioner in this case, would have had a satisfactory opportunity to litigate the issue of Cionci's *127permission in the state actions. The Court of Appeals said that "all the persons involved in the accident were parties" to the state-court actions. If the implication is that the state actions could have resulted in judgments in favor of Lynch's estate and against the insurance company on the issue of Cionei's permission, this implication is not correct. The insurance company was not a party to the tort actions, and was not defending Cionci's estate. Lynch's estate was a party only in the sense that Lynch's personal representative (a different person from Lynch's administrator, the plaintiff in this case) was made a defendant in tort. Furthermore, the Smith and Harris actions against Cionci had nothing to do with the issue of insurance coverage: had Smith or Harris won a judgment against Cionci's estate, they would have had to bring a further action against the insurance company; this further action could well have been brought in a federal court. In short, the net result of dismissal here would presumably have been a diversity action identical with this one, except that

Lynch's estate would have been compelled to wait upon the convenience of plaintiffs over whom it had no control, and would have been dependent upon a victory by those plaintiffs in a suit in which it was a defendant.

The issues that were before the state courts in the tort actions were not the same as the issues presented by this case. To be sure, a critical question of fact in both cases was what Dutcher said to Cionci when he gave him the keys. But in the state-court actions the ultimate question was whether Cionci was acting as Dutcher's agent, thus making Dutcher personally liable for Cionci's tort. In this case the question was simply whether Cionci had "permission," thus bringing Cionci's own liability within the coverage of the insurance policy. Resolution of the "agency" issue in the state court would have had no bearing on the "permission" issue even if *128that resolution were binding on Lynch's estate. Furthermore, although the state court would have had to rule (and still will have to do so, if the cases are ever tried) whether or not Dutcher may testify against the estates under the Dead Man Rule, this question is also a different one in the state and federal cases. In the state cases, Dutcher was a defendant, and the question would be whether he could testify in defense against his own liability. In the present case the question was rather whether he could testify, as a nonparty, on the coverage of his insurance policy.

We think it clear that the judgment below cannot stand. The judgment is vacated and the case is remanded to the Court of Appeals for consideration of those issues raised on appeal that have not been considered, and, should the Court of Appeals affirm the District Court as to those issues, for appropriate disposition preserving the judgment of the District Court and protecting the interests of nonjoined persons.

It is so ordered.

1

Appellants challenged the District Court's ruling on the Dead Man issue, the fairness of submitting the question as to Harris to a jury that had been directed to find in favor of the two estates whose position was factually indistinguishable, and certain instructions.

2

For convenience, we treat these interests in a different order from that appearing in Rule 19 (b). Our list follows that of Reed, Compulsory Joinder of Parties in Civil Actions, 55 Mich. L. Rev. 327, 330 (1957).

3

The Advisory Committee on the Federal Rules of Civil Procedure, in its Note on the 1966 Revision of Rule 19, quoted at 3 Moore, Federal Practice ¶ 19.01 (hereinafter cited as "Committee Note"), comments as follows on the fourth factor listed in Rule 19 (b), the adequacy of plaintiff's remedy if the action is dismissed: "[T]he court should consider whether there is any assurance that the plaintiff, if dismissed, could sue effectively in another - forum where better joinder would be possible." See *Fitzgerald* v. *Haynes,* *110241 F. 2d 417, 420 (C. A. 3d Cir.); *Fouke* v. *Schenewerk,* 197 F. 2d 234, 236.

4

The Committee Note comments that "when the moving party is seeking dismissal in order to protect himself against a later suit by the absent person . . . and is not seeking vicariously to protect the absent person against a prejudicial judgment ... his undue delay in making the motion can properly be counted against him as a reason for denying the motion." Of course, where

an objection to nonjoinder has been erroneously overruled in the district court, the court of appeals may correct the error to prevent harassment of defendants. *Young* v. *Powell,* 179 F. 2d 147.

5

See the discussion by Reed, *supra,* n. 2, at 330-335. See also Hazard, Indispensable Party: The Historical Origin of a Procedural Phantom, 61 Col. L. Rev. 1254 (1961).

6

See *Keegan* v. *Humble Oil & Refining Co.,* 155 F. 2d 971.

7

See *Bourdieu* v. *Pacific Oil Co.,* 299 U. S. 65, where this Court held that an inquiry into indispensability would be unnecessary where the complaint did not state a cause of action. But see *Calcote* v. *Texas Pac. Coal & Oil Co.,* 157 F. 2d 216, criticized, 2 Barron & Holtzoff, Federal Practice & Procedure § 516 (1967 Supp.) (Wright ed.).

8

E. g., Hoe v. *Wilson,* 9 Wall. 501. See generally 2 Barron & Holtzoff, Federal Practice & Procedure §516 (1967 Supp.) (Wright ed.).

9

E. g., Reed, *supra,* n. 2. See Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356 (1967). Compare *Roos* v. *Texas Co.,* 23 F. 2d 171.

10

As the Committee Note points out, this principle meshes with others to be considered. An appropriate statement of the question might be "Can the decree be written so as to protect the legitimate interests of outsiders and, if so, would such a decree be adequate to the plaintiff's needs and an efficient use of judicial machinery?"

11

218 F. Supp. 802, 805-806, quoted at 365 F. 2d, at 805.

12

Rule 19 was completely rewritten subsequent to the proceedings in the District Court in this case. There is, however, no occasion for separate consideration of the question whether the action of the Court of Appeals would have been proper under the old version of the Rule. The new version was adopted on July 1, 1966, while the appeal, in which the joinder question first arose, was pending. The majority in the Court of Appeals did not purport to rely on the *117older version, but on its conclusion that the Rule, in either form, had no application to this case. The dissent below found the Rule applicable, and concluded that the District Court should not be reversed on the basis of either version.

The new text of the Rule was not intended as a change in principles. Rather, the Committee found that the old text "was defective in its phrasing and did not point clearly to the proper basis of decision." This Court, having the ultimate rule-making

authority subject to congressional veto, approved the Committee's suggestions. Where the new version emphasizes the pragmatic consideration of the effects of the alternatives of proceeding or dismissing, the older version tended to emphasize classification of parties as "necessary" or "indispensable." Although the two approaches should come to the same point, since the only reason for asking whether a person is "necessary" or "indispensable" is in order to decide whether to proceed or dismiss in his absence and since that decision must be made on the basis of practical considerations, *Shaughnessy* v. *Pedreiro,* 349 U. S. 48, and not by "prescribed formula," *Niles-Bement Co.* v. *Iron Moulders Union,* 254 U. S. 77, the Committee concluded, without directly criticizing the outcome of any particular ease, that there had at times been "undue preoccupation with abstract classifications of rights or obligations, as against consideration of the particular consequences of proceeding with the action and the ways by which these consequences might be ameliorated by the shaping of final relief or other precautions." An excellent example of the cases causing apprehension is *Parker Rust-Proof Co.* v. *Western Union Tel. Co.,* 105 F. 2d 976. Judge Swan, writing for a panel that included Judges L. Hand and A. N. Hand, stated that a nonjoined person was an "indispensable" party to a suit to compel issuance of a patent, but went on to say that "as the object of the rule respecting indispensable parties is to accomplish justice between all the parties in interest, courts of equity will not suffer it to be so applied as to defeat the very purposes of justice." *Id.,* at 980. On this basis, the Court of Appeals reversed the District Court's dismissal of the action for nonjoinder. Under the present version of the Rule, the same result would be reached for, ultimately, the same reasons. The present version simply avoids the purely verbal anomaly, an indispensable person who turns out to be dispensable after all.

13

One commentator has stated that "[i]f this [the Court of Appeals' position in the present case] is sound, amended Rule 19 would be invalid. But there is no case support for the proposition that the judge-made doctrines of compulsory joinder have created substantive rights beyond the reach of the rulemaking power." 2 Barron & Holtzoff, Federal Practice & Procedure § 512, n. 21.14 (1967 Supp.) (Wright ed.).

14

As the Court has before remarked, "[t]here is no prescribed formula for determining in every case whether a person ... is an indispensable party . . . ." *Niles-Bement Co.* v. *Iron Moulders Union,* 254 U. S. 77, at 80.

15

The Committee Note puts the matter as follows: "The subdivision [19 (b)] uses the word 'indispensable' only in a conclusory *119sense, that is, a person is 'regarded as indispensable' when he cannot be made a party and, upon consideration of the factors above mentioned, it is determined that in his absence it would be preferable to dismiss the action, rather than to retain it."

16

Numerous cases in the lower federal courts have dealt with compulsory joinder, and the Court of Appeals concluded that principles enunciated in those cases required dismissal here. However, none of the cases cited here or below presented a factual situation resembling .this case: the error made by the Court of Appeals was precisely its reliance on formulas extracted from their contexts rather than on pragmatic analysis. Moreover, although the Court of Appeals concluded that the "distilled

essence" of earlier cases is that the question whether to dismiss is "substantive" and that "Rule 19 does not apply to the indispensable party doctrine," it found no cases actually so holding.

One of the reasons listed by the Committee Note for the change in the wording of Rule 19 was "Failure to point to correct basis of decision." The imprecise and confusing language of the original wording of the Rule produced a variety of responses in the *120lower courts. In some cases a formulaic approach was employed, making it difficult now to determine whether the result reached was proper or not. Other cases demonstrate close attention to the significant pragmatic considerations involved in the particular circumstances, leading to a resolution consistent with practical and creative justice. For examples in the latter category, see *Roos* v. *Texas Co.,* 23 F. 2d 171 (C. A. 2d Cir.) (L. Hand, J.) (decided prior to adoption of Fed. Rules Civ. Proc.); *Kroese* v. *General Steel Castings Corp.,* 179 F. 2d 760 (C. A. 3d Cir.) (Goodrich, J.); *Stevens* v. *Loomis,* 334 F. 2d 775 (C. A. 1st Cir.) (Aldrich, J.). It is interesting that the only judicial recognition found by the Court of Appeals of its view that indispensability is a "substantive" matter is a footnote in the last-cited case attributing to the (then) proposed new formulation of Rule 19 "the view that what are indispensable parties is a matter of substance, not of procedure." *Id.,* at 778, n. 7. Taken in context, Judge Aldrich's statement refers simply to the view that a decision whether to dismiss must be made pragmatically, in the context of the "substance" of each case, rather than by procedural formula. The statement is hardly support for the proposition that a court of appeals may ignore Rule 19's command to undertake a practical examination of circumstances.

17

Elmendorf v. *Taylor,* 10 Wheat. 152, at 166-168.

18

12 Wheat., at 198, quoted at 365 F. 2d, at 806. The facts were that T, a trustee of land for the benefit of certain persons, may or may not have conveyed legal title to defendant Hinde. Plaintiff Mallow claimed equitable title by virtue of an executory agreement between the trust beneficiaries and one Langham, who conveyed to plaintiff. Mallow sued Hinde to compel conveyance of the legal title, but T and the beneficiaries could not be joined. Hinde contended that the beneficiaries had no power to sell to Langham, and that the purported contract had, in any event, been obtained by fraud.

19

15 How., at 246, quoted at 365 F. 2d, at 806.

20

17 How., at 139.

21

Ibid. Plaintiff was suing for rescission of a contract but was unable to join some of the parties to it. Reed, *supra,* n. 2, comments that much later difficulty could have been avoided had this Court pointed the way in *Shields* by undertaking a practical examination of the facts. *Id.,* at 340-346. He concludes that "The facts in the opinion are insufficient to demonstrate that the result is a just one." *Id.,* at 344. See also Kaplan, *supra,* n. 9, at 361.

22

Indeed, for example, it has been clear that in a diversity case the question of joinder is one of federal law. *E. g., De Korwin* v. *First Nat. Bank,* 156 F. 2d 858, 860, citing *Shields.* To be sure, state-law questions may arise in determining what interest the outsider actually has, *e. g., Kroese* v. *General Steel Castings Corp.,* 179 F. 2d 760 (C. A. 3d Cir.), but the ultimate question whether, given those state-defined interests, a federal court may proceed without the outsider is a federal matter.

7 Aggregate Litigation: Class Actions, Multidistrict Litigation, and Other Aggregation Devices

WordCloud

7.1 Rule 23. Class Actions

Rule 23. Class Actions

Text of Rule 23

(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 partes 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 the 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 argumenB) 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-members 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 courts 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).

As amended, Apr. 30, 2007, eff. Dec. 1, 2007;1 March 26, 2009, eff. Dec. 1, 2009;2 Apr. 26, 2018, eff. Dec. 1, 2018.

7.2 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.

7.3 Class Action Fairness Act (CAFA) - 28 U.S.C. 1332 (d)

(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 classes 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.

7.4 28 U.S. Code § 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.

(Added Pub. L. 90–296, § 1, Apr. 29, 1968, 82 Stat. 109; amended Pub. L. 94–435, title III, § 303, Sept. 30, 1976, 90 Stat. 1396.)

7.5 Class Actions Generally

Class Actions in Comparative Context

Class actions are another exceptional aspect of American litigation. They allow numerous plaintiffs – sometimes as many as millions – to join together into a single action, represented by a plaintiff who asserts the rights of the entire class (defendant classes are also possible, but less common). The significance of class actions goes far beyond merely aggregating many claims into one lawsuit. They provide a vehicle for challenging governmental and private policy that violate the rights of a wide class of people. They also extend the regulatory reach of private litigation – and remember, that the theme of this course has been the American system of after-the-fact regulation through litigation – by collecting many small claims into one lawsuit that is so sizable it cannot be ignored.

While the US remains an outlier in terms of aggregate litigation, other international jurisdictions increasingly have some form of procedures for aggregate claims. *See generally*, Deborah R. Hensler, *The Future of Mass Litigation: Global Class Actions and Third-Party Litigation Funding*, 79 **Geo. Wash. L. Rev.** 306 (2011) (Listing countries with some form of group or class litigation). *See also* Ellen C. Campbell & Shanshan Zhao, *The Mountains Are High and the Courts Are Far Away, Inaccessibility of Remedy for Small-Claim Chinese Plaintiffs in a Globalizing World*, 30 **N.Y. Int'l L. Rev.** 1 (2017) (Discussing differences in aggregate process in US and China). Few, if any, other jurisdictions allow the scope of class actions that the US does. Some require governmental approval or involvement. Others limit the causes of actions that might be addressed on a class basis, or only allow certain kinds of remedies. Others require class members to affirmatively opt in, which greatly limits the practical utility of collective

action, while others put limits on how class action attorneys can be paid. *See generally*, 2 Waller, Antitrust & American Bus. Abroad § 20:7 (4th ed.)

Even within the US, class actions are controversial. Because the plaintiffs are not personally involved in the lawsuit, the attorneys have much more *de facto* control over the course of the litigation. This creates the risk of agency issues, where the attorneys put their interest ahead of the members of the class. There is also the issue of whether the representative plaintiff really can represent the members of the class. In some cases, the named representative may not be a proper party to take on that responsibility. There also is the issue of whether the claims asserted in any given suit are of a type that can be efficiently and properly resolved through class litigation. The court must deal with whether the common issues really do predominate. Because absent parties can be bound by the result of the class litigation, the court also must deal with making sure those affected by the lawsuit have been given notice, and in cases where opting out of the result as possible, have been given a chance to opt out of the litigation and bring their own separate lawsuit.

Class action procedures attempt to address some of the special problems that arise in class litigation.. The court must test whether the representative plaintiff is well-suited to represent the class, and also to determine whether the claims are such that class proceedings are appropriate. At the time of resolution of the lawsuit. The court must approve any settlement, in contrast to the normal practice of letting the parties reach any settlement that is mutually agreeable, and also must approve attorneys' fees, again in contrast to the normal practice of letting the parties and the attorneys work it out for themselves.

In class actions the certification of the class is often the determinative moment in the litigation. Because of this, a right to appeal exist after the determination of whether a class can be certified. In most cases, class action lawsuits do not go to trial, but settle if the class certification has been granted.

Prerequisites.

The four prerequisites for a class action set forth in Rule 23 (a). The first requirement is numerosity. The class action only is proper when there are so many parties that normal joinder is impractical. There is no set number, and this depends on context. Second comes the requirement of commonality. This requires more than common issues, and seems to require that resolution of the issue for the representative will lead to the resolution for the other class members. We will see this issue discussed *in Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).

The next two requirements deal with the class representative. The class representatives claim must be typical. This means that the injury suffered in the relief sought by the class representative conforms with that of the class as a whole. A plaintiff who has not suffered financial injury, for example cannot represent a class seeking compensation for financial injury. Next comes the requirement of adequacy. The class representative must be able to fairly and adequately represent the class as a whole. This requirement is extended to the lawyers through rule 20 3G, as the lawyer in practice drives the class litigation.

These requirements seek to establish that the litigation is brought not on the half of some vague collective, but on the half of a class with identifiable common claims and remedies. It is essential that the court be able to order relief that addresses the claims of all, and this can only happen with a coherent class.

Type of Class Actions.

There are three types of class actions set forth in Rule 23 (b). The first, set forth in Rule 23 (b)(1), looks to "inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class." These kinds of class actions rarely arise and will not be part of our abbreviated examination of class actions. The second, set forth in Rule 23 (b)(2), looks to situations where resolution of an issue and the grant of relief would effectively determine the options of nonparties. You might wonder in what kind of situation this would occur. Consider a situation where a litigant is suing to require that a school district conform with the Constitution with regard to racial discrimination or seeking to have a state prison system alter inhumane practices to, again, avoid violating the Constitution. The remedy ordered by the court will have an impact on all students in the case of the school setting, and all prisoners in the case of the prison setting. Requiring these actions to be brought as class actions provides a level of procedural protection for those not directly involved in the lawsuit. This kind of litigation and class action is been important in the United States in areas such as civil rights and environmental litigation. The third type of class action, set forth in Rule 23 (b)(3), mainly arises when many small claims are being aggregated into one action, and requires that "questions of law or fact common to class members predominate over any questions affecting only individual members." This is the kind of class action that was involved in the Chinese drywall cases. This type of class action has elements not found in the other two kinds, including a right of individual class members to opt out of the class action after receiving notice. We will discuss this a bit more below, and also read a case that involves this kind of class action.

Certification and Process

In most class actions, the most important decision the court makes is whether to certify the class at all. Class certification has significant importance for the name parties, the absent class members, the defendant(s), and the court itself. In many cases, the class certification leads to settlement of the litigation, as the risk of taking a certified class action to trial is substantial given the potential size of the damages.

To certify a class, the court first must determine that the suit meets the requirements as set out in Rule 23(a)(1) in order to maintain a class action. It also must determine which of the three categories of class action lawsuit the suit fits into. The court must also look to the adequacy of the class representative and counsel to make sure that they can carry forward the litigation appropriately. One thing the certification decision is not supposed to look to is whether or not the merits of the case are strong – that is, whether the plaintiffs are likely to prevail at trial.

In some cases the court may certify what is called a partial class action for example, the court may grant class status as to a determination of liability, but leave assessment of damages to individual actions.

The trial court has broad discretion with regard to whether to certify the class, and appeals are addressed on an abuse of discretion standard. Notwithstanding, any order with regard to class certification is, in an exception to the rule of finality, appealable after the certification decision is made. This exception recognizes the significance of the certification decision.

If the class is certified, the members of the class must be given notice of the class certification. In a (b)(3) class action, they also are given a chance in response to the notice to "opt out" of the litigation. In some cases, if the opt outs are substantial, a

new class of those who opted out might arise. The requirements of notice are complex, but in general must conform with the principles of Constitutional notice we studied in Q1.

Rule 23(b)(3) Class Actions

There are special aspects to (b)(3) class actions. For example, when notice is given, putative members of the class must be allowed a chance ot "opt out" so that they can pursue their claims in another way – by themselves or in another class action. . Because this kind of class action is more fact dependent, the court must also find that a class action is the best way to proceed and that the common issues 'predominate.' To determine this, the court must also make additional inquiries, above and beyond those requires by (a)(1). The court must take into account the interest of class members in controlling the litigation themselves, the existence and nature of any other litigation addressing the same matters, the desirability of concentrating the claims in one forum, and the difficulties in managing a class action. Because this kind of class action is more fact dependent, the court must also find that the common issues 'predominate.'

Subject Matter Jurisdiction

For purposes of subject matter jurisdiction, only the domiciles of the named plaintiffs are taken into account. *See Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921). For example, if there is a nationwide class, and the representative plaintiffs are from New York and New Jersey, but the other 48 states are each represented by members in the class, for diversity purposes only New York and New Jersey matter.

With regard to amount in controversy, section 1367 applies. So long as one plaintiff meets the amount in controversy requirement, any additional plaintiffs can be joined under supplemental jurisdiction. *See Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546 (2005)

The Class Action Fairness Act provides a different way to establish subject matter jurisdiction. This statute provides federal subject matter jurisdiction for kinds of class actions a previously were relegated to state courts. If the aggregate damages of the class exceed $5 million, and if there is minimal diversity among the parties, subject matter jurisdiction exists under CAFA.

Settlement and Attorneys' Fees

In an exception to normal practice, the court must approve any settlement or voluntary dismissal. This is to protect the members of the class against self serving actions by the class counsel. In the case of settlement, the trend has been for courts to give increasingly searching inquiry into whether the class members receive any real benefit from the class settlement.

The court also must approve any award of attorneys' fees, which typically are awarded from either the defendant or the damages obtained. Again, this is protect the class members against self dealing by the attorneys. That said, the fees awarded often are substantial – for example, the attorneys who obtained a $250 million settlement in securities litigation against Alibaba and related defendants were awarded $62.5 million in fees. This fee award reflected both the work done and the result achieved for the class.

Other Aggregate Litigation and Responses

There are other forms of aggregrate litigation besides Class Actions and multidistrict proceedings. *See generally*, Alexandra D. Lahav, Essay, *The Continuum of Aggregation*, 53 **Ga. L. Rev.** 1393 (2019). For example, large bankruptcy proceedings often

include an aggregate aspect as a large body of creditors contend for their share of a limited pool of assets. In a similar way, common fund litigation or disbursement can present similar aggregration issues as a pool of claimants seeks recovery.

The general problem of Rule 23(b)(3) litigation - many small claimants whose claims cannot be litigated individually economically - is increasingly being addressed outside the formal judicial system. Since the rise of the internet, internet marketplaces have had to provide dispute resolution processes for small claims. Some of these have evolved into sophisticated online dispute resolution systems capable of handling many small claims at low cost. One such company, Modria, was spun off from eBay, and markets its platform to users including both corporations and governmental units. Other platforms have spun off or are being used by other large e-commerce vendors. More generally, there is a push to empower online dispute resolution as a way to drive down costs and complexity so that litigants can handle their own disputes directly. See, e.g., https://remotecourts.org/. For a listing of companies involved in the online dispute resolution space see: http://techindex.law.stanford.edu/companies?category=6

Derivative Actions. Derivative actions, while not necessarily class actions, involve some commonalities with class actions. As you have studied in business associations, a derivative action allows shareholders to sue the management of a corporation for breaches of fiduciary duties, with the proceeds to be paid to the corporation. Rule 23.1 sets forth a special procedures for derivative actions, including that any complaint be verified by the party bringing the claim. Because the agency issues inherent in derivative actions are similar to those of class actions, rule 23.1 also requires that any settlement, voluntary dismissal, or compromise received the approval of the court, and that notice be given to the shareholders are members of the corporate entity.

Multidistrict Litigation. Multidistrict litigation panels fall somewhere between class actions and individual actions. In many mass torts, of which the Chinese drywall litigation would be an example, hundreds or thousands of lawsuits may be filed on behalf of the plaintiffs. Many of these lawsuits will involve common issues of law and fact, such as personal jurisdiction, the standard of law to be applied to the claim, and so on. To avoid repetition and to achieve efficiency and speed in the handling of these claims, a federal statute allows these claims to be joined together in a pretrial proceeding before one judge. This judge will determine the pretrial issues and supervise discovery, but will then return the lawsuits to the original forum for any trial. Multidistrict litigation is extremely common in cases of mass torts.

7.6 Wal-Mart Stores, Inc. v. Dukes

WAL-MART STORES, INC. *v.* DUKES et al.
No. 10-277.
Argued March 29, 2011
Decided June 20, 2011
[…]

Justice Scalia

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 1 million people.

*343Pay and promotion decisions at Wal-Mart are generally committed to local managers' broad discretion, which is exercised "in a largely subjective manner." 222 F. R. D. 137, 145 (ND Cal. 2004). 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, 78 Stat. 255, as amended, 42 U. S. C. § 2000e~l *et seq.*1

*344Betty Dukes began working at a Pittsburg, California, Wal-Mart in 1994. She started as a cashier, but later sought and received a promotion to customer service manager. After a series of disciplinary violations, however, Dukes was demoted back to cashier and then to greeter. Dukes concedes she violated company policy, but contends that the disciplinary actions were in fact retaliation for invoking internal complaint procedures and that male employees have not been disciplined for similar infractions. Dukes also claims two male greeters in the Pittsburg store are paid more than she is.

Christine Kwapnoski has worked at Sam's Club stores in Missouri and California for most of her adult life. She has held a number of positions, including a supervisory position. She claims that a male manager yelled at her frequently and screamed at female employees, but not at men. The manager in question "told [her] to 'doll up,' to wear some makeup, and to dress a little better." App. 1003a.

The final named plaintiff, Edith Arana, worked at a Wal-Mart store in Duarte, California, from 1995 to 2001. In 2000, she approached the store manager on more than one occasion about management training, but was brushed off. Arana concluded she was being denied opportunity for advancement because of her sex. She initiated internal complaint procedures, whereupon she was told to apply directly to the district manager if she thought her store manager was being unfair. Arana, however, decided against that and never applied for management training again. In 2001, she was fired for failure to comply with Wal-Mart's timekeeping policy.

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, see 42 U. S. C. *345§ 2000e-2(k). And, respondents say, because Wal-Mart is aware of this effect, its refusal to cabin its managers' authority amounts to disparate treatment, see §2000e-2(a). 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 decisionmaking 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. Under Rule 23(a), the party seeking certification must demonstrate, first, that

> "(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."

Second, the 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 correspond*346ing declaratory relief is appropriate respecting the class as a whole."2

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.'" 222 F. R. D., at 141-142 (quoting Plaintiff's Motion for Class Certification in Case No. 3:01-cv-02252-CRB (ND Cal), Doc. 99, p. 37). 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. 603 F. 3d 671, 601 (CA9 2010) (en banc).

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 *347of 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.3

D

A divided en banc Court of Appeals substantially affirmed the District Court's certification order. 603 F. 3d 571. The majority concluded that respondents' evidence of commonality was sufficient to "raise the common question whether Wal-Mart's female employees nationwide were subjected to a single set of corporate policies (not merely a number of independent discriminatory acts) that may have worked to unlawfully discriminate against them in violation of Title VII." *Id.,* at 612 (emphasis deleted). It also agreed with the District Court that the named plaintiffs' claims were sufficiently typical of the class as a whole to satisfy Rule 23(a)(3), and that they could serve as adequate class representatives, see Rule 23(a)(4). *Id.,* at 614-615. With respect to the Rule 23(b)(2) question, the Ninth Circuit held that respondents' backpay claims could be certified as part of a (b)(2) class because they did not "predominare]" over *the* requests for declaratory and injunctive relief, meaning they were not "superior in strength, influence, or authority" to *348the nonmonetary claims. *Id.,* at 616 (internal quotation marks and brackets omitted).4

Finally, 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. See 603 F. 3d, at 625-626. The Court of Appeals "s[aw] no reason why a similar procedure to that used in *Hilao* could not be employed in this case." *Id.,* at 627. It would allow Wal-Mart "to present individual defenses in the randomly selected 'sample cases,' thus revealing the approximate percentage of class members whose unequal pay or nonpromotion was due to something other than gender discrimination." *Ibid.,* n. 56 (emphasis deleted).

We granted certiorari. 562 U. S. 1091 (2010).

1 — <

The class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano* v. *Yamasaki,* 442 U. S. 682, 700-701 (1979). 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 *349class members." *East Tex. Motor Freight System, Inc.* v. *Rodriguez,* 431 U. S. 395, 403 (1977) (quoting *Schlesinger* v. *Reservists Comm. to Stop the War,* 418 U. S. 208, 216 (1974)). 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.' " *General Telephone Co. of Southwest* v. *Falcon,* 457 U. S. 147, 156 (1982) (quoting *General Telephone Co. of Northwest* v. *EEOC,* 446 U. S. 318, 330 (1980)).

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(á)(2).5 That language is easy to misread, since "[a]ny competently crafted class complaint literally raises common 'questions.' " Naga-reda, 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. Com*350monality requires the plaintiff to demonstrate that the class members "have suffered the same injury," *Falcon, supra,* at 157. 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 class-wide proceeding to generate common *answers* apt to drive the resolution 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," 457 U. S., at 160, and that certification is proper only if "the trial court is satisfied, after a *351rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied," *id.,* at 161; see *id.,* at 160 ("[AJctual, not presumed, conformance with Rule 23(a) remains ... indispensable"). 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.'" *Id.,* at 160 (quoting *Coopers & Lybrand* v. *Livesay,* 437 U. S. 463, 469 (1978); some internal quotation marks omitted).6 Nor is there anything unusual about that consequence: The necessity of touching aspects of the merits in order to resolve *352preliminary matters, *e. g.,* jurisdiction and venue, is a familiar feature of litigation. See *Szabo* v. *Bridgeport Machines, Inc.,* 249 F. 3d 672, 676-677 (CA7 2001) (Easterbrook, J.).

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," *Cooper* v. *Federal Reserve Bank of Richmond,* 467 U. S. 867, 876 (1984). 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. There an employee who claimed that he was deliberately denied a promotion on account of race obtained certification of a class comprising all employees wrongfully denied promotions and all applicants wrongfully denied jobs. 457 U. S., at 152. We rejected that composite class for lack of commonality and typicality, explaining:

> "Conceptually, there is a wide gap between (a) an indi- . vidual's claim that he has been denied a promotion [or *353higher 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 claims will share common questions of law or fact and that the individual's claim will be typical of the class claims." *Id.,* at 157-158.

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)." *Id.,* at 159, n. 15. Second, "[significant proof that an employer operated under a general policy of 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 de-cisionmaking processes." *Ibid.* 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, see App. 1567a-1596a, and as the District Court recognized the company imposes penalties for denials. of equal employment opportunity, 222 F. R. D., at 154. The only evidence of a "general policy of discrimination" respondents produced was the testimony of Dr. William Bielby, their sociological *354expert. Relying on "social framework" analysis, Bielby testified that Wal-Mart has a "strong

corporate culture," that makes it "vulnerable" to "gender bias." *Id.,* at 152. 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." 222 F. R. D. 189,192 (ND Cal. 2004). The parties dispute whether Bielby's testimony even met the standards for the admission of expert testimony under Federal Rule of Evidence 702 and our *Dau-bert* case, see *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.,* 509 U. S. 579 (1993).8 The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. 222 F. R. D., at 191. We doubt that is so, but even if properly considered, Bielby's testimony does nothing to advance respondents' case. "[Wjhether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking" is the essential question on which respondents' theory of commonality depends. If Bielby admittedly has no answer to that question, we can safely disregard *355what he has to say. It 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; it is a policy *against having* uniform employment practices. It is also a very common and presumptively reasonable way of doing business — one that we have said "should itself raise no inference of discriminatory conduct," *Watson* v. *Fort Worth Bank & Trust,* 487 U. S. 977, 990 (1988).

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." *Id.,* at 990-991. 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. To the contrary, left to their own devices most managers in any corporation — and surely most managers in a corporation that forbids sex discrimination — would select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all. Others may choose to reward various attributes that produce disparate impact — such as scores on general aptitude tests or educational achievements, see *Griggs* v. *Duke Power Co.,* 401 U. S. 424, 431-432 (1971). And still other managers may be guilty of intentional discrimination that produces a sex-based disparity. In such a company, demonstrating the invalidity of one manager's use *356of discretion will do nothing to demonstrate the invalidity of another's. A party seeking to certify a nationwide class will be unable to show that all the employees' Title VII claims will in fact depend on the answers to common questions.

Respondents have not identified a common mode of exercising discretion that pervades the entire company — aside from their reliance on Dr. Bielby's social-framework 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. Drogin conducted his analysis region by region, comparing the number of women promoted into management positions with the percentage of women in the available pool of hourly workers. 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." 603 F. 3d, at 604 (internal quotation marks omitted). Bendick compared work-force data from Wal-Mart and competitive retailers and concluded that Wal-Mart "promotes a lower percentage of women than its competitors." *Ibid.*

Even if they are taken at face value, these studies are insufficient to establish that respondents' theory can be proved on a elasswide basis. In *Falcon,* we held that one named plaintiff's experience of discrimination was insufficient to infer that "discriminatory treatment is typical of [the employer's employment] practices." 457 U. S., at 158. A similar failure of inference arises here. As Judge Ikuta observed in her dissent, "[information about disparities at the regional and national level does not establish the existence *357of disparities at individual stores, let alone raise the inference that a company-wide policy of discrimination is implemented by discretionary decisions at the store and district level." 603 F. 3d, at 637. 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.

There is another, more fundamental, respect in which respondents' statistical proof fails. Even if it established (as it does not) a pay or promotion pattern that differs from the nationwide figures or the regional figures in *all'* of Wal-Mart's 3,400 stores, that would still not demonstrate that commonality of issue exists. Some managers will claim that the availability of women, or qualified women, or interested women, in their stores' area does not mirror the national or regional statistics. And almost all of them will claim to have been applying some sex-neutral, performance-based criteria — whose nature and effects will differ from store to store. In the landmark case of ours which held that giving discretion to lower-level supervisors can be the basis of Title VII liability under a disparate-impact theory, the plurality opinion *conditioned* that holding ón the corollary that merely proving that the discretionary system has produced a racial or sexual disparity *is not enough.* "The plaintiff must begin by identifying the specific employment practice that is challenged." *Watson, supra,* at 994; accord, *Wards Cove Packing Co.* v. *Atonio,* 490 U. S. 642, 656 (1989) (approving that statement), superseded by statute on other grounds, 42 U. S. C. § 2000e-2(k). That is all the more necessary when a class of plaintiffs is sought to be certified. Other than the bare existence of delegated discretion, respondents have identified no "specific employment practice" — much less one that ties all their 1.5 million claims together. Merely showing that Wal-Mart's policy of discretion has produced an overall sex-based disparity does not suffice.

*358Respondents' 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. In *Teamsters* v. *United* States, 431 U. S. 324 (1977), in addition to substantial statistical evidence of companywide discrimination, the Government (as plaintiff) produced about 40 specific accounts of racial discrimination from particular individuals. See *id.,* at 338. That number was significant because the company involved had only 6,472 employees, of whom 571 were minorities, *id.,* at 337, and the class itself consisted of around 334 persons, *United States* v. *T. I. M. E.-D. C., Inc.,* 517 F. 2d 299, 308 (CA5 1975), overruled on other grounds, *Teamsters, supra.* The 40 anecdotes thus represented roughly one account for every eight members of the class. Moreover, the Court of Appeals noted that the anecdotes came from individuals "spread throughout" the company who "for the most part" worked at the

company's operational centers that employed the largest numbers of the class members. 517 F. 2d, at 315, and n. 30. Here, by contrast, 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. 603 F. 3d, at 634 (Ikuta, J., dissenting). More than half of these reports are concentrated in only 6 States (Alabama, California, Florida, Missouri, Texas, and Wisconsin); half of all States have only one or two anecdotes; and 14 States have no anecdotes about Wal-Mart's operations at all. *Id.,* at 634-635, and n. 10. Even if every single one of these accounts is true, that would not demonstrate that the entire company "operated] under a general policy of discrimination," *Falcon,* 457 U. S., at 159, n. 15, which is what respondents must show to certify a companywide class.9

*359The dissent misunderstands the nature of the foregoing analysis. It criticizes our focus on the dissimilarities between the putative class members on the ground that we have "blend[ed]" Rule 23(a)(2)'s commonality requirement with. Rule 23(b)(3),s inquiry into whether common questions "predominate" over individual ones. See *post,* at 374-376 (Ginsburg, J., concurring in part and dissenting in part). That is not so. We quite agree that for purposes of Rule 23(a)(2) " '[e]ven a single [common] question' " will do, *post,* at 376, n. 9 (quoting Nagareda, The Preexistence Principle and the Structure of the Class Action, 103 Colum. L. Rev. 149, 176, n. 110 (2003)). We consider dissimilarities not in order to determine (as Rule 23(b)(3) requires) whether common questions *predominate,* but in order to determine (as Rule 23(a)(2) requires) whether there *is* "[e]ven a single [common] question." And there is not here. Because respondents provide no convincing proof of a companywide discriminatory pay and promotion policy, we have concluded that they have not established the existence of any common question.10

In sum, we agree with Chief Judge Kozinski that the members of the class

> "held a multitude of jobs, at different levels of Wal-Mart's hierarchy, for variable lengths of time, in 3,400 stores, sprinkled acroos 50 statec, with a kaleidoscope of supervisors (male and female), subject to a variety of *360regional policies that all differed .... Some thrived while others did poorly. They have little in common but their sex and this lawsuit." 603 F. 3d, at 652 (dissenting opinion).

Ill

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 *361authorize 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, *Amchem, Products, Inc.* v. *Windsor,* 521 U. S. 591, 613 (1997), in determining its meaning we have previously looked to the historical models on which the Rule was based, *Ortiz* v. *Fibreboard Corp.,* 527 U. S. 815, 841-845 (1999). 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. 521 U. S., at 614. 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. See Advisory Committee's Note, 28 U. S. C. App., pp. 1260-1261 (1964 ed., Supp. II) (citing cases); *e. g., Potts* v. *Flax,* 313 F. 2d 284, 289, n. 5 (CA5 1963); *Brunson* v. *Board of Trustees of School Dist. No. 1, Clarendon Cty.,* 311 F. 2d 107, 109 (CA4 1962) *(per curiam); Frasier* v. *Board of Trustees of Univ. of N. C.,* 134 F. Supp. 589, 593 (MDNC 1955) (three-judge court), aff'd, 350 U. S. 979 (1956) *(per curiam).*

Permitting the combination of individualized and class-wide relief in a (b)(2) class is also inconsistent with the structure of Rule 23(b). Classes certified trader (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 per*362force 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, *Am-chem,* 521 U. S., at 614 (internal quotation marks omitted), framed for situations "in which 'class-action treatment is not as clearly called for/" *id.,* at 615 (quoting Advisory Committee's Notes, 28 U. S. C. Ápp., 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).

Given that structure, we think it clear that individualized monetary claims belong 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 *363the 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. See *Phillips Petroleum Co.* v. *Shutts,* 472 U. S. 797, 812 (1985). 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." 28 U. S. C. App., p. 1260 (1964 ed., Supp. II) (emphasis added). The negative implication, they argue, is that it *does* extend to cases in which the appropriate final relief relates only partially and nonpredominantly to money damages. Of course it is the Rule itself, not the Advisory Committee's description of it, that governs. And a mere negative inference does not in our view suffice to establish a disposition that has no basis in the Rule's text, and that does obvious violence to the Rule's structural features. The mere "predominance" of a proper (b)(2) injunctive claim *364does nothing to justify elimination of Rule 23(b)(3)'s procedural protections: It neither establishes the superiority of *class* adjudication over *individual* adjudication nor cures the notice and opt-out problems. We fail to see why the Rule should be read to nullify these protections whenever a plaintiff class, at its option, combines its monetary claims with a request — even a "predominating request" — for an injunction.

Respondents' predominance test, moreover, 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.

The predominance test would also require the District Court to reevaluate the roster of class members continually. The Ninth Circuit recognized the necessity for this when it concluded that those plaintiffs no longer employed by Wal-Mart lack standing to seek injunctive or declaratory relief against its employment practices. The Court of Appeals' response to that difficulty, however, was not to eliminate *all* former employees from the certified class, but to eliminate only those who had left the company's employ by the date *365the complaint was filed. That solution has no logical connection to the problem, since those who have left their Wal-Mart jobs *since* the complaint was filed have no more need for prospective relief than those who left beforehand. As a consequence, even though the validity of a (b)(2) class depends on whether "final injunctive relief or

corresponding declaratory relief is appropriate respecting the class as a *whole,"* Rule 23(b)(2) (emphasis added), about half the members of the class approved by the Ninth Circuit have no claim for injunctive or declaratory relief at all. Of course, the alternative (and logical) solution of excising plaintiffs from the class as they leave their employment may have struck the Court of Appeals as wasteful of the District Court's time. Which indeed it is, since if a backpay action were properly certified for class treatment under *(b)(8),* the ability to litigate a plaintiff's backpay claim as part of the class would not turn on the irrelevant question whether she is still employed at Wal-Mart. What follows from this, however, is not that some arbitrary limitation on class membership should be imposed but that the backpay claims should not be certified under Rule 23(b)(2) at all.

Finally, respondents argue that their backpay claims are appropriate for a (b)(2) class action because a backpay award is equitable in nature. The latter may be true, but it is irrelevant. The Rule does not speak of "equitable" remedies generally but of injunctions and declaratory judgments. As Title VII itself makes pellucidly clear, backpay is neither. See 42 U. S. C. § 2000e-5(g)(2)(B)(i) and (ii) (distinguishing between declaratory and injunctive relief and the payment of "backpay," see § 2000e~5(g)(2)(A)).

C

In *Allison* v. *Citgo Petroleum Corp.,* 151 F. 3d 402, 415 (CA5 1998), the Fifth Circuit held that a (b)(2) class would permit the certification of monetary relief that is "incidental to requested injunctive or declaratory relief," which it de*366fined as "damages that flow directly from liability to the class *as a whole* on the claims forming the basis of the injunc-tive or declaratory relief." In that court's view, such "incidental damages should not require additional hearings to resolve the disparate merits of each individual's case; it should neither introduce new and substantial legal or factual issues, nor entail complex individualized determinations." *Ibid.* We need not decide in this case whether there are any forms of "incidental" monetary relief that are consistent with the interpretation of Rule 23(b)(2) we have announced and that comply with the Due Process Clause. Respondents do not argue that they can satisfy this standard, and in any event they cannot.

Contrary to the Ninth Circuit's view, Wal-Mart is entitled to individualized determinations of each employee's eligibility for backpay. Title VII includes a detailed remedial scheme. If a plaintiff prevails in showing that an employer has discriminated against him in violation of the statute, the court "may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as.may be appropriate, [including] reinstatement or hiring of employees, with or without back pay ... or any other equitable relief as the court deems appropriate." §2000e-5(g)(1). But if the employer can show that it took an adverse employment action against an employee for any reason other than discrimination, the court cannot order the "hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay." § 2000e-5(g)(2)(A).

We have established a procedure for trying pattern-or-practice cases that gives effect to these statutory requirements. When the plaintiff seeks individual relief such as reinstatement or backpay after establishing a pattern or practice of discrimination, "a district court must usually conduct additional proceedings ... to determine the scope of individual relief." *Teamsters,* 431 U. S., at 361. At this phase, the burden of proof will shift to the company, but it *367will have the right to raise any individual affirmative defenses it may have, and to "demonstrate that the individual applicant was denied an employment opportunity for lawful reasons." *Id.,* at 362.

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. 603 F. 3d, at 626-627. 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); see *Ortiz,* 627 U. S., at 845, 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.

[…]

Justice Ginsburg,

with whom Justice Breyer, Justice Sotomayor, and Justice Kagan 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 *368of Title VII, 42 U. S. C. § 2000e *et seq.,* seek monetary relief that is not merely incidental to any injunctive or declaratory relief that might be available. See *ante,* at 360-367. 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.

I — I

<J

Rule 23(a)(2) establishes a preliminary requirement for maintaining a class action: "[T]here are questions of law or fact common to the class." 2 The Rule "does not require that all questions of law or fact raised in the litigation be com*369mon," 1 H. Newberg & A. Conte, Newberg on Class Actions §3.10, pp. 3-48 to 3-49 (3d ed. 1992); indeed, "[e]ven a single question of law or fact common to the members of the class will satisfy the commonality requirement," Nagareda, The Preexistence

Principle and the Structure of the Class Action, 103 Colum. L. Rev. 149, 176, n. 110 (2003). See Advisory Committee's 1937 Notes on Fed. Rule Civ. Proc. 23, 28 U. S. C. App., p. 138 (citing with approval cases in which "there was only a question of law or fact common to" the class members).

A "question" is ordinarily understood to be "[a] subject or point open to controversy." American Heritage Dictionary 1483 (3d ed. 1992). See also Black's Law Dictionary 1366 (9th ed. 2009) (defining "question of fact" as "[a] disputed issue to be resolved . . . [at] trial" and "question of law" as "[a]n issue to be decided by the judge"). Thus, a "question" "common to the class" must be a dispute, either of fact or of law, the resolution of which will advance the determination of the class members' claims.3

B

The District Court, recognizing that "one significant issue common to the class may be sufficient to warrant certification," 222 F. R. D. 137, 145 (ND Cal. 2004), found that the plaintiffs easily met that test. Absent an error of law or an abuse of discretion, an appellate tribunal has no warrant to upset the District Court's finding of commonality. See *Califano* v. *Yamasaki,* 442 U. S. 682, 703 (1979) ("[M]ost issues arising under Rule 23 ... [are] committed in the first instance to the discretion of the district court.").

*370The District Court certified a class of "[a]ll women employed at any Wal-Mart domestic retail store at any time since December 26,1998." 222 F. R. D., at 141-143 (internal quotation marks omitted). The named plaintiffs, led by Betty Dukes, propose to litigate, on behalf of the class, allegations that Wal-Mart discriminates on the basis of gender in pay and promotions. They allege that the company "[r]e-li[es] on gender stereotypes in making employment decisions such as . . . promotion^] [and] pay." App. 55a. Wal-Mart permits those prejudices to infect personnel decisions, the plaintiffs contend, by leaving pay and promotions in the hands of "a nearly all male managerial workforce" using "arbitrary and subjective criteria." *Ibid.* Further alleged barriers to the advancement of female employees include the company's requirement, "as a condition of promotion to management jobs, that employees be willing to relocate." *Id.,* at 56a. Absent instruction otherwise, there is a risk that managers will act on the familiar assumption that women, because of their services to husband and children, are less mobile than men. See Dept, of Labor, Federal Glass Ceiling Commission, Good for Business: Making Full Use of the Nation's Human Capital 151 (1995).

Women fill 70 percent of the hourly jobs in the retailer's stores but make up only "33 percent of management employees." 222 F. R. D., at 146. "[T]he higher one looks in the organization the lower the percentage of women." *Id.,* at 155. The plaintiffs' "largely uncontested descriptive statistics" also show that women working in the company's stores "are paid less than men in every region" and "that the salary gap widens over time even for men and women hired into the same jobs at the same time." *Ibid.]* cf. *Ledbetter* v. *Goodyear Tire & Rubber Co.,* 550 U. S. 618, 643 (2007) (Ginsburg, J., dissenting).

The District Court identified "systems for . . . promoting in-store employees" that were "sufficiently similar across regions and stores" to conclude that "the manner in which *371these systems affect the class raises issues that are common to all class members." 222 P. R. D., at 149. The selection of employees for promotion to in-store management "is fairly characterized as a 'tap on the shoulder' process," in which managers have discretion about whose shoulders to tap. *Id.,* at 148. Vacancies are not

regularly posted; from among those employees satisfying minimum qualifications, managers choose whom to promote on the basis of their own subjective impressions. *Ibid.*

Wal-Mart's compensation policies also operate uniformly across stores, the District Court found. The retailer leaves open a $2 band for every position's hourly pay rate. Wal-Mart provides- no standards or criteria for setting wages within that band, and thus does nothing to counter unconscious bias on the part of supervisors. See *id.,* at 146-147.

Wal-Mart's supervisors do not make their discretionary decisions in a vacuum. The District Court reviewed means Wal-Mart used to maintain a "carefully constructed . . . corporate culture," such as frequent meetings to reinforce the common way of thinking, regular transfers of managers between stores to ensure uniformity throughout the company, monitoring of stores "on a close and constant basis," and "Wal-Mart TV," "broadcas[t]... into all stores." Id., at 151— 153 (internal quotation marks omitted).

The plaintiffs' evidence, including class members' tales of their own experiences,4 suggests that gender bias suffused Wal-Mart's company culture. Among illustrations, senior management often refer to female associates as "little Janie *372Qs." Plaintiffs' Motion for Class Certification in No. 3:01-cv-02252-CRB (ND Cal.), Doc. 99, p. 21 (internal quotation marks omitted). One manager told an employee that "[m]en are here to make a career and women aren't." 222 F. R. D., at 166 (internal quotation marks omitted). A committee of female Wal-Mart executives concluded that "[stereotypes limit the opportunities offered to women." Plaintiffs' Motion for Class Certification in No. 3:01-cv-02252-CRB (ND Cal.), Doc. 99, at 24 (internal quotation marks omitted).

Finally, the plaintiffs presented an expert's appraisal to show that the pay and promotions disparities at Wal-Mart "can be explained only by gender discrimination and not by . . . neutral variables." 222 F. R. D., at 155. Using regression analyses, their expert, Richard Drogin, controlled for factors including, *inter alia,* job performance, length of time with the company, and the store where an employee worked. *Id.,* at 159.6 The results, the District Court found, were sufficient to raise an "inference of discrimination." *Id.,* at 155-160.

C

The District Court's identification of a common question, whether Wal-Mart's pay and promotions policies gave rise to unlawful discrimination, was hardly infirm. The practice of delegating to supervisors large discretion to make personnel decisions, uncontrolled by formal standards, has long been known to have the potential to produce disparate effects. Managers, like all humankind, may be prey to biases *373of which they are unaware.6 The risk of discrimination is heightened when those managers are predominantly of one sex, and are steeped in a corporate culture that perpetuates gender stereotypes.

The' plaintiffs5 allegations' resemble those in one of the prototypical cases in this area, *Leisner* v. *New York Tel. Co.,* 358 F. Supp. 359, 364-365 (SDNY 1973). In deciding on promotions, supervisors in that case were to start with objective measures; but ultimately, they were to "look at the individual as a total individual." *Id.,* at 365 (internal quotation marks omitted). The final question they were to ask and answer: "Is this person going to be successful in our business?" *Ibid,* (internal quotation marks omitted). It is hardly surprising that for many managers, the ideal candidate was someone with characteristics similar to their own.

We have held that "discretionary employment practices" can give rise to Title VII claims, not only when such practices are motivated by discriminatory intent but also when they produce discriminatory results. See *Watson* v. *Fort Worth Bank & Trust,* 487 U. S. 977, 988, 991 (1988). But see *ante,* at 357 ("[Pjroving that [a] discretionary system has produced a . . . disparity *is not enough.")*. In *Watson,* as here, an employer had given its managers large authority over promotions. An employee sued the bank under Title VII, alleging that the "discretionary promotion system" *374caused a discriminatory effect based on race. 487 U. S., at 984 (internal quotation marks omitted). Four different supervisors had declined, on separate occasions, to promote the employee. *Id.,* at 982. Their reasons were subjective and unknown. The employer, we noted, "had not developed precise and formal criteria for evaluating candidates"; "[i]t relied instead on the subjective judgment of supervisors." *Ibid.*

Aware of "the problem of subconscious stereotypes and prejudices," we held that the employer's "undisciplined system of subjective decisionmaking" was an "employment practic[e]" that "may be analyzed under the disparate impact approach." *Id.,* at 990-991. See also *Wards Cove Packing Co.* v. *Atonio,* 490 U. S. 642, 657 (1989) (recognizing "the use of 'subjective decision making'" as an "employment prac-tie[e]" subject to disparate-impact attack).

The plaintiffs' allegations state claims of gender discrimination in the form of biased decisionmaking in both pay and promotions. The evidence reviewed by the District Court adequately demonstrated that resolving those claims would necessitate examination of particular policies and practices alleged to affect, adversely and globally, women employed at Wal-Mart's stores. Rule 23(a)(2), setting a necessary but not a sufficient criterion for class-action certification, demands nothing further.

II

A'

The Court gives no credence to the key dispute common to the class: whether Wal-Mart's discretionary pay and promotion policies are discriminatory. See *ante,* at 349 ("Reciting" questions like "Is [giving managers discretion over pay] an unlawful employment practice?" "is not sufficient to obtain class certification."). "What matters," the Court asserts, "is not the raising of common 'questions,'" but whether there are "[dissimilarities within the proposed *375class" that "have the potential to impede the generation of common answers." *Ante,* at 350 (quoting Nagareda, Class Certification in the Age of Aggregate Proof, 84 N. Y. U. L. Rev. 97, 132 (2009); some internal quotation marks omitted).

The Court blends Rule 23(a)(2)'s threshold criterion with the more demanding criteria of Rule 23(b)(3), and thereby elevates the (a)(2) inquiry so that it is no longer "easily satisfied," 5 J. Moore et al., Moore's Federal Practice §23.23[2], p. 23-72 (3d ed. 2011).7 Rule 23(b)(3) certification requires, in addition to the four 23(a) findings, determinations that "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 . . . adjudicating the controversy."8

*376The Court's emphasis on differences between class members mimics the Rule 23(b)(8) inquiry into whether common questions "predominate" over individual issues. And by asking whether the individual differences "impede" common adjudication, *ante,* at 350 (internal quotation marks omitted), the Court duplicates 23(b)(3)'s question whether "a class action is superior" to other modes of adjudication. Indeed, Professor Nagareda, whose "dissimilarities" inquiry the Court endorses, developed his position in the context of Rule 23(b)(3). See 84 N. Y. U. L. Rev., at 131 (Rule 23(b)(3) requires "some decisive

degree of similarity across the proposed class" because it "speaks of common 'questions' that 'predominate' over individual ones").9 "The Rule 23(b)(3) predominance inquiry" is meant to "tes[t] whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Products, Inc.* v. *Windsor,* 521 U. S. 591, 623 (1997). If courts must conduct a "dissimilarities" analysis at the Rule 23(a)(2) stage, no mission remains for Rule 23(b)(3).

Because Rule 23(a) is also a prerequisite for Rule 23(b)(1) and Rule 23(b)(2) classes, the Court's "dissimilarities" position is far reaching. Individual differences should not bar a Rule 23(b)(1) or Rule 23(b)(2) class, so long as the Rule 23(a) threshold is met. See *id.,* at 623, n. 19 (Rule 23(b)(1)(B) "does not have a predominance requirement"); *Yamasaki,* 442 U. S., at 701 (Rule 23(b)(2) action in which the Court noted that "[i]t is unlikely that differences in the factual background of each claim will affect the outcome of the legal *377*issue"). For* example, in *Franks* v. *Bowman Transp. Co.,* 424 U. S. 747 (1976), a Rule 23(b)(2) class of African-American truckdrivers complained that the defendant had discriminatorily refused to hire black applicants. We recognized that the "qualification[s] and performance" of individual class members might vary. *Id.,* at 772 (internal quotation marks omitted). "Generalizations concerning such individually applicable evidence," we cautioned, "cannot serve as a justification for the denial of [injunctive] relief to the entire class." *Ibid.*

B

The "dissimilarities" approach leads the Court to train its attention on what distinguishes individual class members, rather than on what unites them. Given the lack of standards for pay and promotions, the majority says, "demonstrating the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another's." *Ante,* at 356-356.

Wal-Mart's delegation of discretion over pay and promotions is a policy uniform throughout all stores. The very nature of discretion is that people will exercise it in various ways. A system of delegated discretion, *Watson* held, is a practice actionable under Title YII when it produces discriminatory outcomes. 487 U. S., at 990-991; see *supra,* at 373-374. A finding that Wal-Mart's pay and promotions practices in fact violate the law would be the first step in the usual order of proof for plaintiffs seeking individual remedies for companywide discrimination. *Teamsters* v. *United States,* 431 U. S. 324, 359 (1977); see *Albemarle Paper Co.* v. *Moody,* 422 U. S. 405, 415-423 (1975). That each individual employee's unique circumstances will ultimately determine whether she is entitled to backpay or damages, § 2000e-5(g)(2)(A) (barring backpay if a plaintiff "was refused . . . advancement ... for any reason other than discrimination"), should not factor into the Rule 23(a)(2) determination.

378 * *

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.

[…]

7.7 Link to www.chinesedrywallsettlement.com

https://www.chinesedrywallsettlement.com/

7.8 Class Certification and Settlement Approval Taishan Claims

ORDER AND REASONS

Eldon E. Fallon, United States District Judge

*1 Pending before the Court is Settlement Class Counsel's Motion for Entry of an Order and Judgment (1) Granting Final Approval of the Class Settlement with Taishan and (2) Certifying the Settlement Class. R. Doc. 22397. Defendants have filed a supplemental memorandum in support thereof. R. Doc. 22393. Settlement Class Counsel has also filed a Motion for an Award of Attorney Fees and Costs. R. Doc. 22380. Because the award of attorney fees is relevant to the fairness, reasonableness, and adequacy of the Settlement, the Court will address both issues in this Order and Reasons. The Court heard oral argument from counsel at a Final Fairness Hearing on December 11, 2019, and, having considered the arguments of counsel and the objectors, as well as the parties' submissions, now rules as follows.

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I. BACKGROUND

From 2004 through 2006, the housing boom in Florida and rebuilding efforts necessitated by Hurricanes Rita and Katrina led to a shortage of construction materials, including drywall. As a result, drywall manufactured in China was brought into the United States and used to construct and refurbish homes in coastal areas of the country, notably the Gulf Coast and East Coast. Sometime after the installation of the Chinese drywall, homeowners began to complain of emissions of foul-smelling gas, the corrosion and blackening of metal wiring, surfaces, and objects, and the breaking down of appliances and electrical devices in their homes. See In re Chinese Manufactured Drywall Prods. Liab. Litig., 894 F. Supp. 2d 819, 829–30 (E.D. La. 2012), aff'd, 742 F.3d 576 (5th Cir. 2014).

*2 In an attempt to recoup their damages, these homeowners began to file suit in various state and federal courts against homebuilders, developers, installers, realtors, brokers, suppliers, importers, exporters, distributors, and manufacturers who were involved with the Chinese drywall. Because of the commonality of facts in the various cases, this litigation was designated as a multidistrict litigation in accordance with 28 U.S.C § 1407. Pursuant to a Transfer Order from the United States Judicial

Panel on Multidistrict Litigation on June 15, 2009, all federal cases involving Chinese drywall were transferred and consolidated for pretrial proceedings in MDL 09-2047 before this Court.

The Chinese drywall at issue was largely manufactured by two groups of defendants: (1) the Knauf Entities and (2) the Taishan Entities. The litigation has focused upon these two entities and their downstream associates and has proceeded on strikingly different tracks for the claims against each group.

II. PROCEDURAL HISTORY

A. The Knauf Defendants

The Knauf Entities are German-based, international manufacturers of building products, including drywall, whose Chinese subsidiary, Knauf Plasterboard (Tianjin) Co., Ltd. ("KPT"), advertised and sold its Chinese drywall in the United States. The Knauf Entities are named defendants in numerous cases consolidated with the MDL litigation and litigation in state courts.

The Knauf Entities first entered their appearance in the MDL litigation on July 2, 2009 and discovery quickly ensued. Thereafter, the Court presided over a bellwether trial in Hernandez v. Knauf Gips KG, Case No. 09-6050, involving a homeowner's claims against KPT for defective drywall. The Court found in favor of the plaintiff family in Hernandez, issued a detailed Findings of Fact and Conclusions of Law, and entered a Judgment in the amount of $164,049.64, including remediation damages in the amount of $136,940.46—which represented a remediation cost of $81.13 per square foot based on the footprint square footage of the house.

Subsequently, the Knauf Entities agreed to institute a pilot remediation program utilizing the remediation protocol formulated by the Court from the evidence in Hernandez. The pilot program included about fifty homes. At the Court's urging, the parties began working together to monetize this program and make it available to a broader class of plaintiffs.

On December 20, 2011, the Knauf Entities and the PSC entered into a global, class Settlement Agreement ("Knauf Settlement Agreement"), which was designed to resolve all Knauf-related, Chinese drywall claims. Under the terms of the Knauf Settlement, homeowners had the choice of a sum certain or having the house totally remediated in addition to receiving reasonable costs and attorney fees. Furthermore, after a jury trial in a bellwether case, numerous defendants in the chain-of-

commerce with the Knauf Entities entered into class settlement agreements, the effect of which settles almost all of the Knauf Entities' chain-of-commerce litigation. The total amount of the Knauf Settlement is estimated at $1.1 billion.

Although the Court occasionally has to deal with settlement administration and enforcement issues, the Knauf portion of this litigation is now resolved.

B. The Chinese Defendants

The litigation against the Chinese entities has taken a different course. The Chinese Defendants in the litigation include the principal Chinese-based Defendant, Taishan, namely, Taishan Gypsum Co. Ltd. ("TG") and its wholly-owned subsidiary, Taian Taishan Plasterboard Co., Ltd. ("TTP") (collectively "Taishan" or "Taishan Entities"). Other Chinese-based Defendants include the CNBM and BNBM Entities.

*3 The Court's initial inquiry regarding Taishan involved four cases in this MDL: (1) Germano v. Taishan Gypsum Co. (Case No. 09-6687); (2) The Mitchell Co. v. Knauf Gips KG (Case No. 09-4115); (3) Gross v. Knauf Gips KG (Case No. 09-6690); and (4) Wiltz v. Beijing New Building Materials Public Ltd. (Case No. 10-361).

The first issues involving Taishan arose when Taishan failed to timely answer or otherwise enter an appearance in Mitchell and Germano, despite the fact that it had been properly served in each case. Thus, after an extended period of time, the Court entered preliminary defaults against Taishan in both of these cases.

Thereafter, the Court moved forward with an evidentiary hearing in furtherance of the preliminary default in Germano on the Plaintiffs' claimed damages. At this hearing, the Plaintiffs presented evidence specific to seven individual properties, which served as bellwether cases. Following this hearing on February 19 and 20, 2010, the Court issued detailed Findings of Fact and Conclusions of Law. On May 10, 2010, the Court issued a Default Judgment against Taishan in Germano and in favor of the Plaintiffs in the amount of $2,609,129.99. R. Doc. 2380, 3013. On June 10, 2010, the last day to timely appeal, Taishan filed a Notice of Appeal of the Default Judgment in Germano and entered its appearance in Germano and Mitchell. Taishan challenged this Court's jurisdiction over the Defendants. As a result, because this was the first instance where Defendants raised jurisdictional issues, the Fifth Circuit remanded the case to this Court to determine whether the Court indeed has jurisdiction over Taishan.

After Taishan entered its appearance in the MDL, it quickly sought to have the Default Judgment in Germano and the Preliminary Default in Mitchell vacated for lack of personal jurisdiction. In the fall of 2010, the Court directed the parties to commence the personal jurisdiction discovery necessary to resolve Taishan's motions to vacate. Sometime after the initial discovery, the parties agreed to expand the discovery beyond the Germano and Mitchell cases to other cases in which Taishan had been served, including Gross and Wiltz.

Formal personal jurisdiction discovery of Taishan began in October 2010. Discovery included the production of both written and electronic documents, as well as depositions of Taishan's corporate representatives, with each type of discovery proceeding in a parallel fashion. This discovery has often been contentious, requiring close supervision by the Court. The Court has presided over regularly-scheduled status conferences to keep the parties on track and conducted hearings and issued rulings to resolve numerous discovery-related disputes.

The first Taishan depositions were held in Hong Kong on April 4-8, 2011. Thirteen attorneys traveled to Hong Kong and deposed several Taishan witnesses. However, upon return to the United States, several motions were filed seeking to schedule a second round of Taishan depositions as a result of problems during the depositions and seeking discovery sanctions against Taishan. The Court, after reviewing the transcripts from the depositions, concluded that the depositions were ineffective because of disagreement among interpreters, counsel and witnesses, translation difficulties, speaking objections, colloquy among counsel and interpreters, and in general, ensuing chaos.

*4 In view of the foregoing, the Court scheduled the second round of Taishan depositions for the week of January 9, 2012 in Hong Kong. Due to the problems experienced during the first depositions, the Court appointed a Federal Rule of Evidence 706 expert to operate as the sole interpreter at the depositions, and the Court decided to travel to Hong Kong to preside over the depositions. Counsel for the interested parties and the Court traveled to Hong Kong for these depositions. Because the Court was present at the depositions, objections were ruled upon immediately and the majority of problems that plagued the first round of depositions were absent. Also, the Court was able to observe the comments, intonation, and body language of the deponents. Upon return from Hong Kong, the parties informed the Court that minimal further discovery was necessary before briefing could be submitted on Taishan's personal jurisdiction challenges.

In April 2012, Taishan filed various motions, including its motions to dismiss for lack of personal jurisdiction. On June 29, 2012, over three years since the creation of this MDL, and after a year-and-a-half of personal jurisdiction discovery on Taishan, the Court presided over a hearing on Taishan's motions. The Court coordinated its hearing with the Honorable Joseph Farina of the Florida state court, who had a similar motion involving Taishan's challenge to personal jurisdiction.

On September 4, 2012, this Court issued a 142-page Order regarding Taishan's motions in Germano, Mitchell, Gross, and Wiltz, in which the Court denied the motions to dismiss and held that it maintained personal jurisdiction over Taishan. In re Chinese Manufactured Drywall Prods. Liab. Litig., 894 F. Supp. 2d 819 (E.D. La. 2012). The Court also ruled that Taishan was operating as the alter ego of TG and TPP. The Court certified an interlocutory appeal, and the Fifth Circuit granted permission to appeal.

In January and May of 2014, two different panels of the Fifth Circuit affirmed this Court's ruling and held that this Court maintained personal jurisdiction over Taishan, TG and TPP. In re Chinese-Manufactured Drywall Prods. Liab. Litig., 753 F.3d 521 (5th Cir. 2014); In re Chinese-Manufactured Drywall Prods. Liab. Litig., 742 F.3d 576 (5th Cir. 2014). The time for writ of certiorari passed, and the issue of personal jurisdiction over Taishan became firmly and finally settled. Nevertheless, Taishan refused to pay the Germano judgment or voluntarily participate in this litigation.

On June 20, 2014, the Court ordered Taishan to appear in open court on July 17, 2014 to be examined as a judgment debtor. Taishan failed to appear for the July 17, 2014 Judgment Debtor Examination, and the Court held Taishan in contempt and ordered that Taishan pay $15,000.00 in attorney's fees to Plaintiffs' counsel; that Taishan pay $40,000.00 as a penalty for contempt; that Taishan and any of its affiliates or subsidiaries be enjoined from conducting any business in the United States until or unless it participated in this judicial process; and that if Taishan violated the injunction, it would be obligated to pay a further penalty of 25-percent of the profits earned by the Company or its affiliate who violate the Order for the year of the violation.

On July 23, 2014, Plaintiffs filed their Omnibus Motion for Class Certification pursuant to Rule 23(b)(3). Taishan did not appear and, on September 26, 2014, this Court certified a class of all owners of real properties in the United States, who are named Plaintiffs on the complaints in Amorin, Germano, Gross, and/or Wiltz (i.e., not an absent class member), asserting claims for remediated damages arising from, or otherwise related to Chinese Drywall manufactured, sold, distributed, supplied, marketed, inspected, imported or delivered by the Taishan Defendants.

Taishan finally entered an appearance with the Court in February 2015, and, to satisfy the contempt, Taishan paid the judgment and both the sum of $15,000.00 in attorney's fees to Plaintiffs' counsel and the contempt penalty of $40,000.00 in March 2015. On March 17, 2015, the Court ordered Taishan and the BNBM and CNBM Entities to participate in expedited discovery related to "the relationship between Taishan and BNBM/CNBM, including whether affiliate and/or alter ego status exists."

*5 In March 2016, this Court granted CNBM Group's motion to dismiss, finding it was an "agent or instrumentality of a foreign state" within the meaning of the Foreign Sovereign Immunities Act ("FSIA"), and therefore outside the jurisdiction of

this Court under 28 U.S.C. § 1603(b). The Court determined that the tortious activity exception did not apply because the alleged tortious conduct did not occur within the United States under 28 U.S.C. § 1605(a)(5). Further, the Court found that the commercial activity exception did not apply in this case, as CNBM Group did not directly manufacture, inspect, sell, or market drywall in the United States. Because Plaintiffs failed to present evidence sufficient to overcome the presumption that CNBM Group was entitled to independent status for purposes of the FSIA, the Court granted the motion and dismissed CNBM Group from the present litigation.

On April 21, 2017, the Court issued a 100-page opinion related to jurisdictional challenges being raised in four separate motions filed by Defendants. The Court found that Taishan was an agent of BNBM under Florida and Virginia law, such that Taishan's contacts in Florida and Virginia are imputed to BNBM. This Court further found that CNBM, BNBM Group, and BNBM were part of a single business enterprise with Taishan under Louisiana law, such that Taishan's contacts in Louisiana may be imputed to Defendants, and the Court has jurisdiction over Defendants in relation to Plaintiffs' claims based on Louisiana law.

Also on April 21, 2017, the Court issued its Findings of Fact and Conclusions of Law related to the June 9, 2015 damages hearing, and adopted Plaintiffs' damage calculations methodology related to remediation of properties.

On May 22, 2017, Defendants filed a motion pursuant to 28 U.S.C. § 1292(b) to certify interlocutory appeal from this Court's jurisdiction order. Because the Court found that its Order and Reasons involved a controlling question of law as to which there is substantial ground for difference of opinion, and because the Court further found that an interlocutory appeal from that Order and Reasons could materially advance the ultimate termination of this MDL, on August 4, 2017, the Court certified an interlocutory appeal to the Fifth Circuit pursuant to 28 U.S.C. § 1292(b).

On August 1, 2017, Defendants filed a motion to dismiss for lack of personal jurisdiction following the recent U.S. Supreme Court case of Bristol–Myers Squibb v. Superior Court of California. Based on Bristol–Myers Squibb, Defendants contested this Court's findings of personal jurisdiction, class certification, and agency relationship. On August 14, 2017, Defendants filed a petition for permission to appeal pursuant to 28 U.S.C. § 1292(b) in the Fifth Circuit, in which they argued that the Bristol–Myers Squibb opinion impacts questions raised on appeal. On August 24, 2017, this Court vacated its 28 U.S.C. § 1292(b) certification order to avoid piecemeal litigations. The Court noted its duty to address the effect of Bristol–Myers Squibb on the jurisdictional issue before certifying the matter to the Fifth Circuit. Subsequently, on November 30, 2017, the Court denied Defendants' motion to dismiss, holding that Bristol–Myers Squibb does not change this Court's jurisdictional findings and class certification.

On January 2, 2018, the Court denied Defendants CNBM Company, BNBM Group, and BNBM PLC's motion to vacate the default judgments against them. On March 5, 2018, the Court reinstated its order to certify interlocutory appeal of its April 2017 jurisdiction opinion arising from the Chinese Defendants' agency relationship. The Court, nevertheless, denied Defendants' request to certify the interlocutory appeal of its opinion involving Bristol–Myers Squibb's impact (or lack thereof) on the Court's personal jurisdiction analysis. The Court noted that the Supreme Court's opinion in Bristol–Myers Squibb did not address class actions and therefore was inapplicable to this MDL. Additionally, two separate panels on the Fifth Circuit had already reaffirmed the Court's original personal jurisdiction analysis in 2014. Any further litigation on the issue of personal jurisdiction for the Chinese Defendants would cause needless delay and waste judicial resources. BNBM and CNBM petitioned the Fifth Circuit for permission to appeal this Court's jurisdictional order, and the jurisdictional appeal is currently pending.

*6 In 2018, the Court suggested to the Judicial Panel on Multidistrict Litigation that the Florida and Virginia Amorin actions be remanded to the transferor courts. R. Docs. 21242, 21695. In 2019, the Court issued a suggestion of remand with respect to the Florida and Virginia Brooke actions as well. R. Doc. 22138, 22139.

A significant development in the Taishan aspect of this litigation occurred in the spring of 2019. On May 22 and 23, 2019, the parties underwent mediation with the goal of resolving the entirety of the Amorin1 and Brooke2 matters pending in the Eastern District of Louisiana, the Southern District of Florida, and the Eastern District of Virginia. On May 23, 2019, the parties agreed to a Term Sheet, and negotiations continued in person and by telephone for three months. All matters in the Amorin and Brooke actions were accordingly stayed by the remand courts and this Court, pending the execution of a Settlement Agreement between the parties. The stay was extended several times and preliminary approval of the Settlement Agreement was granted by the Court on August 29, 2019. R. Doc. 22314.

C. The Taishan Settlement Agreement

The proposed Taishan Settlement Agreement is the result of over a decade of litigation and a complex negotiation process. Specifically, it obligates Taishan to pay $248,000,000 to fully resolve all claims of the Amorin class, the plaintiffs named in the Brooke complaints, and any other property owners with Chinese drywall attributable to Taishan ("Absent Class Members"). The settlement funds are "intended to provide compensation for all property and remediation damages as well as Other Losses." R. Doc. 22305-2 at 21. The Settlement specifically excludes 498 Florida Amorin Plaintiffs who received a separate settlement from Taishan (the "Parker Waichman Settlement"), the plaintiffs involved in the Mitchell action,3 and plaintiffs whose claims were previously voluntarily dismissed or dismissed for failure to complete a Supplemental Plaintiff Profile Form. R. Doc. 22305-2 at 5. If the Settlement is approved, Class Members who have not opted out will be deemed to have fully

released any and all claims, as defined by the Settlement Agreement, against Taishan and the Additional Released Parties,4 and will be barred from bringing or continuing suit on a released claim against these entities. R. Doc. 22305-2 at 19-20.

*7 The amount a plaintiff stands to receive under the Settlement Agreement is determined by a Court-appointed Allocation Neutral. R. Doc. 22305-2 at 20-21. Mr. J. Cal Mayo, Jr., the Allocation Neutral, has developed an allocation model to determine the proper allocation and distribution of settlement funds among all the affected properties and eligible class members. R. Doc. 22304. This model attempts to "strike a balance between property-specific allocation, on the one hand, and efficient and effective allocation, on the other hand." R. Doc. 22304-1 at 2. To that end, the allocation model considers a number of "objective allocation criteria," including square footage of the Affected Property, whether the claimant was an Amorin plaintiff, a Brooke plaintiff, or an Absent Class Member, product identification, and the prior receipt of settlement funds. R. Doc. 22304-1. The allocation model does not consider the national average construction cost based on zip codes, ownership status, remediation status, or the value of other losses. R. Doc. 22304-1. The Settlement provides for a single allocation for each Affected Property, such that settlement awards may need to be divided among eligible class members with competing claims to the same property. The allocation model does not consider, nor does the Settlement provide compensation for personal injury claims, but such claims shall nevertheless be released pursuant to the Agreement. R. Doc. 22397-1 at 23.

Following preliminary approval, Class Members were able to access the allocation model on the Settlement website and on the Court's docket. A Master Spreadsheet of Known Class Member Claims was also posted and filed, providing class members who had submitted sufficient proof of covered Chinese drywall with the ability to review the objective criteria used to calculate the value of their claim. Class Members had the opportunity to dispute the information on the Master Spreadsheet by October 3, 2019. One hundred and nine challenges were made, and a Revised Master Spreadsheet was filed with the Court on October 31, 2019. R. Doc. 22355-1. It was also posted on the Settlement Website, and a Challenge Determination Notice was sent to each affected Class Member. Under the terms of the Settlement, the review, determination, and approval of the allocation model by the Court shall be final and binding.

The parties undertook a significant effort to notify all Class Members, including Absent Class Members, of the proposed Settlement Agreement. A website (ChineseDrywallSettlement.com) was published to provide Class Members with up to date information about the settlement and the litigation. A notice of the proposed settlement was posted in every courthouse in which a Chinese drywall related case was pending. Working with Kinsella Media, the parties implemented a Media Notice Program to publish notice of the Settlement in print and online/mobile ads in relevant markets. Critically, each known Class Member was notified of the Settlement by mail and provided with a gross estimate of their award under the Settlement as calculated by the allocation model.

The Taishan Settlement Agreement binds all Class Members save those who formally opt-out from its terms. The Settlement involved a ninety-day period during which plaintiffs could opt-out by personally signing and mailing a request to do so to Settlement Class Counsel. Parties who choose not to opt-out but nevertheless were displeased with the Settlement could submit a formal objection within the same ninety-day period. The opt-out and objection period closed on November 27, 2019. The objections were collected by Settlement Class Counsel and submitted to the Court for consideration at the Final Fairness Hearing on December 11, 2019. Settlement Class Counsel received ninety-two opt-out requests, although not all were compliant with the Settlement Agreement's opt-out procedure. Of the compliant requests, seventy-eight were from known Class Members,5 and twelve were from Absent Class Members. Settlement Class Counsel received twenty-two objections.

The Taishan Settlement Agreement is a historic achievement. It is, however, critically different from the Settlement Agreement reached in the Knauf aspect of this litigation. While the Knauf Settlement Agreement obligated Knauf to pay a designated amount to cover reasonable costs and attorney fees for both contract counsel and common benefit counsel in addition to completely remediating the affected properties,6 the Taishan Settlement Agreement provides $248,000,000 to resolve all claims and pay all attorney fees and costs. Taishan is not involved in the allocation of funds. Therefore, while the Knauf aspect of the litigation required the Court to fairly allocate designated funds among common benefit counsel and individually retained attorneys, the Court has a much more difficult task here. First, the Court must determine what percentage of the total settlement fund is appropriately allocated to attorney fees and costs. Second, the Court must determine how to allocate that amount between common benefit counsel and individually retained attorneys. Third, the Court must individually allocate a specific portion of those fees to each attorney entitled to such an award. Furthermore, this is a time sensitive inquiry because the allocation of attorney fees and costs necessarily reduces the amount of settlement funds available for distribution to the individual plaintiffs in this matter. Settlement Class Counsel has requested an award of attorney fees for both contract counsel and common benefit counsel totaling 30% of the settlement funds, and a 3% award for expenses. The Court first addresses final approval in Section III of this opinion and turns to the issue of attorney fees in Section IV.

III. MOTION FOR FINAL APPROVAL

*8 Settlement Class Counsel seeks certification of the Settlement Class and final approval of the class settlements with Taishan Gypsum Company Ltd. f/k/a Shandong Taihe Dongxin Co., Ltd. and Taian Taishan Plasterboard Co. Ltd. R. Doc. 22397. In support of its motion, Settlement Class Counsel argues that the settlement is fair, reasonable, and adequate in light of the specific requirements of Rule 23(e) and the Fifth Circuit's Reed factors. Further, Settlement Class Counsel stresses that notice to the class complied with due process and that the overwhelming majority of class members support the settlement. At the Final Fairness Hearing, Class Counsel stressed that the Settlement will provide significant benefits to almost 4,000 plaintiffs and that the Settlement is an historic and substantial achievement in light of the procedural posture of the litigation, factual

issues, the challenges of service, jurisdiction, and appeals, and the significant uncertainty of collecting on a potential judgment if the case went to trial.

A. Objections to the Motion

Class counsel received and filed into the record twenty-seven objections to the settlement. Twenty-two objections were made by Class Members. The Court summarizes the objections below and addresses the arguments in its analysis.

1. Alisa Roundtree

Alisa Roundtree objected to the Settlement on November 7, 2019. Ms. Roundtree's primary concerns involve the disparate treatment of Amorin and Brooke plaintiffs and the reduction of claims involving disputed product identification. She contends that an eighty percent reduction of the Brooke plaintiffs' claims is unfair because "it is not [the plaintiffs'] fault that the discovery and litigation necessary to move the Brooke Complaint case to resolution was stayed or halted for several years." R. Doc. 22389-1 at 4.

2. Penny Alexander

Penny Alexander objected to the Settlement on November 20, 2019. Ms. Alexander's primary concern involves the amount of her estimated award, which she does not believe sufficiently compensates her and her family for the loss they have endured. R. Doc. 22389-2.

3. Lori Staton

Lori Staton objected to the Settlement on November 22, 2019. Her property contained both Knauf and Taishan drywall. Ms. Staton's primary concern involves the amount of her estimated award, which she does not believe sufficiently compensates her for the loss she has endured. Ms. Staton explains that she has previously received settlement funds for Alternative Living

Expenses and Other Losses from the Knauf Global Settlement. Her Other Losses award originally entailed $10,000. She objected to this award and the Special Master in the Global Settlement ruled that her Other Losses actually totaled $170,000. However, Ms. Staton contends she only received $73,161.79 "[d]ue to the limitation of funds in the settlement." R. Doc. 22389-3 at 1. Accordingly, Ms. Staton believes she is still owed the outstanding balance of that claim, and accordingly wishes to receive $96,838.21, instead of her lower estimated amount in the Taishan settlement. R. Doc. 22389-3.

4. Charles Caulkins

Charles Caulkins objected to the Settlement on November 27, 2019. Mr. Caulkins' primary concern involves the disparate treatment of Amorin and Brooke plaintiffs. Mr. Caulkins recognizes that there are legal and factual challenges involving the statute of limitations that may impact Brooke claims, but believes "they are not such a certainty to justify wiping out 80% of his claim." R. Doc. 22389-4.

5. Dailyn Martinez

Dailyn Martinez objected to the Settlement on November 27, 2019. Ms. Martinez and her husband also addressed the Court at the Final Fairness Hearing. Ms. Martinez's primary concern involves the amount of her estimated award, which she does not believe sufficiently compensates her and her family for the losses they have endured. R. Doc. 22389-5.

6. Gary and Ina Helmick

Gary and Ina Helmick objected to the Settlement on November 10, 2019. The Helmicks' primary concern involves the method of allocating settlement funds. In particular, the Helmicks' argue the allocation model should consider actual losses or expenses incurred, rather than the solely the "objective criteria" considered by the Allocation Neutral. R. Doc. 22389-6. The Helmicks' further disagree with the disparate treatment of the Amorin and Brooke plaintiffs because "the losses experience by all individuals who have lived in Chinese drywall homes, while all very individual, have been EQUALLY devastating." R. Doc. 22389-6.

7. Dominesha Clay

*9 Dominesha Clay objected to the Settlement on October 14, 2019. Ms. Clay's primary concern involves the amount of her estimated award, which she does not believe sufficiently compensates her and her family for the loss they have endured. R. Doc. 22389-7.

8. Kenneth Randall and Alicia Doherty

Kenneth Randall and Alicia Doherty object to the settlement for three reasons. First, they disagree with the 25% discount of their claim based on product identification. The believe that Taishan admitted to manufacturing the drywall used in their home, which contained the words "meet or exceeds." According to Mr. Randall and Ms. Doherty, the Special Master's report regarding product identification categories attributable to Taishan indicates that Taishan only denies liability as to drywall with the marking "meets or exceeds." Second, Mr. Randall and Ms. Doherty object to the deduction of previous funds received from other drywall settlements. They explain that they received $16,169.22 for loss of household items from a previous settlement. They argue that this sum should not be deducted from their instant recovery because these funds were not used for remediation, which is the purpose of the Taishan Settlement. Third, Mr. Randall and Ms. Doherty object to the allocation of attorney fees from the settlement award. R. Doc. 22389-8.

9. Stephen and Bonita Hemming

Stephen and Bonita Hemming object to the Settlement on the grounds that it is unfair to treat Amorin and Brooke plaintiffs differently merely because Brooke plaintiffs were not aware of the presence of Chinese drywall in their homes until after the litigation began. R. Doc. 22389-9.

10. Russell Moody

Russell Moody objected to the Settlement on November 26, 2019. Mr. Moody raises ten objections. First, he argues that the Settlement should not be given final approval until Class Counsel's concerns regarding the Parker Waichman Settlement are addressed. He believes the Parker Waichman Settlement, which applies to the 498 Florida plaintiffs who are excluded from the

Taishan Settlement, "appears to ... blatantly violate the legal and Constitutional rights" of the plaintiffs. R. Doc. 22389-10 at 5. Second, he argues that the Court, his individual attorney, and Class Counsel have failed to keep the plaintiffs informed and engaged during this litigation. Specifically, he contends his attorney failed to provide him with honest answers to his questions regarding the Settlement. Third, he argues that a motion pending before Judge Cooke, Plaintiff's Motion and Memorandum of Law to Adopt Plan for Resolution of the Florida Amorin Plaintiffs' Claims for Remediation and Other Damages, contained false and fraudulent statements. The Court, however, is unable to decipher exactly what statements Mr. Moody believes to be false and fraudulent. Fourth, he argues the Settlement should be denied because the Allocation Neutral considered inadmissible evidence when developing the allocation model. In particular, he objects to the Allocation Neutral's reliance on the Florida Special Master's Report because the report has not yet been adjudicated or adopted by Judge Cooke. Fifth, he believes the allocation model is directly in conflict with the Settlement's terms. In particular, he believes the decision to discount claims based on product identification clearly contradicts the PSC's previous position that all the drywall at issue was in fact manufactured by Taishan. Accordingly, he believes product identification should not be considered in the allocation model. He also objects to the fact that the Settlement does not provide plaintiffs with the right to appeal the application of the allocation model. Sixth, he argues that treating product identification as anything other than mere proof of defective drywall is a violation of the Settlement's terms. Seventh, he argues that the Settlement fails to provide sufficient funds for its intended purpose, which is to "provide compensation for all [emphasis added] property and remediation damages as well as other losses." R. Doc. 22389-10 at 11. Eighth, he doubts that the Settlement's Notice program complied with the Settlement's own terms. Ninth, he objects to the fact that plaintiffs with drywall not attributable to Taishan as per the Florida Special Master's Report stand to recover for what he calls a "participation trophy." He does not believe these plaintiffs are entitled to receive a settlement award since the report indicated that Taishan did not manufacture the drywall affecting their homes. Tenth, he argues that certain Plaintiffs' attorneys made public statements concerning the likelihood of success on the merits that are "at odds with the Global Settlement Agreement." R. Doc. 22389-10 at 11.

11. Frederick Yorsch

*10 Frederick Yorsch objected to the Settlement on November 27, 2019. R. Doc. 22389-11. On December 17, 2019, Mr. Yorsch withdrew his objection to the Settlement. Accordingly, the Court will not consider it.

12. Van Foster for Good Ole Boyz, LLC

Van Foster objected to the Settlement on November 27, 2019, on behalf of Good Ole Boyz, LLC. His only objection involves a notation on the master spreadsheet, which indicates that another class member has asserted a claim for the same Affected

Property. Mr. Foster believes he is entitled to the entirety of the settlement proceeds and does not know whether the competing claim has submitted any documentation to the claims administrator. R. Doc. 22389-12. Because Van Foster's objection does not involve the fairness, reasonableness, or adequacy of the Settlement Agreement, the Court will not address it here. Mr. Foster is instructed to raise this argument with the Claims Administrator.

13. Theodore and Cynthia Tarver

Theodore and Cynthia Tarver objected to the Settlement on November 27, 2019. Their primary concern involves the settlement amount, which they contend is not large enough to adequately compensate all the plaintiffs. In particular, they feel it is unfairly small in comparison to the Knauf Settlement. R. Doc. 22389-13.

14. Chris Cummings

Chris Cummins objected to the Settlement on November 27, 2019. His primary concern involves the settlement amount, which he contends is not large enough to adequately compensate all the plaintiffs. Additionally, he objects to the disparate treatment of Amorin and Brooke plaintiffs. In particular, he believes it is unfair to reduce the value of the Brooke claims on the grounds that less work has been conducted in Brooke, while requiring Brooke and Amorin plaintiffs to equally share the burden of fees and costs. R. Doc. 22389-14.

15. Robert Bishop

Robert Bishop objected to the Settlement on November 27, 2019. His primary concern involves the settlement amount, which he contends is not large enough to adequately compensate all the plaintiffs. Additionally, he objects to the disparate treatment of Amorin and Brooke plaintiffs. In particular, he believes it is unfair to reduce the value of the Brooke claims on the grounds that less work has been conducted in Brooke, while requiring Brooke and Amorin plaintiffs to equally share the burden of fees and costs. R. Doc. 22389-15.

16. John Prestridge

John Prestridge objected to the Settlement on November 27, 2019. His primary concern involves the settlement amount, which he contends is not large enough to adequately compensate all the plaintiffs. He believes the settlement in unfair because it provides drastically less than he would have received under the Knauf Settlement. R. Doc. 22389-16.

17. Matthew Harper

Matthew Harper objected to the Settlement on November 27, 2019. His primary concern involves the settlement amount, which he contends is not large enough to adequately compensate all the plaintiffs. He believes the settlement in unfair because it provides drastically less than he would have received under the Knauf Settlement. R. Doc. 22389-17.

18. Kent and Lindsay Archer

Kent and Lindsay Archer objected to the Settlement on November 27, 2019. Their primary concern involves the settlement amount, which they contend is not large enough to adequately compensate all the plaintiffs. Additionally, they object to the disparate treatment of Amorin and Brooke plaintiffs. In particular, they believe it is unfair to reduce the value of the Brooke claims on the grounds that less work has been conducted in Brooke, while requiring Brooke and Amorin plaintiffs to equally share the burden of fees and costs. R. Doc. 22389-18.

19. Timothy and Sebrina Hall

*11 Timothy and Sebrina Hall objected to the Settlement on November 27, 2019. Their primary concern involves the settlement amount, which they contend is not large enough to adequately compensate all the plaintiffs. Additionally, they object to the disparate treatment of Amorin and Brooke plaintiffs. In particular, they believe it is unfair to reduce the value of the Brooke claims on the grounds that less work has been conducted in Brooke, while requiring Brooke and Amorin plaintiffs to equally share the burden of fees and costs. R. Doc. 22389-19.

20. Robert Brasher

Robert Brasher objected to the Settlement on November 27, 2019. His primary concern involves the settlement amount, which he contends is not large enough to adequately compensate all the plaintiffs. Additionally, he objects to the disparate treatment of Amorin and Brooke plaintiffs. In particular, he believes it is unfair to reduce the value of the Brooke claims on the grounds that less work has been conducted in Brooke, while requiring Brooke and Amorin plaintiffs to equally share the burden of fees and costs. R. Doc. 22389-20.

21. Robert and Debbie Hayes

Robert and Debbie Hayes objected to the Settlement on November 27, 2019. Their primary concern involves the settlement amount, which they contend is not large enough to adequately compensate all plaintiffs. They argue that the Settlement should cover the full cost of remediation, as the Knauf Settlement did. R. Doc. 22389-21.

22. James Zimmerman

James Zimmerman objected to the Settlement on November 20, 2019. His primary concern involves the settlement amount, which is not large enough to adequately compensate him for the necessary repairs to his property. R. Doc. 22389-22.

23. Mary Escudie (non-class member)

Mary Escudie objects not to the Settlement itself, but to being excluded from it. Ms. Escudie explains that she was a Florida Amorin class member who rejected the Parker Waichman Settlement offer. Accordingly, she seeks to be reinstated a class member in the Taishan Settlement. R. Doc. 22389-23. Because Ms. Escudie's objection does not challenge the fairness, reasonableness, or adequacy of the Settlement Agreement, the Court will entertain her arguments in a separate, forthcoming order.

24. Michael Guerriero (non-class member)

Michael Guerriero objected not to the Settlement itself, but to being excluded from it. He explains that he was originally a part of the individual settlement arranged by Parker Waichman. Although slightly unclear from his objection letter, it appears as though Mr. Guerriero failed to submit a Supplemental Plaintiff Profile Form in time to receive benefits from the Parker Waichman settlement, and accordingly now requests the Court to allow him to participate in the Taishan Settlement. Mr. Guerriero explains that he failed to complete the SPPF in a timely manner because he suffered a stroke that required serious medical care and continues to suffer "depression, fear, and anxiety" as a result. He asks this Court to overlook what he believes amounts to "excusable neglect due to medical reasons beyond [his] control." R.Doc. 22389-24. Because Mr. Guerriero's objection does not challenge the fairness, reasonableness, or adequacy of the Settlement Agreement, the Court will entertain his arguments in a separate, forthcoming order.

25. Pamela Rigsby and Irene Page (non-class member)

Pamela Rigsby and Irene Page objected to the Settlement on October 9, 2019. Their primary concerns involve the disparate treatment of Amorin and Brooke plaintiffs and the disparity between the Knauf Settlement and the Taishan Settlement with respect to available funds. Ms. Rigsby and Ms. Page further indicate that they intend to opt-out of the settlement. The Court notes that Ms. Rigsby and Ms. Page have in fact opted-out, and therefore the Court will not consider their objection.

26. Patricia Gottlieb (non-class member)

*12 Patricia Gottlieb objected to the Settlement on October 9, 2019. Her primary concerns involve the sufficiency of the settlement and the method of allocating funds under the allocation model. R. Doc. 22389-26. After filing an objection, Ms. Gottlieb opted-out of the Settlement. Accordingly, the Court will not consider her objection.

27. Jimmy Doyle (non-class member)

Jimmy Doyle is an attorney who represents six objectors and all but four of the opt-out plaintiffs in this matter. Mr. Doyle's primary concerns, ostensibly raised on behalf of his objecting clients, involve the disparate treatment of Amorin and Brooke plaintiffs because "[t]here are no terms in the Agreement defining certain claims as either superior or inferior to others deserving of a different monetary allocation." R. Doc. 22389-27 at 3. He also objects to the Allocation Neutral's decision to ignore factors such as ownership status and remediation status. Additionally, he argues that the settlement is inadequate to compensate the class, especially in comparison to the "estimated damages incurred by members of the class as indicated by preliminary discovery or other objective measures." R. Doc. 22389-27 at 5.

B. Law & Discussion

1. Class Action Settlement Prior to Class Certification

While the Amorin class was certified by the Court, the Brooke class has not as yet been certified. Accordingly, it is necessary to consider the requirements for class certification for the proposed Brooke class and also evaluate the reasonableness, fairness, and adequacy of the proposed Settlement for the entire Settlement Class, which includes both the Amorin and Brooke classes, as well as absent Class Members.

[1]"Before an initial class ruling, a proposed class settlement may be effectuated by stipulation of the parties agreeing to a temporary settlement class for purposes of settlement only." William B. Rubenstein, Alba Conte, and Herbert B. Newberg, 4 Newberg on Class Actions § 11:22 (4th ed. 2010). "[A]pproval of a classwide settlement invokes the requirements of Rule 23(e)." Id. Rule 23(e) provides that "[t]he claims ... of a certified class may be settled ... or compromised only with the court's approval." Fed. R. Civ. P. 23(e); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). "Settlement classes—cases certified as class actions solely for settlement—can provide significant benefits to class members and enable the defendants to achieve final resolution of multiple suits." Manual for Complex Litigation § 21.612. However, "[c]ourts have held that approval of settlement class actions under Rule 23(e) requires closer judicial scrutiny than approval of settlements reached only after class certification has been litigated through the adversary process." Id.

Rule 23 of the Federal Rules of Civil Procedure, governing class actions, sets forth certain requirements that must be satisfied in order for a proposed class to be certified. In particular, the "subsection (a) and (b) requirements insure that a proposed class has 'sufficient unity so that the absent class members can fairly be bound by decisions of the class representatives.' " In re FEMA Trailer Formaldehyde Prods. Liab. Litig., 2008 WL 5423488, at *3 (E.D. La. Dec. 29, 2008) (quoting Amchem, 521 U.S. 591, 117 S.Ct. 2231). Under Rule 23(a),

One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

*13 (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.

Fed. R. Civ. P. 23(a). As courts within this district have recognized,

The first two requirements focus on the characteristics of the class; the second two focus instead on the desired characteristics of the class representatives. The rule is designed "to assure that courts will identify the common interests of class members and evaluate the named plaintiffs' and class counsel's ability to fairly and adequately protect class interests."

In re FEMA Trailer, 2008 WL 5423488, at *3 (quoting In re Lease Oil Antitrust Litig., 186 F.R.D. 403, 419 (S.D. Tex. 1999)).

Additionally, class certification requires that at least one of the specific provisions of Rule 23(b) must be met. Relevant here, Rule 23(b)(3) requires that "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." Fed. R. Civ. P. 23(b)(3). "To succeed under Rule 23(b)(3), plaintiffs must sufficiently demonstrate both predominance of common class issues and that the class action mechanism is the superior method of adjudicating the case." In re FEMA Trailer, 2008 WL 5423488, at *3 (citing Mullen v. Treasure Chest Casino, LLC, 186 F.3d 620, 623-24 (5th Cir. 1999)).

2. Rule 23 Criteria

To determine whether a settlement class should be certified for the Brooke claimants and absent class members, the Court will review the applicable law on Rule 23 and evaluate each criterion.

a. Numerosity

[2] [3] [4] Rule 23(a)(1) provides that a class action is maintainable only if "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). To demonstrate numerosity, Settlement Class Counsel must establish that joinder is impracticable through "some evidence or reasonable estimate of the number of purported class members." Pederson v. La.

State Univ., 213 F.3d 858, 868 (5th Cir. 2000). Rule 23 does not provide a clear formula for determining whether the numerosity requirement has been met; thus, courts evaluate numerosity based upon the facts, circumstances, and context of the case. 1 William B. Rubenstein, Newberg on Class Actions § 3:12 (5th ed. 2019). Indeed, "[t]here is enormous disparity among the decisions as to the threshold size of the class that will satisfy the Rule 23(a)(1) prerequisites." Id. Although the plaintiffs bear the burden of showing that joinder is impracticable, "a good-faith estimate should be sufficient when the number of class members is not readily ascertainable," and the numerosity requirement "ordinarily receives only summary treatment ... and has often gone uncontested." Id.

[5]Here, the class includes under 4,000 individual plaintiffs. Notably, over 2,800 of these plaintiffs have already been certified as a class in the Amorin matter. The Court concludes that the numerosity requirement is satisfied in this case.

b. Commonality

*14 [6] [7] [8] [9]The commonality requirement under Rule 23(a)(2) requires for maintenance of a class action that there be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Commonality "does not require that all questions of law or fact raised in the litigation be common. The commonality standard is more qualitative than quantitative." 1 William B. Rubenstein, supra, § 3:20; see also In re FEMA Trailer, 2008 WL 5423488, at *6. Indeed, "[t]he commonality requirement is satisfied if at least one issue's resolution will affect all or a significant number of class members." Stewart v. Winter, 669 F.2d 328, 335 (5th Cir. 1982). The Rule 23(a)(2) commonality "requirement is easily met in most cases." Id.

[10]Commonality is easily satisfied in the instant case, because the Judicial Panel on Multidistrict Litigation ordered the subject cases consolidated in this MDL based upon commonality of facts. Further, the various underlying claims all involve common questions about the defectiveness of the drywall and damages caused by the drywall. The Court finds that the commonality requirement is satisfied in this case.

c. Typicality

[11] Rule 23(a)(3) provides that a class action may be maintained only if "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). "The inherent logic of the typicality requirement is that a class representative will adequately pursue her own claims, and if those claims are 'typical' of those of the rest of the class, then her pursuit of her own interest will necessarily benefit the class as well." 1 Rubenstein, supra, § 3:28.

[12]Here, the typicality requirement is satisfied because each Class Member seeks to recover for the same type of property damage, caused by the same type of drywall, manufactured by the same entities. Additionally, the claims all involve similar questions involving property damage and the need for and scope of remediation. Accordingly, the Court finds that the typicality requirement is satisfied in this case.

d. Adequacy of Representation

[13] [14] [15] [16] [17] Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This criterion, which aims to protect the rights of absent class members, requires courts to consider the adequacy of the proposed class representatives and the adequacy of class counsel. 1 Rubenstein, supra, § 3:54. "The central component of class representative adequacy is the absence of conflicts of interest between the proposed representatives and the class." Id. In contrast, "[a]dequacy of counsel asks whether the attorneys who seek to represent the class are competent to do the job." Id.; see also Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 157 n. 13, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982) ("[T]he adequacy of representation requirement ...also raises concerns about the competency of class counsel and conflicts of interest."). With regard to the former, a court must consider whether any proposed class representative has an interest "materially adverse to some of the class" and whether he or she "is properly qualified to assume the role of class representative." 1 Rubenstein, supra, § 3:54. As to the latter requirement, "courts consider the competence and experience of class counsel, attributes which will most often be presumed in the absence of proof to the contrary." 1 William B. Rubenstein, Alba Conte, and Herbert B. Newberg, Newberg on Class Actions § 3:24 (4th ed. 2010).

[18]David Griffin, Lillian Eyrich, Michelle Geramo, Virginia Tiernan, Debra Williams, and Judd Mendelson act as Class Representatives. Each Class Representative owns property allegedly damaged by covered Chinese drywall and has a high degree of knowledge regarding the litigation. They do not possess any interests antagonistic to the Class as a whole. Further, Class Counsel has extensive experience with complex litigation in general and this litigation specifically, which has been active for more than ten years. The Court concludes that the Class Representatives and Class Counsel adequately represent the entire class.

e. Predominance of Common Questions of Law & Fact

*15 Rule 23(b)(3) provides that a class action is maintainable if all the prerequisites of subsection (a) are satisfied and "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). Factors for the Court to consider in its determination 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.

Fed. R. Civ. P. 23(b)

[19] [20] [21]There is "considerable overlap" between commonality and the predominance of common questions of law and fact. See 1 Rubenstein, supra, § 3:27. However, "the predominance test is 'far more demanding' than the commonality test." In re FEMA Trailer, 2008 WL 5423488, at * 12 (quoting Unger v. Amedisys, Inc., 401 F.3d 316, 320 (5th Cir. 2005)). "In order to 'predominate,' common issues must constitute a significant part of the individual cases." Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 472 (5th Cir. 1986). "As the predominance test is meant to help courts identify cases in which aggregate treatment would be efficient, it focuses on the extent to which the issues in the cases are common as opposed to individual—the more common the issues, the more likely it is that the case will be processed efficiently in the aggregate; the less common the issues, the less likely efficient resolution will be furthered by aggregation." 2 William B. Rubenstein, Newberg on Class Actions § 4:49 (5th ed. 2019).

[22]This requirement is satisfied because the common questions of liability substantially outweigh any questions pertinent to individual Class Members alone. Further, the relevant evidence necessary to establish plaintiffs' claims is common to all Class Members who would seek to prove entitlement to damages based on Taishan's allegedly wrongful conduct. Lastly, as Class Counsel argues, the "resolution of thousands of claims in one action is far superior to individual lawsuits, because it promotes consistency and efficiency of adjudication." R. Doc. 22397-1 at 52. The Court concludes that common questions of law and fact predominate in this case, and that a class action is a superior method of adjudication than consideration of several thousand individual claims. It is now appropriate to consider the fairness, reasonableness, and adequacy of the Settlement Agreement with respect to the claims of both the Amorin and Brooke claimants, as well as absent class members.

3. Fairness, Reasonableness, and Adequacy

Under Rule 23, "[r]eview of a proposed class action settlement generally involves two hearings," the first of which is a "preliminary fairness" evaluation made by the Court. Manual for Complex Litigation § 21.632 (4th ed. 2004). Indeed, within the Fifth Circuit it is routine to conduct a preliminary fairness evaluation prior to the issuance of notice. See, e.g., Cope v. Duggins, 2001 WL 333102, at *1 (E.D. La. Apr. 4, 2001); In re Shell Oil Refinery, 155 F.R.D. 552, 555 (E.D. La. 1993). During this evaluation, the Court must "make a preliminary determination that the proposed class satisfies the criteria set out in Rule 23(a) and at least one of the subsections of Rule 23(b)." Manual for Complex Litigation § 21.632. Additionally, the Court "must make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms and must direct the preparation of notice of the certification, proposed settlement, and date of the final fairness hearing." Id. After having granted preliminary approval and allowed the notice process to move forward, the Court conducts a more thorough and rigorous analysis of the same factors in order to determine the appropriateness of granting final approval. Id. § 21.6; see also In re OCA, Inc. Sec. & Derivative Litig., 2008 WL 4681369, at *11 (E.D. La. Oct. 17, 2008). "Counsel for the class and the other settling parties bear the burden of persuasion that the proposed settlement is fair, reasonable, and adequate." Manual for Complex Litigation § 21.631; In re Vioxx Prods. Liab. Litig., 239 F.R.D. 450, 459 (E.D. La. 2006). The Court granted preliminary approval of the Taishan Settlement on August 29, 2019. R. Doc. 22314. Accordingly, the Court now considers whether final approval is warranted.

*16 [23]The Court is required to render a determination on the fairness, reasonableness, and adequacy of the Settlement Agreement. Courts may consider a large number of factors in order to determine whether these requirements are satisfied. Traditionally, courts in the Fifth Circuit have considered the following six factors, from Reed v. General Motors Corp., in making this determination: (1) the existence of fraud or collusion; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings; (4) plaintiffs' probability of success; (5) the range of possible recovery; and (6) the opinions of class counsel, class representatives, and absent class members. 703 F.2d 170, 172 (5th Cir. 1983).

Additionally, in 2018, Rule 23 was amended to provide uniform guidance regarding this determination. Rule 23(e)(2) instructs courts to consider 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.

Fed. R. Civ. P. 23(e)(2). The Advisory Committee's notes to the 2018 amendments, however, clearly indicate that the changes to the rule are meant to "focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal," rather than "displace any factor" sanctioned by the circuit courts. Id. Accordingly, the Court will consider the Rule 23 requirements as informed by the Reed factors.

a. Adequacy of Representation

[24]The adequacy requirement mandates an inquiry into "the zeal and competence of the representative[s'] counsel and ... the willingness and ability of the representative[s] to take an active role in and control the litigation and to protect the interests of absentees." Berger v. Compaq Comput. Corp., 257 F.3d 475, 479-80 (5th Cir. 2001).

[25]Settlement Class Counsel have been intimately involved with the litigation for over a decade and strongly support this Settlement. Class Counsel suggests it has the experience and institutional knowledge to effectively resolve these claims "meaningfully and intelligently." R. Doc. 22397-1 at 56.

The Court finds that the Class Representatives and Settlement Class Counsel have diligently and zealously represented the plaintiffs. In the face of legal complexities, procedural hurdles, and inherent uncertainty, Class Counsel has coordinated discovery efforts, conducted depositions both in this country and abroad, filed thousands of pleadings and other documents into the record, and represented the parties before this Court, the remand courts, and appellate courts, for over a decade. Class Counsel additionally succeeded in securing a Settlement Agreement with a formidable opponent that, at various points in this litigation, refused to so much as acknowledge this Court's jurisdiction. Further, the Class Representatives are capable of fairly and adequately protecting the interests of the Class because they have been involved in this litigation for years and raise claims that are factually and legally analogous to those of other Class Members.

b. Arm's Length Negotiation

[26] [27] [28]A strong presumption exists in favor of settlement if the district court determines that the settlement resulted from arms-length negotiations between experienced counsel and was not tainted by fraud or collusion. See Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 116 (2d Cir. 2005); see also In re Oil Spill by Oil Rig Deepwater Horizon, MDL 2179,

295 F.R.D. 112, 146 (E.D. La. 2013); Turner v. Murphy Oil USA, Inc., 472 F. Supp. 2d 830, 844 (E.D. La. 2007); In re Train Derailment Near Amite Louisiana, MDL 1531, 2006 WL 1561470, at *19 (E.D. La. May 24, 2006). Fraud or collusion, either actual or perceived, may be suspected when the attorneys have made agreements amongst themselves regarding the allocation of attorney fees, especially when the common benefit fee is deducted directly from the settlement fund. Courts must be particularly diligent when evaluating a proposed settlement in which the fee award has been negotiated by class counsel because pecuniary self-interest has long been cited by courts and scholars as a threat to the performance of counsel's professional and fiduciary obligations to class members. See, e.g., Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277, 279-80 (7th Cir. 2002); John C. Coffee, Jr., Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation, 100 Colum. L. Rev. 370, 385–93 (2002); David L. Shapiro, Class Actions: The Class as Party and Client, 73 Notre Dame L. Rev. 913, 958–60 & n. 132 (1998).

*17 [29]The presumption in favor of settlement is warranted here. First, the Settlement is the product of arms-length negotiations between sophisticated parties with the guidance of an experienced, professional mediator. The process involved a global demand on Taishan, followed by the exchange of detailed damage calculations, arguments, responses, offers, and counter offers. The mediation lasted several days, followed by a three-month negotiation period. The negotiation was conducted by highly skilled attorneys with extensive experience in complex litigation and specific knowledge of the facts and legal issues presented in this MDL. Counsel on both sides have zealously advocated for their clients for some ten years, as evidenced by the extensive discovery, motions practice, and significant resources expended in this case. The parties entered the negotiation with the experience and institutional knowledge necessary to successfully negotiate on behalf of their clients, and the settlement was accordingly achieved as a result of the adversarial process.

Second, the prospect of fraud or collusion is substantially lessened where, as here, the settlement agreement leaves the determination and allocation of attorney fees to the sole discretion of the trial court. Because the parties have not agreed to an amount of attorney fees and instead have merely petitioned the Court for an award they believe is appropriate, there is no threat of the issue tainting the fairness of the settlement negotiations. Accordingly, the Court finds that the proposed Settlement is the product of an arms-length negotiation untainted by fraud or collusion.

c. Adequacy of Relief

Determining whether the proposed relief is adequate requires the Court to consider several of the Reed factors, namely, (1) the complexity, expense, and likely duration of the litigation, (2) the stage of the proceedings, (3) plaintiffs' probability of success on the merits, (4) the range of possible recovery, and (5) the opinions of class counsel, class representatives, and absent class members. Here, these factors all indicate that the proposed relief is adequate. The Court discusses each factor in turn.

i. The Complexity, Expense, and Likely Duration of the Litigation

[30] [31]This factor requires courts to compare the benefits and risks of the proposed settlement as well as the potential future relief in light of the uncertainties of the litigation. In re Oil Spill by Oil Rig Deepwater Horizon, 295 F.R.D. at 147. This litigation has been procedurally complex, expensive, and extremely lengthy. The case has been active for over ten years, during which significant resources have been expended to serve Taishan, conduct discovery, undertake extensive motion practice, try bellwether trials, and file over 20,000 documents into the record. Each day the case continues is another day during which homeowners are unable to commit necessary financial resources to the remediation of their homes.

Additionally, the burden of this litigation cannot be understated. This settlement affects the claims of nearly 4,000 plaintiffs. Although the Amorin claims have been vigorously prosecuted, the Brooke claims remain in an early stage of litigation. Taking these 1,200 Brooke cases to trial would take years, require additional discovery and motion practice, and generate significant expenses. Further, if a favorable judgement were obtained, the prevailing party would likely encounter formidable hurdles in collecting on the judgment. In all cases, the determination of individual damages could take years to resolve, and would greatly increase the cost, fees, and time associated with this already-expansive litigation. Despite the PSC's diligent efforts, there is no certainty as to the outcome of these trials. Success on the merits is not guaranteed, and even if a judgment favorable to plaintiffs is rendered, Taishan would be certain to appeal it, as it has other substantive directives from this Court. Because the settlement provides monetary relief for class members now, as opposed to potential relief in the future, the Court finds that this factor supports approval of the Settlement.

ii. The Stage of the Proceedings

*18 [32] [33]The stage of the proceedings and the nature and extent of discovery can be significant factors in evaluating the fairness of a settlement. This factor requires courts to consider "whether the parties have obtained sufficient information to evaluate the merits of the competing positions." In re Oil Spill by Oil Rig Deepwater Horizon, 295 F.R.D. at 148 (quoting In re Educ. Testing Serv. Praxis Principles of Learning and Teaching: Grades 7–12 Litig., 447 F. Supp. 2d 612, 620 (E.D. La. 2006) (quotations omitted)). "Thus, the question is not whether the parties have completed a particular amount of discovery, but whether the parties have obtained sufficient information about the strengths and weaknesses of their respective cases to make a reasoned judgment about the desirability of settling the case on the terms proposed ...." Id. (quoting In re Educ. Testing Serv., 447 F. Supp. 2d at 620-21).

[34]For the past ten years, the parties in this matter have conducted significant discovery, engaged reputable experts, litigated bellwether trials, and negotiated other settlements. In doing so, they have developed and honed a particularly thorough understanding of the facts of the case, its legal theories, and the strength and weaknesses of the parties' positions. Considering the work that has been done in this case and the expertise of counsel on all sides, the Court is convinced that the parties were fully informed of the factual and legal obstacles that could influence the decision to settle the matter before trial. Accordingly, this factor weighs in favor of approving the settlement.

iii. Plaintiffs' Probability of Success on the Merits

[35] [36]This factor requires the Court to compare the relief offered by the proposed Settlement with the likely recovery if the case were to proceed to trial. Absent fraud or collusion, the probability of success on the merits has been hailed as the most important Reed factor. See Parker v. Anderson, 667 F.2d 1204, 1209 (5th Cir. 1982). In evaluating the probability of success, "the Court must compare the terms of the settlement with the rewards the class would have been likely to receive following a successful trial." DeHoyos v. Allstate Corp., 240 F.R.D. 269, 287 (W.D. Tex. 2007).

[37]The Amorin and Brooke complaints raise various claims aimed at holding Taishan responsible for property damage allegedly caused by defective Chinese drywall. Taishan has stipulated to manufacturing certain kinds of drywall, and there is no serious contention that the drywall itself was not defective.

This fact, however, must be weighed against the significant legal hurdles that could substantially impair the probability of success on the merits. The obstacles to achieving a favorable result and collecting on any potential judgment are significant. The Taishan Defendants have challenged this Court's rulings at every turn, and a challenge to this Court's jurisdiction over Defendants BNBM, BNBM Group, and CNBM is currently set for oral argument before the Fifth Circuit in February 2020.7 Additionally, a large number of Florida Amorin claims risk being dismissed if Judge Cooke adopts the Florida Special Master's Report and Recommendation,8 which found insufficient evidence to attribute certain types of drywall to Taishan. Although the PSC filed an opposition to the report, there is no guarantee that Judge Cooke will entertain the objection and adopting the report would leave plaintiffs with non-attributable drywall without further recourse. Further, this Court has previously indicated that the applicable statutes of limitation pose a substantial bar to the Brooke claims.9 Lastly, and perhaps most importantly, even if plaintiffs were to secure a judgment in their favor at trial, there is absolutely no guarantee of solvency and collectability. At the very least, a judgment would inevitably trigger an appeal, creating additional costs and delays. Even if a judgment were affirmed, there are significant questions regarding the enforcement of a judgment against a Chinese company that contests the jurisdiction of the American courts. Taishan has limited or no assets in this country. Thus, any enforcement

would have to be pursued in China, a country that has no treaty with the United States governing enforcement of judgment. See Enforcement of Judgments, U.S. Dep't of State, https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/internl-judicial-asst/Enforcement-of-Judges.html (last visited Jan. 9, 2019). Accordingly, the Court considers the finality of the Settlement and the immediate cash benefit it provides to be superior to the possibility of achieving a larger judgment at a future trial without any mechanism to enforce it.

iv. Range of Possible Recovery

*19 [38] [39]"[I]n any case there is a range of reasonableness with respect to a settlement—a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion ...." Newman v. Stein, 464 F.2d 689, 693 (2d Cir. 1972). Thus, after determining if any legal or factual obstacles exist, a district court must inquire whether the settlement's terms fall within a reasonable range of recovery, given the likelihood of the plaintiffs' success on the merits. When considering this factor, the Court must remain aware that

[c]ompromise is the essence of settlement and the court should not make the proponents of a proposed settlement justify each term of settlement against a hypothetical or speculative measure of which concessions might have been gained; inherent in compromise is a yielding of absolutes and an abandoning of highest hopes.

Nelson v. Waring, 602 F. Supp. 410, 413 (N.D. Miss. 1983) (quoting Cotton v. Hinton, 559 F.2d 1326, 1330 (5th Cir. 1977).

[40]Like all settlements, the Taishan Settlement Agreement is a compromise. It is not designed to provide complete and total relief to every single claimant. Without re-hashing the inherent risks and uncertainties associated with this litigation, the Court stresses that many plaintiffs risk recovering nothing if the case proceeds to trial, whether due to the Florida Special Master's determination regarding product identification, the effect of the statutes of limitation on Brooke claims, or the vagaries of collecting on any judgment. For these plaintiffs whose claims are in tenuous positions, the Settlement provides immediate monetary relief that is firmly in the range of possible recovery. The settlement award is also in the range of possible recovery even for the plaintiffs whose claims are not subject to dismissal for these reasons. As explained above, the inherent risks and uncertainties involving jurisdiction, appeals, and collectability render every claim subject to a possible recovery of zero dollars. Even though a larger recovery than the one offered by the Settlement is a possibility, the value of the settlement award represents a fair compromise when considering the risks associated with this litigation. Taking into consideration the legal and factual obstacles discussed above, the Court finds that the Taishan Settlement provides class members with a sum of money that falls within the reasonable range of recovery. It will not make every plaintiff whole, but the Court urges litigants to remember that, as cited above, "inherent in compromise is a yielding of absolutes and an abandoning of highest hopes." Id.

v. Opinion of Class Counsel, Class Representatives, and Absent Class Members

[41] [42] [43]Class Counsel are intimately familiar with the case and the Settlement, and therefore the Court will give weight to class counsel's opinion regarding the fairness of settlement. See Cotton, 559 F.2d at 1330 ("[T]he trial court is entitled to rely upon the judgment of experienced counsel for the parties."). Class counsel's opinion should be presumed reasonable because they are in the best position to evaluate fairness due to an intimate familiarity with the lawsuit. Boyd v. Bechtel Corp., 485 F. Supp. 610, 622 (N.D. Cal. 1979). However, the Court's deference must not be so great that it blindly follows class counsel's recommendations. Id. Rather, the Court must give class counsel's recommendations appropriate weight in light of all the factors surrounding the settlement. Id. (citing Pettway v. Am. Cast Iron Pipe Co., 576 F.2d 1157, 1215-16 (5th Cir. 1978), and Saylor v. Lindsley, 456 F. 2d 896, 900–01 (2d Cir. 1972)).

*20 [44]Settlement Class Counsel has filed a 110-page brief in support of final approval of the Settlement. R. Doc. 22397-1. The Settlement is additionally supported by Defendants. R. Doc. 22393. As explained above, this Settlement was achieved through an arms-length negotiation between sophisticated and experienced counsel who developed a thorough understanding of the relative strengths and weakness of the case through extensive motion practice, discovery, and experience with complex litigation. Although the Court affords deference to their views, its consideration of this factor does not end there. All of the Class Representatives in this matter—David Griffin, Lillian Eyrich, Mary Michelle Germano, Virginia Tiernan, Debra Williams, and Judd Mendelson—have declined to opt-out or object to the Settlement. The Class Representatives have all filed affidavits in support of the Settlement, explaining that they "strongly support this Settlement, believe it is fair, reasonable and adequate, and urge the Court to grant final approval to the Settlement and certify the Settlement Class." R. Doc. 22397-16, 22397-17, 22397-18, 22397-19, 22397-20, 22397-21.

[45]Further, the attitude of Absent Class Members, expressed either directly or indirectly by their failure to object after notice and the high level of participation in the proposed settlement program, is an additional factor on which district courts generally place heavy emphasis. See In re Microstrategy, Inc. Sec. Litig., 150 F. Supp. 2d 896 (E.D. Va. 2001) (stating that class reaction is perhaps the most significant factor in determining whether a settlement is adequate). The Taishan Settlement affects 3,948 known class members. Of those 3,948 plaintiffs, 22 objected to the settlement and 92 opted out.10 Additionally, five non-class members filed objections to the Settlement, but two of these objectors in fact object to their status as non-class members and seek to join the Settlement Class and recover settlement funds. Thus, approximately 97% of proposed class members have accepted the Settlement, and the Court accordingly finds that this factor weighs in favor of final approval.

d. Equitable Treatment of Class Members

This Rule 23 factor requires the Court to consider whether "the proposal treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2)(d). This inquiry involves a determination of "whether the apportionment of relief among class members takes appropriate account of differences among their claims." Rule 23 (e)(2)(C), (D), Advisory Committee Notes to 2018 Amendments.

[46]The Taishan Settlement is designed to distribute settlement funds among the thousands of plaintiffs on an equitable basis. To assist in this endeavor, the parties enlisted the help of an Allocation Neutral, who considered a variety of factors and ultimately developed an allocation model to guide the process. The allocation model assigns relative values to a handful of objective criteria that collectively determine each individual award. The Court finds that the allocation model is specifically designed to efficiently and effectively distribute funds on an equitable basis that considers relevant, objective factors. Accordingly, this factor weighs in favor of final approval.

e. The Objections

[47] [48] [49]Any class member who does not opt out may object to the settlement under Rule 23(e)(4). The absence or small number of objections may provide a helpful indication that the settlement is fair, reasonable, and adequate. See In re Corrugated Container Antitrust Litig., 643 F.2d 195, 217-18 (5th Cir. 1981); Pettway, 576 F.2d at 1216–17 (stating that the higher the number of objectors, the heavier the burden of proving fairness, and ruling that it was an abuse of discretion to approve a settlement opposed by the named plaintiff and 70% of class members). But see In re Warfarin Sodium Antitrust Litig., 212 F.R.D. 231, 254 (D. Del. 2002) (stating that though class reaction is an indicator of class member support, courts must not place too much dependence on a small number of objections); Theodore Eisenberg & Geoffrey Miller, The Role of Opt–Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues, 57 Vand. L. Rev. 1529, 1532-34 (2004) (cautioning that reliance on low opt-out and objection numbers in any given case may be misplaced given that the authors found opt-out and objection rates to be "trivially small in the mass of cases"). However, a court may approve a class action settlement even if opposition exists. See Ayers v. Thompson, 358 F.3d 356, 368-73 (5th Cir. 2004) ("That several class members desire broader relief ... does not prevent judicial approval of this settlement agreement, which promises substantial relief to the class."). Nevertheless, courts must independently examine all objections to determine if they have merit and whether they raise questions regarding the fairness of settlement. See In re Corrugated Container, 643 F.2d at 217-18.

*21 [50] [51] [52]Courts have held that objections must be sufficiently clear and unambiguous for court consideration; otherwise the party will be deemed to have waived their objection. Luevano v. Campbell, 93 F.R.D. 68, 77 (D.D.C. 1981). Moreover, objectors must comply with procedural requirements stipulated in the settlement agreement, such as filing a written statement of objection with the court in advance of the hearing and giving notice of intent to appear at the fairness hearing.

However, the court has discretion to permit objections at the fairness hearing even if the party wishing to voice an objection has not filed a written statement in advance. See e.g., In re Ford Motor Co. Bronco II Prods. Liab. Litig., MDL 991, 1994 WL 599525, at *4-5 (E.D. La. Nov. 1, 1994); In re Prudential–Bache Energy Income P'ships Sec. Litig., 815 F. Supp. 177, 179 (E.D. La. 1993). Objections ought to focus on the fairness, reasonableness, and adequacy of the agreement, rather than "renegotiate terms of the settlement based on individual preferences." In re Oil Spill by Oil Rig Deepwater Horizon, 295 F.R.D. at 152.

As explained above, the Court has received twenty-seven objections to the Settlement Agreement, twenty-two of which were filed by Class Members. Having detailed each above, the Court finds that the objections primarily involve the following issues: (1) the size of the settlement and adequacy of the funds, (2) the disparate treatment of Amorin and Brooke plaintiffs, (3) the effect of product identification on the award estimate, and (4) the inclusion of attorney fees. In addition, one objector challenges the sufficiency of the Notice Program. The Court will discuss each of these issues in turn.

i. The Size of the Settlement and Adequacy of the Funds

[53]Several Class Members object to the Settlement on the grounds that it simply does not provide enough money to make them whole again or to allow them to fully remediate their homes. Additionally, some Class Members object to the disparity between the Taishan Settlement and the Knauf Settlement, which provided for complete remediation of affected properties in addition to attorney fees.

The Court acknowledges that this Settlement is smaller than the Knauf Settlement and does not provide 100% of the funds necessary to completely remediate each Affected Property. However, the Court urges the parties to remember that settlements do not usually make claimants completely whole. This Settlement aims to resolve claims on an aggregate basis to provide the greatest total recovery for the greatest number of people and was negotiated in light of the complexities that exist in the Taishan aspect of the litigation that were absent from the Knauf matters. Many of these objections focus on the value of individual claims, but do not actually target the fairness or adequacy of the Settlement as a whole. While these may be reasons to opt out, they are not reasons to unravel the entire Settlement, which 97% of class members apparently support.

The court urges litigants to recognize that a settlement is, at its core, a compromise. See In re Oil Spill by Oil Rig Deepwater Horizon, 910 F. Supp. 2d 891, 941 (E.D. La. 2012), aff'd sub nom. In re Deepwater Horizon, 739 F.3d 790 (5th Cir. 2014) ("Settlements are compromises, and the fact that some class members wish BP had paid more compensation is no reason to reject the Settlement."); United States v. Par. of Orleans Criminal Sheriff, No. CIV.A. 90-4930, 1997 WL 35215, at *4 (E.D. La. Jan. 27, 1997) ("Since this is a settlement, no one can be expected to receive 100% recovery ...."). What Class Members are

missing in terms of dollars they make up for by guaranteed recovery and an end to a decade of litigation. The fact that Class Members wish Taishan was willing to pay more to settle these claims does not warrant unraveling the entire Agreement. The objectors who are unhappy with the amount of their estimated allocation had the right to opt-out of the Settlement and pursue their claims against Taishan in court. In not opting out, these objectors apparently recognize the inherent difficulties and uncertainties associated with pursuing this option, and their actions suggest that final approval of the Settlement is warranted.

ii. Disparate Treatment of Amorin and Brooke Plaintiffs

*22 [54] [55]Several objectors raise concerns with the methodology used by the Allocation Neutral to determine the value of each claimant's recovery. The Court begins by noting that fairness is not synonymous with equality. See Ortiz v. Fibreboard Corp., 527 U.S. 815, 855–56, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999) ("[A] settlement must seek equity by providing for procedures to resolve the difficult issues of treating such differently situated claimants with fairness as among themselves."). Indeed, "[i]t is perfectly fair and reasonable, and indeed common and accepted, for settlement benefits to turn on the strength of class members' claims." In re Oil Spill by Oil Rig Deepwater Horizon, 910 F. Supp. 2d at 948. There is no elusive or magical way to distribute the funds among differently situated claimants in a manner that would make every single claimant completely satisfied with their recovery. The Allocation Neutral, who has no financial interest in this litigation, was appointed to determine the fairest, most equitable way of doing so. This methodology was designed to be efficient and cost effective, as is in the best interest of the class because it minimizes the expenses that will be deducted from the recovery.

With respect to the disparate treatment of Amorin and Brooke plaintiffs, the Court notes that this distinction may appear to be ambiguous line-drawing without good reason. However, as explained at the Final Fairness Hearing, the effect of a Class Member's claim status has a significant impact on the value of their claim and likelihood of success on the merits. As the Allocation Neutral explained, the Amorin class has gone through a significant amount of litigation—a default judgment has been entered with respect to liability and a class has been certified. The Florida and Virginia remand courts have adopted this Court's rulings with respect to such matters. The last step of the Amorin litigation, albeit a very complex one, is to calculate the individual measure of damages suffered by each plaintiff. In stark contrast, the Brooke claims are in the nascent stages of litigation. Several complaints have been filed, but the Defendants have not answered, no discovery has occurred nor has a class been certified. Developing these claims in a manner that resembles the Amorin litigation would entail significant time and expense. Furthermore, many of these claims are jeopardized by applicable statute of limitations defenses potentially available to Defendants. Accordingly, the Brooke claims are inherently riskier and less valuable than the Amorin claims. The Amorin and Brooke groups have very different chances of success on the merits, and it is equitable to treat claimants with more fully developed cases as better situated than those facing more substantial obstacles to recovery. In so finding, the Court does not intend to suggest that the hardship suffered by Amorin and Brooke plaintiffs is not comparable. To the contrary, the Court recognizes that the hardship of living with Chinese drywall has been shared equally by all Affected Property owners. That fact,

however, does not justify the equal distribution of funds among class members because fairness requires that claimants be treated in an equitable fashion that considers, among other things, the strength and status of their individual claims.

iii. Effect of Product Identification

[56]The same logic applies to the discounts for product identification issues. The allocation model assigns certain discounts to claims arising from the installation of types of drywall the Florida Special Master determined were not attributable to Taishan. Taishan admits it manufactured the following brand of drywall: (E) DUN, (H) TAIAN TAISHAN and Taihe Edge Tape, (K) Venture Supply. BNBM admits it manufactured (A) BNBM and Dragon Board. Accordingly, affected properties with these brands of drywall are not discounted. However, claims involving (D) Crescent City Gypsum, (I) MADE IN CHINA MEET[S] OR EXCEED[S], and (J) various drywall dimensions, including 4feet[x/*]12feet[x/*]1/2 inch, are discounted by 25% because Taishan admits it manufactured some, but not all of this drywall. An 80% discount is applied to drywall categories (B) C&K, (C) Chinese Manufacturer #2 (purple stamp), (F) IMT Gypsum, (G) Prowall, and (L) White Edge Tape, boards with no markings or boards with no markings other than numbers of letters, because, as the Florida Special Master found, there is insufficient evidence linking these boards to Taishan. With respect to product identification, the applicable discounts reflect the fact that if the class were to forego settlement and proceed to trial, the claimants with drywall falling into a discounted category would likely recover substantially less, or nothing at all, than a claimant with drywall clearly attributable to the Taishan Entities.

iv. Inclusion of Attorney Fees

*23 [57]The Court recognizes that the reduction of individual awards for an as-of-yet undetermined amount of attorney fees may seem, to some plaintiffs, like an unfair penalty. Nevertheless, the Court finds that a reduction of some amount for attorney fees is both absolutely necessary and well-deserved. Plaintiffs' attorneys typically work on a contingency arrangement, and the Court assumes that the majority, if not all, of the plaintiffs in this litigation were prepared to allocate approximately one-third of any recovery at trial to their attorney. Here, Settlement Class Counsel has requested an award of 30% for attorney fees, to include both contract counsel and common benefit counsel, and 3% for costs, which approximates a typical contingency arrangement. Further, an award of attorney fees is necessary in all settlements of this nature both to reward the attorneys for their years of hard work and to encourage other attorneys to take on complex, challenging, and meaningful cases in the future. As noted above, both common benefit counsel and the individually retained attorneys have been actively litigating this case for over a decade to the benefit of individual clients and the entire class. This case has been exceedingly complex. It has been remarkably expensive. It has been taxing on the attorneys' time and financial resources. To simply deny

them compensation from the settlement fund is inconceivable. The appropriate amount of attorney fees has not yet been established. The Court will deal with this issue in section IV of this opinion.

v. Notice

[58]One objector alleges that due process has been violated because media outreach was insufficient. Although the Court notes that a generalized allegation is insufficient to stage an actual attack on a settlement, DeHoyos, 240 F.R.D. at 293, it will nevertheless address the argument.

[59]Certification of a class settlement under Rule 23(b)(3) requires that the proposed class receive adequate notice of the settlement. Rule 23(c)(2)(b) requires that class members receive "the best notice that is practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(b). This notice must include: (1) "the nature of the action," (2) "the definition of the class certified," (3) "the class claims, issues, or defenses," (4) "that a class member may enter an appearance through an attorney if the member so desires," (5) "that the court will exclude from the class any member who requests exclusion," (6) "the time and manner for requesting exclusion," and (6) "the binding effect of a class judgment on members." Fed. R. Civ. P. 23(c)(2)(b)(i)-(vii). Further, under Rule 23(e)(1), notice must be directed "in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1). Rule 23's notice requirement implicates due process concerns, because "[n]otice of a mandatory class settlement ... will deprive class members of their claims" and "therefore requires that class members be given information reasonably necessary for them to make a decision whether to object to the settlement." In re Katrina Canal Breaches Litig., 628 F.3d 185, 197 (5th Cir. 2010).

[60]Here, the Court is satisfied that the Notice Program complied with Rule 23. During the Class Notice Period, the Claims Administrator mailed a long-form notice to all known Class Members. This notice was written in plain, understandable English, and advised class members of their rights and obligations under the Settlement. It explained the subject matter of the litigation, defined the class, advised Class Members of their right to representation and their right to object or opt-out, the procedure for doing so, and explained the binding effect of the Settlement on Class Members who chose not to opt-out. Each known Class Member was additionally provided with an estimate of their award and allowed to challenge that estimate. To notify Absent Class Members, the Court mailed notices to all courthouses in which Chinese drywall-related matters were pending. A website was published, and a call center established, to provide individuals with information about the litigation and the Settlement.

Class Counsel also worked with Kinsella Media to develop a Media Notice Program. Shannon Wheatman, a specialist in the design and implementation of class action notification programs, testified as a representative of Kinsella Media at the Final

Fairness Hearing. As she explained, the Notice Program consisted of individual mailings to each known Class Member, paid media advertising in English and Spanish-language newspapers, lifestyle websites, national magazines, and digital media outlets. The digital media campaign resulted in twenty-five million gross impressions, and the settlement website has been viewed over 121,000 times. The notices and advertisements were written in plain English and designed to capture a reader's attention. Ms. Wheatman testified, and the Court agrees, that the Notice Program satisfies the best notice practicable standard under Rule 23(c) and the requirements for class notification under Rule 23(e)(1).

f. The Settlement Agreement is Fair, Reasonable, and Adequate

*24 Considering the foregoing, none of the objections warrant denial of final approval. Accordingly, the Court concludes that the Taishan Settlement Agreement is fair, reasonable, and adequate. The Court concedes that this Settlement will not provide every plaintiff with sufficient funds to completely remediate their homes. However, considering the significant expenses, delays, risks of continued litigation, risks of collectability, and the overwhelming support of Class Counsel and Class Members, the Court finds that it is fair to monetarily compensate plaintiffs immediately rather than continuing this litigation for, at minimum, several more years. Class Counsel, Defense Counsel, and over 97% of Class Members appear to agree. Accordingly, the Court confirms its previous decision preliminarily approving the Settlement and certifying the Settlement Class.

IV. MOTION FOR ATTORNEYS' FEES AND COSTS

At this juncture, the Court turns to the issue of attorney fees and costs. Settlement Class Counsel seeks an award of attorney fees for common benefit counsel and contract counsel, and cost reimbursements for common benefit counsel. R. Doc. 22380. As mentioned, Settlement Class Counsel requests an award representing 30% of the aggregate amount of the Settlement for attorney fees and 3% for costs, totaling $74,400,000 in fees and approximately $7,074,830.15 in costs.

A. Law and Analysis

[61] [62]"[U]nder the 'American Rule,' the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser." Pennsylvania v. Del. Valley Citizens' Council for Clean Air, 478 U.S. 546, 561, 106 S.Ct. 3088, 92 L.Ed.2d 439 (1986) (quotation omitted). Likewise, the attorney for the prevailing litigant must generally look to his or her own client

for payment of attorneys' fees. Since the nineteenth century, however, the Supreme Court has recognized an equitable exception to this rule, known as the common fund or common benefit doctrine, that permits the creation of a common fund in order to pay reasonable attorney fees for legal services beneficial to persons other than a particular client, thus spreading the cost of the litigation to all beneficiaries. See In re Zyprexa Prods. Liab. Litig., 594 F.3d 113, 128 (2d Cir. 2010) (Kaplan, J., concurring).11 This equitable common fund doctrine was originally, and perhaps still is, most commonly applied to awards of attorney fees in class actions. See e.g., 5 William B. Rubenstein, Newberg on Class Actions § 15:53 (5th ed. 2019) (discussing common fund doctrine in context of class actions).

*25 But the common fund doctrine is not limited solely to class actions. See Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 59 S.Ct. 777, 83 L.Ed. 1184 (1939) (employing common benefit doctrine to award fees and costs to litigant whose success benefitted unrelated parties by establishing their legal rights); Alan Hirsh & Diane Sheeley, Fed. Judicial Ctr., Awarding Attorneys' Fees and Managing Fee Litigation 51 (2nd ed. 2005) ("Although many common fund cases are class actions ... the common fund doctrine is not limited to class actions."); Manual for Complex Litigation § 14.121. As class actions morph into multidistrict litigation, as is the modern trend, the common benefit concept has migrated into the latter area. The theoretical bases for the application of this concept to MDLs are the same as for class actions, namely equity and her blood brother, quantum meruit. However, there is a difference. In class actions the beneficiary of the common benefit is the claimant; in MDLs the beneficiary is the individually retained attorney (contract counsel). See Eldon E. Fallon, Common Benefit Fees in Multidistrict Litigation, 74 La. L. Rev. 371, 375 (2014).

MDL courts have consistently cited the common fund doctrine as a basis for assessing common benefit fees in favor of attorneys who render legal services beneficial to all MDL plaintiffs. See e.g., In re Genetically Modified Rice Litig., MDL 1811, 2010 WL 716190, at *4 (E.D. Mo. Feb. 24, 2010) (relying on common fund doctrine as an alternate basis of inherent managerial authority and concluding that "[b]oth sources of authority provide the same result"); In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., MDL No. 05-1708, 2008 WL 682174, at *4 (D. Minn. Mar. 7, 2008).

In addition to judicial precedent the Court also finds authority to assess common benefit attorney fees in its inherent managerial authority, particularly in light of the complex nature of this MDL. The Fifth Circuit has long recognized that a court's power to consolidate and manage litigation necessarily implies a corollary authority to appoint lead or liaison counsel and to compensate them for their work. See In re Air Crash Disaster at Fl. Everglades on Dec. 29, 1972, 549 F.2d 1006 (5th Cir. 1977). Further, the Fifth Circuit has explained that a district court has inherent authority "to bring management power to bear upon massive and complex litigation to prevent [the litigation] from monopolizing the services of the court to the exclusion of other litigants." In re Air Crash Disaster, 549 F.2d at 1012. This policy seeks to avoid the unjust enrichment of those who profit from a common fund at the expense of those whose labors produced the fund, and it serves to encourage attorneys to accept the considerable risks associated with prosecuting complex, multi-plaintiff matters for the benefit and protection of all plaintiffs' rights.

1. Methodology for Determining Common Benefit Fees

Attorney fees and costs, authorized by law or the agreement of the parties, must be reasonable. Fed. R. Civ. P. 23(h). "The decision of an award of attorney fees in a common-fund case is committed to the sound discretion of the trial court, which must consider the unique contours of the case." Manuel for Complex Litigation § 14.121 (4th ed. 2004).

[63]Courts have employed various methods for determining the reasonableness of an award of common benefit fees. These methods include: (1) the lodestar method, which entails multiplying the reasonable number of hours expended on the litigation by an adjusted reasonable hourly rate; (2) the percentage method, in which the court compensates common benefit attorneys based on a percentage of the amount recovered; or (3) the blended method, a combination of both methods, in which the percentage is selected and cross checked for reasonableness by utilizing the lodestar method. See Union Asset Mgmt. Holding A.G. v. Dell, Inc., 669 F.3d 632, 644 (5th Cir. 2012); In re Vioxx Prods. Liab. Litig., 760 F. Supp. 2d 640, 652 (E.D. La. 2010) (finding the blended method to be in line with Fifth Circuit precedent). It is appropriate to consider each of these methods in turn in an effort to determine a fair common benefit fee.

a. Lodestar Method

*26 [64]Using the lodestar method to calculate reasonable common benefit fees begins with a determination of the reasonable number of hours spent on this part of the case. Once this is done, the appropriate hourly rate is established. This is then tested based on an analysis of 12 factors known as the Johnson factors—first formulated in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717 (5th Cir. 1974). These factors include (a) the time and labor required; (b) the novelty and difficulty of the questions; (c) the skill required to perform the legal service properly; (d) the preclusion of other employment by the attorneys due to acceptance of the case; (e) the customary fee; (f) whether the fee is fixed or contingent; (g) time limitations imposed by the client or circumstances; (h) the amount involved and the results obtained; (i) the experience, reputation, and ability of the attorneys; (j) the "undesirability" of the case; (k) the nature and length of the professional relationship with the client; and (l) awards in similar cases. Id. at 717-19; see also Von Clark v. Butler, 916 F.2d 255, 258 (5th Cir. 1990).

The lodestar method is not without flaws. Many courts and commentators have noted problems with the lodestar method including potential for manipulation, disincentive for an early settlement, reward for excessive and wasteful attorney effort, and confusion and lack of predictability in setting fees. See Vaughn R. Walker & Ben Horwich, The Ethical Imperative of a

Lodestar Cross-Check: Judicial Misgivings About "Reasonable Percentage" Fees in Common Fund Cases, 18 Geo. J. Legal Ethics 1453, 1456 (2005) (summarizing Court Awarded Attorney Fees: Report of the Third Circuit Task Force, 108 F.R.D. 237 (1985)). In response to the difficulties with the lodestar method, some courts have used the percentage method for determining an appropriate common benefit fee.

b. Percentage Method

The percentage method bases the common benefit fee on a fair percentage of the amount recovered. Some courts have concluded that the percentage method provides more predictability to attorneys and class members, encourages settlement, and avoids protracted litigation for the sake of racking up hours. See Walker and Horwich, supra at 1456-57 (citing In re Activision Sec. Litig., 723 F. Supp. 1373, 1378 (N.D. Cal. 1989)); accord In re Diet Drugs, 582 F.3d 524, 540 (3d Cir. 2009).

[65]The percentage method, however, cannot be arbitrary, devoid of all reality, or inconsistent with usual fees for the type of case involved. There is no one percentage that should apply to all cases. The percentage should be informed by the facts and circumstances of the particular case. Data compiled in empirical studies of attorney fees in class actions reveal that the higher the settlement, the lower the percentage of the fee. Theodore Eisenberg & Geoffrey Miller, Attorneys' Fees and Expenses in Class Action Settlements 1993–2008, 7 J. Empirical Legal Studies 248 (2010). For example, in settlements between $190 million and $900 million, common benefit fees between 10 percent and 12 percent have been allowed. See id. at 265. Whereas for settlements between $1 million and $2 million, common benefit fees between 32-percent and 37-percent have been awarded. See id. Of course, the percentages allowed in past cases are only guideposts, and each case should be analyzed on its own basis with the objective of determining a reasonable fee in the case before the court.

c. Blended Method

[66]The blended method is usually used to ensure that the amount of the common benefit fee established by the percentage method is reasonable. Under the blended method, the fee arrived at by the percentage method is cross-checked by the lodestar method utilizing the Johnson factors. If the fee arrived at by the percentage method is within "the ballpark" of the fee that would result from the lodestar method, the reasonableness of the fee is more sustainable. The blended method has been used by many district courts, including this one. See In re Vioxx Prods. Liab. Litig., 760 F. Supp. 2d 640; In re Enron Corp. Sec., Derivative & ERISA Litig., 586 F. Supp. 2d 732 (S.D. Tex. 2008); Batchelder v. Kerr-McGee Corp., 246 F. Supp. 2d 525 (N.D. Miss. 2003). All circuit courts, including the Fifth Circuit, have approved this use of the blended method. See Union

Asset Mgmt. Holding, 669 F.3d at 644 ("To be clear, we endorse the district courts' continued use of the percentage method cross-checked with the Johnson factors. We join the majority of circuits in allowing our district courts the flexibility to choose between the percentage and lodestar method in common fund cases, with their analyses under either approach informed by the Johnson considerations.").

*27 [67]The Court finds the blended percentage approach to be the best method for calculating reasonable attorney fees in this litigation. As such, the Court will (1) determine the value of the benefit claimants receive and assign an initial benchmark percentage, (2) determine whether the benchmark percentage should be adjusted in light of the Johnson factors, and (3) conduct a lodestar analysis to determine whether the fee is indeed reasonable. The Court notes, however, that "[t]he lodestar analysis is not undertaken to calculate a specific fee, but only to provide a broad cross check on the reasonableness of the fee arrived at by the percentage method." In re Vioxx Prods. Liab. Litig., 760 F. Supp. 2d at 652.

i. Valuation of Benefit Obtained and Determination of a Benchmark Percentage

The Taishan Settlement Agreement created a $248 million fund for the compensation of claimants whose damages were attributable to defective drywall manufactured by the Taishan entities. The Court finds no reason to omit any portion of that settlement fund from consideration with respect to the reasonable amount of attorney fees. Accordingly, $248 million is the appropriate amount for calculation of a reasonable percentage of attorney fees.

[68]The Taishan Settlement Agreement provides that petitioning attorneys may seek an award of attorney fees "totaling in the aggregate up to 32% of the Settlement Funds," which "shall be paid from the Settlement Funds exclusively." R. Doc. 22305-2 at 38. Settlement Class Counsel now seeks an award of 30% and argues that this benchmark percentage is reasonable and consistent with Fifth Circuit precedent. However, the Court's goal in setting a benchmark percentage is not simply to rubber-stamp Settlement Class Counsel's proposed figured. Rather, the Court is required to independently determine a reasonable percentage appropriate to the facts particular to the Settlement in this aspect of the case.

[69]Determining a reasonable benchmark percentage is an inquiry that must be addressed on a case by case basis. An influential empirical study analyzing attorney fees in class action settlements is instructive to this endeavor. See In re Vioxx Prods. Liab. Litig., 760 F. Supp. 2d at 652; In re Lawnmower Engine Horsepower Mktg. & Sales Practices Litig., 733 F. Supp. 2d 997, 1012-15 (E.D. Wis. 2010); Murphy Oil, 472 F. Supp. 2d at 862-64; In re Educ. Testing Servs., 447 F. Supp. 2d at 630; Allapattah Servs., Inc. v. Exxon Corp., 454 F. Supp. 2d 1185, 1212 (S.D. Fla. 2006); In re Cabletron Sys. Inc. Sec. Litig., 239 F.R.D. 30, 37 n. 12, 41 (D.N.H. 2006). Theodore Eisenberg and Geoffrey Miller's detailed study, titled Attorney Fees in Class Action Settlements: An Empirical Study, investigates the relationship between the amount recovered through a

settlement and the award of attorney fees over a fifteen-year period. In particular, it explains that there exists "an overwhelming correlation between class recovery and attorney fees," and that the benchmark percentage should be determined by considering two specific Johnson factors: the customary fee and awards in similar cases. Theodore Eisenberg & Geoffrey P. Miller, Attorneys' Fees and Expenses in Class Action Settlements: An Empirical Study, 1 J. Empirical Legal Studies 27, 72 (2004).

Given that the parties have not negotiated a specific fee award, the Court will look to Eisenberg and Miller's data sets to determine an average percentage for cases of similar magnitude. The Court has already determined that for purposes of calculating reasonable attorney fees in this case, the class benefit is valued at $248,000,000. This recovery falls within the "greater than 90%" decile of client recovery in the study, which includes all recoveries greater than $190 million. The data suggests that the mean fee percentage in such cases in 12% with a standard deviation of 8.1%. Id. Further, "fee requests falling within one standard deviation above or below the mean should be viewed as generally reasonable and approved by the court unless reasons are shown to question the fee." Id. at 74. In other words, a fee falling between 4% (approximately one standard deviation below) and 20% (approximately one standard deviation above) is considered reasonable under this metric.

*28 [70]Awards in similar cases are also highly instructive to the Court for the purpose of determining a benchmark perspective. Perhaps most analogous here is the Knauf Settlement Agreement, reached in another aspect of this litigation. Despite the differences between the Knauf and Taishan Settlement described in detail above, the Knauf Settlement is instructive because it involved the same types of claims, many of the same attorneys, and the same diligent effort. Attorney fees in the Knauf matter constituted approximately 17.7% of the total settlement, which was divided among common benefit counsel and contract counsel. See R. Doc. 22168. Similarly, in Murphy Oil, this Court awarded 17% of a $195,000,000 settlement for attorney fees. 472 F. Supp. 2d at 867. In that case, the Court stressed that property damage cases, such as the instant case, are entitled to a smaller award of attorney fees than cases involving personal injury claims. Id. at 866.

[71]While the Manual for Complex Litigation states that a fee of 25% of a common fund "represents a typical benchmark," see Manual for Complex Litigation § 14.121, Eisenberg and Miller report that "a scaling effect exists, with fees constituting a lower percent of the client's recovery as the client's recovery increases." Eisenberg & Miller, supra, at 28. In other words, the higher the recovery, the lower the percentage. Thus, after studying the relevant data and considering awards in similar cases, the Court will use an initial benchmark of 19% in this case to compensate both contract counsel and common benefit counsel. This sum is less than the Manual for Complex Litigation's standard benchmark but within one standard deviation of the mean fee percentage in similar cases according to Eisenberg and Miller's study. The Court further notes that this fee, while on the high side of the standard deviation suggested in Eisenberg and Miller's study, is warranted in light of the complexities and challenges presented by the Taishan aspect of this litigation and also consistent with the fees in the Knauf Settlement and other comparable cases.

ii. Johnson Factors

The Court now considers the Johnson factors, addressing them in conjunction with the circumstances of this case, to determine whether an adjustment to the benchmark of 19% is warranted.

a. The time and labor required

[72]Class counsel and their staff have logged over 109,000 hours of work in the Taishan aspect of this litigation between January 1, 2014 and August 31, 2019. These hours have been logged contemporaneously with performing the work and reported monthly in accordance with the protocol established by the Court in Pretrial Orders 9 and 9A. These reports have been systematically audited and approved by the Court-appointed CPA and reviewed monthly by the Court. A summary of these reports reflects the type of work performed and the total number of hours logged by common benefit counsel.

The work performed by common benefit counsel and contract counsel was time-consuming. Counsel had to negotiate trial plans and coordinate various schedules, travel nationally and internationally for depositions and hearings, and spend countless hours conducting discovery, drafting pleadings, and counseling clients. However, the Court believes the benchmark percentage adequately compensates the time and labor required in this particular case and declines to increase the benchmark percentage based on this factor, particularly in view of the fact that the fee comes out of the litigants' recovery, a recovery that is considerably smaller than that of a comparable litigant in the Knauf Settlement.

b. The novelty and difficulty of the questions

[73]The corrosive environment shown to have resulted from the sulfur off-gassing of defective Chinese-manufactured drywall is an event unprecedented in the drywall industry. There was little or no evidence that this condition was known or could or should have been anticipated. Although manufacturers are "strictly liable" for manufacturing defective products, the Taishan Defendants raised a formidable challenge to the PSC's efforts to hold them accountable in this matter. Taishan is a foreign corporation with its principal offices in the China, and accordingly this case involved significant issues of service, jurisdiction, and limitations on any recovery. In sum, this case involves both challenging and novel issues of law, fact, and procedure.

However, the Court believes the benchmark percentage adequately considers the novelty and difficulty of the questions presented by this particular case and declines to increase the benchmark percentage based on this factor.

c. The skill required to properly perform the necessary legal services

*29 [74]The level of legal skills required to bring about the class settlements in this case was by no means ordinary. Common benefit counsel faced formidable adversaries with significant resources and had to make the case credible enough to convince a foreign manufacturer to resolve thousands of claims at a substantial economic cost. However, the Court concludes that the benchmark percentage adequately considers counsel's skill and declines to increase the benchmark percentage based on this factor.

d. The preclusion of other employment by the attorneys due to acceptance of this case

[75]As the time records and submissions in this case suggest, this litigation required attorneys to whole-heartedly devote themselves and their offices to the handling of this matter. The urgency of the situation was recognized, and the Court imposed a strict schedule. However, there is no evidence to suggest that counsel were precluded from other employment by having accepted responsibilities inherent in this case, and therefore an increase to the benchmark percentage is not warranted.

e. The customary fee

[76] [77]"These factors primarily deal with the expectation of plaintiffs' attorneys at the outset of the case when measuring the risks involved and deciding whether to accept the case." Murphy Oil, 472 F. Supp. 2d at 866 (citing Johnson, 488 F.2d at 718). "In effect, these factors seek to reward the attorney for accepting the risk and achieving successful results." Id. The Court considered this factor when determining the benchmark percentage. Further, the Court notes that the 19% benchmark percentage is reasonable in light of the awards granted in other similar cases, including approval of the Knauf Settlement. Accordingly, no adjustment of the benchmark is warranted.

f. Whether the fee is fixed or contingent

All or virtually all plaintiffs' counsel undertook this case on a contingency basis. Especially considering the inherent risk and unpredictable nature of this litigation, the Court finds that counsel were subject to risks inherent in a contingent fee arrangement. Accordingly, this factor does not justify an adjustment to the benchmark fee.

g. Time limitations imposed by circumstance

[78]This case required the litigants and the attorneys to abide by a strict time schedule. The successful resolution of the Knauf aspect of the litigation in 2013 naturally informed and re-shaped the ensuing litigation, allowing the attorneys to turn their attention to the more challenging Taishan aspect of the case. The Court continued to be intimately involved with every step of the case and held the parties to a high standard of efficient and effective work. The Court continued to hold monthly status conferences to discuss case developments and resolve any disputes that arose. Counsel responded diligently to the time schedule imposed by the Court, and their efforts played a major role in bringing this matter to a prompt and successful conclusion. However, the Court believes the benchmark percentage adequately reflects the time limitations imposed in this particular case and declines to increase the benchmark percentage based on this factor.

h. The amount involved and the result achieved

This Johnson factor is entitled to considerable weight in evaluating the reasonableness of a common benefit fee award. In fact, the Supreme Court has observed, "[T]he most critical factor in determining the reasonableness of a fee award is the degree of success obtained." Hensley v. Eckerhart, 461 U.S. 424, 436, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983).

*30 [79]The Court recognizes that this Settlement is an unprecedented success that directly benefits over three thousand individuals. However, the Court also recognizes that the settlement fund does not provide claimants with sufficient funds to completely remediate their homes. This is especially challenging considering that the Knauf Settlement provided substantially more funds for remediation and other losses. As explained above, the Court finds that the disparity between the Knauf and Taishan Settlements does not make this settlement unfair, inadequate, or unreasonable in light of the difficulties facing these claimants as opposed to claimants in the Knauf Settlement. However, the disparity does give this Court pause with respect to this Johnson factor. The Court weighs the limited funds provided by the Settlement against the formidable challenges associated with this litigation and finds that this Johnson factor is neutral.

i. Experience, reputation and ability of common benefit counsel

Although all counsel on the PSC or authorized by the PSC to do common benefit work are highly skilled and very capable professionals, the Court finds that this factor is adequately reflected in the benchmark percentage.

j. The "undesirability" of the case

[80]Significant economic risks were accepted by counsel in prosecuting a product liability case of this magnitude against foreign defendants. The fact that the major settling defendant was a Chinese manufacturer only added to the degree of risk given the renowned difficulty enforcing judgments in that country. Beyond these risks, the presence of these foreign manufacturers ensured that substantial litigation costs for travel would exist, and that difficulties with service of process, foreign discovery, translation services, sovereign immunity defenses and other jurisdictional defenses, would present themselves. Nevertheless, the Court finds that this factor is adequately reflected in the benchmark percentage.

k. The nature and length of the professional relationship with the client

This factor was designed to consider those instances in which an attorney in private practice may vary his or her fee for similar work in the light of the professional relationship of the client with his or her office. Since few, if any longstanding client relations between common benefit counsel and class members preceded this MDL, this Johnson factor is a neutral as it relates to the reasonableness of the fee.

l. Fee awards in similar cases

[81]In MDL cases and also often in class action matters, the determination of a reasonable hourly fee is largely influenced by the relationship which the total fee bears to the total amount recovered. The Court specifically considered comparable awards

of attorney fees, including an award of attorney fees in another aspect of this case, when determining the benchmark percentage. Accordingly, the Court does not find that an upward adjustment is warranted.

iii. Lodestar Analysis

The final step of the blended method is to cross-check the benchmark percentage with an abbreviated loadstar analysis. See In re Oil Spill by the Oil Rig Deepwater Horizon, MDL 2179, 2016 WL 6215974, at *19 (E.D. La. Oct. 25, 2016) (citing In re Vioxx, 760 F. Supp. 2d at 659) ("[T]he loadstar cross-check is a streamlined process, avoiding the detailed analysis that goes into a traditional lodestar examination.").

[82]An award of attorney fees of 19% of the Settlement Fund, or $47,120,000, is reasonable when analyzed in light of the Johnson factors and compared to hourly fees in similar cases. As mentioned above, common benefit counsel alone has logged over 109,236.22 hours of work in this litigation between January 1, 2014 and August 31, 2019. Notably, this number includes hours logged by non-lawyer professionals working at the direction of common benefit counsel but does not consider work performed by contract counsel. Accordingly, the Court must now address the division of the total fee between common benefit counsel and contract counsel to determine if the fee awarded to each group is indeed reasonable.

*31 This Court concluded that the appropriate division of attorney fees in the Knauf portion of this case was 52% to common benefit counsel and 48% to contract counsel. It would be easy to make the same division for this portion of the case and to be done with the unpleasant task of dividing fees among attorneys. But such a division would not be fair since it would not account for the additional hours of discovery, travel (both domestic and foreign), motion practice, conferences, appeals, court appearances, and settlement negotiations that common benefit counsel expended in achieving resolution of the Taishan portion of this case. Taking all of this into consideration, a fair division of fees is 40% to contract counsel and 60% to common benefit counsel. Such a split yields approximately $28,272,000 for common benefit counsel and $18,848,000 for contract counsel.

A common benefit fee of approximately $28,272,000 is reasonable. Taking into account the 109,236.22 hours reported by common benefit counsel, this award results in an hourly fee of approximately $258.82.12 The Court acknowledges that this hourly fee is certainly less than the usual hourly rate for such experienced and competent counsel and is less than what common benefit counsel may have expected. However, the hours reported to the CPA included the work of non-lawyer legal professionals, which, while unquestionably necessary and important, does not generate the same hourly fee as the work of an attorney. Further, a common benefit fee of $28,272,000 is roughly 11.4% of the total settlement amount recovered. This percentage is consistent with the common benefit fee awarded in cases producing similar recoveries, as explained in Eisenberg

and Miller's study, and greater than the percentage of the fee allocated to common benefit counsel in the Knauf aspect of this litigation. See R. Doc. 21168 at 20 (awarding 9.181% of the total settlement amount recovered to common benefit counsel).

This division leaves $18,848,000 for contract counsel. The Court recognizes that contract counsel generally performed significant works for their clients. But the nature of their services were mostly administrative, such as collecting evidence, filling out forms, keeping clients abreast of the developments on the case, and such other similar work. This work is necessary and important in all cases, but it can be done—and usually is done—by non-lawyers working under the supervision and direction of attorneys. Accordingly, the work of contract counsel in this case is not entitled to the same consideration as the work performed by common benefit counsel.

Ultimately, the Court finds it reasonable to award $47,120,000 to compensate both common benefit counsel and individually retained attorneys in light of the circumstances in this case, namely that the case involves property damage claims and that the attorney fees come out of the overall recovery available to claimants, unlike in the Knauf Settlement. As previously mentioned, sixty percent of this award shall compensate common benefit counsel, and forty percent shall compensate contract counsel. The Court will determine the appropriate division of the common benefit fee among those counsel who performed common benefit work at a later date.

2. Costs

*32 [83] [84] [85]"Typically, class action counsel who create a common fund for the benefit of the class ... are entitled to reimbursement of reasonable litigation expenses from that fund." In re Pool Prod. Distribution Mkt. Antitrust Litig., MDL 2328, 2015 WL 4528880, at *18 (E.D. La. July 27, 2015). The reimbursement of costs and expenses seeks not to reward attorneys for their work but restore the status quo. However, the requested expenses may not "cannibalize the entire ... settlement." In re Katrina Canal Breaches Litig., 628 F.3d at 196. Accordingly, the Court must review the estimated expenses for which reimbursement is sought and determine whether the total requested sum is fair to the settlement class.

[86]Settlement Class Counsel seeks 3% for costs, which includes shared expenses, held costs, and a $500 stipend per Affected Property. According to detailed records kept by the Court-appointed CPA pursuant to PTO 9 and 9A, Settlement Class Counsel, the PSC, and common benefit counsel incurred $1,166,418.88 in held costs and $1,669,824.00 as cash assessments, for a total of $2,836,242.88. R. Doc. 22380-4. These costs were generated between January 1, 2014 and August 31, 2019.

In view of the nature and circumstances of this case, the Court concludes that an award of $2,836,242.88 is appropriate to cover the costs and expenses of common benefit counsel. This award is in addition to the attorney fee award of 19% of $248,000,000, or $47,120,000, to cover the fees of both common benefit and contract counsel. Although this total award is less than the thirty percent sought by Class Counsel, plus three percent for costs, the Court finds that it strikes a fair balance between the diligent and commendable effort exerted by the attorneys and the limited funds available to compensate Class Members for their property damage.

3. Incentive Awards

Lastly, courts "commonly permit payments to class representatives above those received in settlement by class members generally." Smith v. Tower Loan of Miss., Inc., 216 F.R.D. 338, 367-68 (S.D. Miss. 2003); see In re Catfish Antitrust Litig., 939 F. Supp. 493, 503-04 (N.D. Ms. 1996). Eisenberg and Miller have performed an empirical study of incentive payments to class representatives and have identified several justifications. See Theodore Eisenberg & Geoffrey P. Miller, Incentive Awards to Class Action Plaintiffs: An Empirical Study, 53 UCLA L. Rev. 1303 (2006). In particular, class representatives must be familiar with the case in order to be adequate representatives and are often deposed. In this case, certain plaintiffs participated in additional, individualized discovery and made themselves available for depositions. The Class Representatives also submitted affidavits demonstrating familiarity with the Settlement Agreement and expressing their approval of it. Accordingly, Settlement Class Counsel seeks an award of $10,000 for each Priority Plaintiff in Florida13 and each Select Claimant in Louisiana14 to "recognize their efforts in participating in additional individualized discovery," and $2,500 for Settlement Class Representatives.15 R. Doc. 22397-1 at 41.

*33 The Court agrees that the Priority Plaintiffs, Select Claimants, and Class Representatives have been significantly involved in this matter to the benefit of the entire class and finds that an incentive award is justified. However, the Court recognizes that this Settlement provides a limited fund for recovery and that any additional award to one claimant necessarily reduces the available funds for all other claimants. Accordingly, in the interest of justice and fairness to all class members, the Court will award each Priority Plaintiff and Select Claimant an additional $5,000, and each Class Representative an additional $2,500.

V. CONCLUSION

Considering the foregoing,

IT IS ORDERED that Settlement Class Counsel's Motion for Entry of an Order and Judgment (1) Granting Final Approval of the Class Settlement with Taishan and (2) Certifying the Settlement Class is GRANTED and that the Taishan Settlement Agreement is hereby APPROVED.

IT IS FURTHER ORDERED that Settlement Class Counsel's Motion for an Award of Attorneys' Fees and Cost Reimbursements for Common Benefit Counsel and Individually Retained Attorneys is GRANTED IN PART. Counsel are awarded 19% of the Settlement funds, or $47,120,000 for attorney fees, for both common benefit counsel and contract counsel. Common benefit counsel are entitled to 60% of this amount, or $28,272,000, and contract counsel are entitled to 40% of the this amount, or $18,848,000. Common benefit counsel are also awarded $2,836,242.88 for costs. The allocation of contract counsel's fees will be allocated in accordance with the standard set forth in PTO 28(f) and applied in the Knauf matter. R. Doc. 20282. The Court will address the allocation and distribution of common benefit fees among those attorneys who performed common benefit work at a later date.

All Citations

--- F.Supp.3d ----, 2020 WL 128589

Footnotes

1

On September 26, 2014, the Court certified the Amorin class, comprised of homeowners with defective drywall allegedly manufactured by any of the Taishan entities.

2

The Brooke action involves the plaintiffs who filed suit after the Amorin class had been certified. The Court has not ruled on the applicability of Amorin rulings to the Brooke complaints. The operative Brooke complaints are Brooke, et al. v. The State-Owned Assets Supervision and Administration Commission of the State Council, et al., Civ. Action No. 15-4127 (E.D. La.); Brooke, et al. v. The State-Owned Assets Supervision and Administration Commission of the State Council, et al., Civ. Action No. 15-6631 (S.D. Fla.) (Miami Case No. 15-24348); Brooke, et al. v. The State-Owned Assets Supervision and Administration Commission of the State Council, et al., Civ. Action No. 15-6632 (E.D. Va.) (Norfolk Case No. 15-506).

3

On July 8, 2019, the Court denied Mitchell's motion seeking certification of a homebuilder class. R. Doc. 22287. On August 22, 2019, the Court suggested that the Mitchell matter be remanded to state court in Florida. The Court noted that remand was appropriate because the purpose behind consolidating these related actions in this Court had been served. The Court had addressed numerous discovery disputes, dispositive motions, and other pretrial issues involving facts and legal questions common to the various cases in this MDL proceeding. No further pretrial motions raising common questions were pending in these cases, and remand to the transferor court appeared to be in the interest of judicial efficiency and fairness to the parties.

4

The released parties are Taishan, BNBM, BNBM Group, CNBM, CNBM Group, and the State-Owned Assets Supervision and Administration Commission of the State Council ("SASAC"). R. Doc. 22392-3 at 20.

5

This represents about 2% of known Class Members.

6

The total for both attorney fees and costs in the Knauf aspect of this litigation was $233,078,270.33, which included $197,803,738.17 for attorney fees and $35,274,532.16 for costs. In re Chinese-Manufactured Drywall Products Liability Litigation, MDL No. 09-2047, 2018 WL 2095729, at *2 (E.D. La. May 7, 2018).

7

In re Chinese-Manufactured Drywall Prod. Liab. Litig., MDL 2047, No. 18-30742 (5th Cir. Nov. 22, 2019), Doc. No. 00515211235.

8

See Special Master's Product ID R&R (FLSD ECF No. 233). At the time of Settlement, PSC's objections to the Special Master's Report were pending consideration by Judge Cooke.

9

See In re Chinese-Manufactured Drywall Prod. Liab. Litig., MDL 2047, 2019 WL 1057003 (E.D. La. Mar. 6, 2019). In this order, the Court noted the potential viability of applicable statute of limitations defenses and explained that accordingly, the viability of Brooke claims would need to be addressed on case by case basis.

10

The Court notes that only seventy-eight Class Members opted out of the Settlement, as did twelve absent class members. The remainder of opt-outs were procedurally deficient. The Court will address the procedurally deficient opt-outs in a separate, forthcoming order.

11

Some authorities have commented on the "persistent and confusing identification of common-fund recovery as an 'exception' to the American rule on attorneys' fees," noting that in a common fund situation the funds are actually distributed "among those aligned with the plaintiff rather than extract[ed] ... from the defeated adversary." See Restatement (Third) of Restitution § 30 Reporter's Note a (Tentative Draft No. 3, 1994) (quoting Thomas D. Rowe, Jr., The Legal Theory of Attorney Fee Shifting: A Critical Overview, 1982 Duke L.J. 651, 662 (1982)). Regardless of specific taxonomy, the common-fund doctrine, as well as the Court's inherent power to assess fees to compensate appointed managing attorneys, constitute departures from the traditional rule that each litigant bears his or her own costs.

12

The number of hours reported does not reflect the considerable time spent on "other" administrative matters by the Fee Committee. The Court notes that including these additional hours in the lodestar analysis would reduce the already meager hourly fee. This reality is unfortunate, but the Court urges counsel to remember that the risk of a small recovery is inherent in any contingency arrangement, and that any sum allocated to attorney fees necessarily reduces the recovery available to the thousands of claimants who have patiently waited for over a decade to recover from Taishan. This unfortunate situation is somewhat ameliorated by the fact that many common benefit counsel also acted as contract counsel and accordingly will recover from both buckets, and that many common benefit counsel recovered attorney fees from the Knauf aspect of the MDL, which provided a substantially larger award of attorney fees.

13

The Priority Plaintiffs in Florida are: Janet Avery; Lillian Chatmon; Andrew and Dawn Feldkamp; William and Vicki Foster; Candace Gody; David Griffin; John and Bertha Hernandez; Gul and Deborah Lalwani; Cassandra Marin; Dailyn Martinez; Jose and Adela Miranda; Tracy Nguyen; Jeovany and Monica Nunez; Kelly and Lori O'Brien; Kevin and Stacey Rosen; Michael Rosen; Larry and Rosalee Walls; and Marc and Jennifer Wites. R. Doc. 22305-2 at 39.

14

The Select Claimants in Louisiana are: Lana Alonzo; Johnny and Rachelle Blue; Roger Callia; Mary Ann Catalanotto; Kasie and Patrick Couture; Brent Desselle; Lillian Eyrich; Nicola and Connie Fineschi; Jane Gonzales; Mary Haindel; Mathew and Jan Hughes; Betty Jurisich; Dawn Ross and Ronald V. LaPierre; Peter and Frankie Maggiore; Mark and Keri Pollock; Virginia Randazzo; Frankie Sims as Executrix of Estate of Juanita Davis (deceased); Martin and Doris Tatum; Melissa Young; Michael and Linda Zubrowsk; Cathy Allen; Charles and Mary Ann Back; Frances and Joseph Barisich; Colin Berthaut; Angeles Blalock; Boland Marine a/k/a 5943 Boeing Street, LLC; Holly Braselman; Jill Donaldson; Joseph and Tracy Fatta; Donald and Nadja Fisher; Dominesha James Clay; Sheral Lavergne; Annette Lawrence; Debbie Leon; Brian and Barbara Lewis; Jerry Phillips; Marcus and Dana Staub; Rosanne Wilfer; Zhou Zhang and Xue Ying Zhao. R. Doc. 22305-2 at 39.

15

The Class Representatives are: Michelle Germano, Judd Mendelson, Debra Williams, and Virginia Tiernan. Class Representatives Lillian Eyrich and David Griffin are eligible to receive incentive awards as Select Claimants in Louisiana, and accordingly will not receive an additional award for serving as a Class Representative. R. Doc. 22305-2 at 39.

7.9 Class Settlement Information Website for Taishan Cases

https://www.chinesedrywallsettlement.com/

8 Discovery and Case Management

8.1 The Rules Relating to Discovery

5. Rule 26. Duty to Disclose; General Provisions Governing Discovery
6. Rule 27. Depositions to Perpetuate Testimony
7. Rule 28. Persons Before Whom Depositions May Be Taken
8. Rule 29. Stipulations About Discovery Procedure
9. Rule 30. Depositions by Oral Examination
10. Rule 31. Depositions by Written Questions
11. Rule 32. Using Depositions in Court Proceedings
12. Rule 33. Interrogatories to Parties
13. Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes
14. Rule 35. Physical and Mental Examinations
15. Rule 36. Requests for Admission
16. Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

8.2 Discovery in Comparative Context

U.S. Discovery in Context

The broad discovery allowed by the federal rules was a new development in US litigation when it was adopted. While it built on discovery practice in equity courts and some state systems, it extended discovery in substantial ways over any prior practice. The goal was to avoid "trial by ambush" by making the key facts available to both sides before trial started. Something happened that was not expected – discovery and the motions that arise from it have now become, in effect, how US litigation is conducted. A vanishing percentage of US federal cases actually go trial in light of the information exchange that comes through discovery, which, if cases and claims are not dismissed for lack of evidence after the full discovery process has run, allows the parties to accurately price and settle claims.

US discovery remains exceptional in world-wide context. The broad scope of US discovery gives private parties investigative powers normally only held by governmental agencies. Even in major arbitrations, which in some cases have adopted some discovery, the scope of discovery usually is less than allowed in US federal courts.

The Tools of Discovery

The federal rules set forth the tools of discovery. Rule 26 sets forth the general provisions, including the scope of discovery and the duty to make disclosures at the outset of the case. Rule 26 also provides for protective orders, expert testimony, and protection of litigation work product materials.

Rules 27, 28, 30, 31, and 32 deal with depositions. Depositions are a procedure in which witnesses can be required to answer questions under oath much as if they were at trial. Rule 27 deals with the limited situation of using depositions to perpetuate testimony of someone who may not be able to testify at trial, and allows such a deposition to take place before an action is filed. This represents a somewhat narrow exception to the rule that prefiling discovery is not available, and aside from the likely unavailability later of a witness requires that an identifiable action with federal subject matter jurisdiction appears likely to be filed. Rule 28 deals with the issue of before whom a deposition may be taken. Within the United States, the rule is simple: anyone qualified to administer an oath may preside at a deposition, so long as they do not have an interest in the litigation themselves. Outside of the United States, the situation gets a great deal more complicated, in large part due to the differing approaches other nations take towards allowing US discovery on their soil. Rule 30 governs depositions by oral examination,

which is the main form of deposition testimony. The great advantage of deposition testimony is that the answers are given by the witness directly without intervention of the opposing attorney. This increases the likelihood of receiving candid and unpolished answers. Such depositions are used to determine what the underlying facts are, and can be used at trial either for impeachment purposes or in some instances to substitute for live testimony. Rule 31 allows depositions by written questions, which are significantly less popular and of dubious utility going forward given the possibility of remotely conducted live depositions. In general, so long as a witness is available to testify live at trial such live testimony is preferred to use of either written or video deposition testimony. If deposition testimony is used in the place of live testimony, it is subject to the same rules of evidence that would be applied to live testimony, and it is of course essential that opposing parties had an opportunity to cross-examine the witness at the depositions. Depositions have proved very important, however, for determining what witnesses will say at trial, and therefore to determining whether and how the case might be settled. If a witness does appear at trial, deposition testimony can also be used to impeach the testimony, by showing that they said something different at an earlier date should their testimony take a different course.

Rule 33 deals with the written interrogatories. Interrogatories arose from equitable practice, and allow litigant to pose questions to the other party which must be answered in writing, under oath. In practice, while the answers must be made by the party and the oath must be given by the party, most interrogatory answers are processed through the hands of an attorney, who in practice is careful to give the other party what they are entitled to and no more. The careful crafting of interrogatories and the equally careful crafting of answers can be an expensive and time-consuming process. Some attorneys feel that interrogatories are best used only for matters where the facts are unknown but not subject to debate, and are not used for points that are likely to be actively contested between the parties. A typical good use of interrogatories would be to get the names and addresses of all individuals who worked on a particular transaction or occurrence and a description of their roles. Interrogatories can also be used to ask if the other side will make certain contentions – for example, that the plaintiff was contributorily negligent. An answer to such an interrogatory can help direct the course of factual discovery.

Rule 34 deals with the production of documents and things. In modern large case litigation the production of documents has changed materially sense the situation that existed at the time the rules were adopted. At the time the rules were adopted, the documents relevant to a lawsuit could be expected to be relatively finite, and to exist in the form of actual written documents such as business records, memoranda, receipts, and other such items. One imagines that the drafters of the rules expected a folder or at most a box of documents being exchanged in litigation. The invention of the xerographic copy machine changed that, and by the 1960s and 1970s production of documents could include hundreds or thousands of boxes of responsive documents that were pulled from corporate record depositories. The shift to digital documents has multiplied the scope of documents, and today document production can include terabytes of documents,, and in formats ranging from emails to text messages to drafts of word processing documents to video recordings. Nonetheless, documents remain a core element of the discovery process. They are not easily subject to manipulation by attorneys but exist as they were created prior to the inception of litigation, and so tend to be persuasive with factfinders. Documents and interrogatories also provide a roadmap with regard to which witnesses should be deposed, as well as to what testimony they may be expected to give. In modern practice discovery of documents has shifted to e-discovery, in which outside vendors use technology to sift through vast quantities of electronic documents, creating a subset based on search and sometimes artificial intelligence technology that is further reviewed by the lawyers

Rule 35 deals with physical and mental examinations. To give examples of the use of this rule, a plaintiff who claims physical injury may be required to submit to a physical examination to determine if the claimed injuries are real. Similarly, in the event that defects in an automobile are attributed as the cause for an accident, the vehicle may be examined by an expert to determine whether it was properly functioning at the time the accident occurred. In general, parties have a right to examine people and objects that might yield evidence relevant to the case, and rule 35 provides the vehicle for doing that.

Rule 36 deals with requests for admission. Requests for admission ask the other party to concede that a given fact is true. For example, in order to establish beyond doubt subject matter jurisdiction the plaintiff might ask the defendant to admit that it is incorporated under the laws of Delaware and headquartered in New York City. There also can be issues that at the outset of the case might have seemed possible to dispute, but as the case proceeds these issues may become indisputable based on the evidence or a party may decide for tactical reasons not to dispute that issue. In order to establish these points and to save trial time, a request to admit can be made, and the judge will instruct the jury if there is a jury to accept the fact of those matters that have been conceded in a request to admit. Failure to respond to a request to admit in a timely fashion is treated as an admission, so they cannot be ignored. Requests to admit can also be somewhat treacherous for plaintiffs, because an admitted request to admit removes the need and the possibility to present trial testimony on that point. In some cases, plaintiffs would prefer to admit testimony in order to dramatize the situation in the theater like environment of the live trial. If they have made a request to admit on the point, they lose that opportunity if the defendant admits the contention.

Rule 37 deals with sanctions. The parties and attorneys in a federal lawsuit are required to cooperate in discovery matters, and they withhold matters that should have been produced or otherwise fail to cooperate, they can be subject to court orders to make proper production, and if they fail to comply properly with those orders they can be subject to sanctions. The sanctions can range from monetary penalties to the admission or waiver of certain issues, all the way to the court directing a finding of liability.

Stages of Discovery

Discovery typically progresses in stages. The first stage begins before litigation even has been filed. When it becomes clear that litigation is likely to be filed, a party has an obligation to preserve any evidence it has within its control or possession. In a corporate level, this requires the issuance of a "hold order" so that all the employees of the Corporation retain materials relevant to the litigation. Failure to do this, as we will see in the *Zubulake* case, can lead to significant sanctions that can in some situations determine the outcome of the case.

The next stage of discovery involves the production of materials without request under rule 26. In effect, rule 26 requires each side to produce those materials that they expect to rely upon a trial. This includes documents, as well as the names and identities of witnesses. Failure to make this production can lead to the foreclosure of using that evidence at trial, which again can be determinative of the outcome of the case.

The next stage of discovery normally involves exchanges of written documents. Interrogatories will be served, often alongside document requests. Once responses are served to these requests, the parties are likely to proceed to deposition testimony.

Requests to admit may be served at any time after the Rule 16 conference at the outset of the case, but often they are not answered definitively until discovery is complete or nearly complete. Parties are required to admit to those things that are true,

but denials, objections, and requests for additional time effectively allow additional time if the answer is not immediately amenable to an answer (e.g., plaintiff has no evidence showing that defendant was aware the product had defects). Also answered late in the litigation are what are known as contention interrogatories. These request a party to state whether certain arguments or contentions will be made on their side of the case. A contention interrogatory might ask, for example, whether a defendant will claim the defendant was contributorily liable or whether defendant will claim some third party was in fact the tortfeasor. In many cases these do not need to be made at the outset, but responses must be made in time for the other party taking discovery to be able to obtain evidence relative to the contentions that are being pursued.

After all fact discovery is closed, the parties normally will turn to expert discovery. Experts will review the facts in the case, including the fruits of discovery, and prepare opinions based upon their expert knowledge. Economists often serve as expert witnesses, especially in cases where economic or financial issues are prominent and scientists also can serve as expert witnesses. Expert testimony allows a factfinder to be informed on issues that are beyond the expertise of a layman.

Scope of Discovery

Rule 26 sets forth the scope of permissible discovery. Over time, the rules have reduced this scope. At one time, for example, discovery was proper into any matter related to the subject matter of the litigation. Now, discovery must be related to a specific cause of action or defense. This has the effect of foreclosing discovery that might allow, for example, a claimant on a contract claim to seek evidence relevant to a more lucrative antitrust or fraud claim. The rules have also reduced the quantity. While at one time there was no limitation in the rules on, for example, the numbers of interrogatories or the number and length of depositions, there are now default limits. While these can be extended in complex cases, the effect of the caps is intended to keep a check on requests for discovery unless a court or the other parties are persuaded to lift the caps.

The rules also have moved proportionality front and center. While proportionality has long been an aspect of permissible discovery, recent amendments stress this concept. The idea is that vast discovery is inappropriate for a smaller value case.

Another aspect of the scope of discovery has to do with protective orders. Parties may seek protective orders to limit or prevent discovery into sensitive areas. They can also, failing that, seek protective orders that require all parties to keep the information shared in discovery strictly confidential, which in some cases will limit the sharing of discovered information with individuals at client companies who may be in a position to use the information for reasons aside from the litigation.

Privilege and work product are also important limitations on the scope of discovery. Parties are entitled to assert attorney client privilege and to invoke the work product doctrine to cut off discovery requests. To do this, some record has to be made showing that the claim of privilege or work product is legitimatate. In the case of documents, a 'privilege log' usually is given to the other side, showing what documents were withheld and stating the basis for not producing them.

Judicial Control and Sanctions

Over time, the judicial role in discovery has grown. Rule 16 typically is employed to require the parties to meet with a judge at the outset of litigation for a pretrial conference. The Rule 26(f) conference to discuss discovery and establish a discovery plan also often occurs under some form of court supervision.

Judges also have the ppwer to impose sanctions for discovery misconduct. While we no of no reliable empirical studies showing an increase in sanctions, we have heard anecdotal reports that judges have become more willing over time to impose sanctions when parties engage in discovery abuse – especially when they fail to produce materials that should have been produced, or allow the destruction of relevant materials such as documents. Sanctions are imposed largely at the judge's discretion and are reviewed on a permissive abuse of discretion standard, with any appeal normally held until the end of the case under the finality rule, giving the trial judge substantial power over the parties in this context.

8.3 § 68 Attorney–Client Privilege - Restatement of The Law Governing Lawyers

Except as otherwise provided in this Restatement, the attorney-client privilege may be invoked as provided in § 86 with respect to: (1) a communication (2) made between privileged persons (3) in confidence (4) for the purpose of obtaining or providing legal assistance for the client.

8.4 Hickman v. Taylor

HICKMAN, ADMINISTRATOR, *v.* TAYLOR et al., trading as TAYLOR & ANDERSON TOWING & LIGHTERAGE CO., et al.

No. 47.
Argued November 13, 1946.
Decided January 13, 1947.
[…]

Mr. Justice Murphy

delivered the opinion of the Court.

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. Examination into a person's files and records, including those resulting from the professional activities of an attorney, must be judged with care. It is not without reason that various safeguards have been established to preclude unwarranted excursions into the privacy of a man's work. At the same time, public policy supports reasonable and necessary inquiries. Properly to balance these competing interests is a delicate and difficult task.

*498On 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. At the time when Fortenbaugh secured the statements

of the survivors, representatives of two of the deceased crew members had been in communication with him. Ultimately claims were presented by representatives of all five of the deceased; four of the claims, however, were settled without litigation: The fifth claimant, petitioner herein, brought suit in a federal court under the Jones Act on November 26,1943, naming as defendants the two tug owners, individually and as partners, and the railroad.

One year later, petitioner 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. Tay*499lor.' 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."

In connection with the hearing on these objections, Fortenbaugh made a written statement and gave an informal oral deposition explaining the circumstances under which he had taken the statements. But he was not expressly asked in the deposition to produce the statements. The District Court for the Eastern District of Pennsylvania, sitting *en banc,* held that the requested matters were not privileged. 4 F. R. D. 479. The court then decreed that the tug owners and Fortenbaugh, as counsel and agent for the tug owners, forthwith "answer Plaintiff's 38th interrogatory and supplementary interrogatories; produce all written statements of witnesses obtained by Mr. Fortenbaugh, as counsel and agent for Defendants; *500state in substance any fact concerning this case which Defendants learned through oral statements made by witnesses to Mr. Fortenbaugh whether or not included in his private memoranda and produce Mr. Fortenbaugh's mem-oranda containing statements of fact by witnesses or to submit these memoranda to the Court for determination of those portions which should be revealed to Plaintiff." Upon their refusal, the court adjudged them in contempt and ordered them imprisoned until they complied.

The Third Circuit Court of Appeals, also sitting *en banc,* reversed the judgment of the District Court. 153 F. 2d 212. It held that the information here sought was part of the "work product of the lawyer" and hence privileged from discovery under the Federal Rules of Civil Procedure. The importance of the problem, which has engendered a great divergence of views among district courts,1 led us to grant certiorari. 328 U. S. 876.

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.2 Inquiry into the issues and the facts before

trial was *501narrowly confined and was often cumbersome in method.3 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.4

There is an initial question as to which of the deposition-discovery rules is involved in this case. Petitioner, in filing his interrogatories, thought that he was proceeding under Rule 33. That rule provides that a party may serve upon any adverse party written interrogatories to be answered by the party served.5 The District Court pro*502ceeded on the same assumption in its opinion, although its order to produce and its contempt order stated that both Rules 33 and 34 were involved. Rule 34 establishes a procedure whereby, upon motion of any party showing good cause therefor and upon notice to all other parties, the court may order any party to produce and permit the inspection and copying or photographing of any designated documents, etc., not privileged, which constitute or contain evidence material to any matter involved in the action and which are in his possession, custody or control.6

The Circuit Court of Appeals, however, felt that Rule 26 was the crucial one. Petitioner, it said, was proceeding by interrogatories and, in connection with those interrogatories, wanted copies of memoranda and statements secured from witnesses. While the court believed that Rule 33 was involved, at least as to the defending tug owners, it stated that this rule could not be used as the basis for condemning Fortenbaugh's failure to disclose or produce *503the memoranda and statements, since the rule applies only to interrogatories addressed to adverse parties, not to their agents or counsel. And Rule 34 was said to be inapplicable since petitioner was not trying to see an original document and to copy or photograph it, within the scope of that rule. The court then concluded that Rule 26 must be the one really involved. That provides that the testimony of any person, whether a party or not, may be taken by any party by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence; and that the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether relating to the claim or defense of the examining party or of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things.7

*504The matter is not without difficulty in light of the events that transpired below. We believe, however, that petitioner was proceeding primarily under Rule 33. He addressed simple interrogatories solely to the individual tug owners, the adverse parties, as contemplated by that rule. He did not, and could not under Rule 33, address such interrogatories to their counsel, Fortenbaugh. Nor did he direct these interrogatories either to the tug owners or to Fortenbaugh by way of deposition; Rule 26 thus could not come into operation. And it does not appear from the record that petitioner filed a motion under Rule 34 for a court order directing the production of the documents in question. Indeed, such an order could not have been entered as to Fortenbaugh since Rule 34, like Rule 33, is limited to parties to the proceeding, thereby excluding their counsel or agents.

Thus to the extent that petitioner was seeking the production of the memoranda and statements gathered by Fortenbaugh in the course of his activities as counsel, petitioner misconceived his remedy. Rule 33 did not permit him to obtain such

memoranda and statements as adjuncts to the interrogatories addressed to the individual tug owners. A party clearly cannot refuse to answer interrogatories on the ground that the information sought is solely within the knowledge of his attorney. But that is not this case. Here production was sought of documents prepared by a party's attorney after the claim has arisen. Rule 33 does not make provision for such production, even when sought in connection with permissible interrogatories. Moreover, since petitioner was also foreclosed from securing them through an order under Rule 34, his only recourse was to take Fortenbaugh's deposition under Rule 26 and to attempt to force Fortenbaugh to produce the materials by use of a subpoena *duces tecum,* in accordance with Rule 45. Holtzoff, "Instruments of Discovery under the Federal Rules of Civil Procedure," 41 *505Mich. L. Rev. 205, 220. But despite petitioner's faulty-choice of action, the District Court entered an order, apparently under Rule 34, commanding the tug owners and Fortenbaugh, as their agent and counsel, to produce the materials in question. Their refusal led to the anomalous result of holding the tug owners in contempt for failure to produce that which was in the possession of their counsel and of holding Fortenbaugh in contempt for failure to produce that which he could not be compelled to produce under either Rule 33 or Rule 34.

But, under the circumstances, we deem it unnecessary and unwise to rest our decision upon this procedural irregularity, an irregularity which is not strongly urged upon us and which was disregarded in the two courts below. It matters little at this late stage whether Fortenbaugh fails to answer interrogatories filed under Rule 26 or under Rule 33 or whether he refuses to produce the memoranda and statements pursuant to a subpoena under Rule 45 or a court order under Rule 34. The deposition-discovery rules create integrated procedural devices. And the basic question at stake is whether any of those devices may be used to inquire into materials collected by an adverse party's counsel in the course of preparation for possible litigation. The fact that the petitioner may have used the wrong method does not destroy the main thrust of his attempt. Nor does it relieve us of the responsibility of dealing with the problem raised by that attempt. It would be inconsistent with the liberal atmosphere surrounding these rules to insist that petitioner now go through the empty formality of pursuing the right procedural device only to reestablish precisely the same basic problem now confronting us. We do not mean to say, however, that there may not be situations in which the failure to proceed in accordance with a specific rule would be important or decisive. But in the present circumstances, for the purposes of this decision, the procedural *506irregularity is not material. Having noted the proper procedure, we may accordingly turn our attention to the substance of the underlying problem.

In urging that he has a right to inquire into the materials secured and prepared by Fortenbaugh, petitioner emphasizes that the deposition-discovery portions of the Federal Rules of Civil Procedure are designed to enable the parties to discover the true facts and to compel their disclosure wherever they may be found. It is said that inquiry may be made under these rules, epitomized by Rule 26, as to any relevant matter which is not privileged ; and since the discovery provisions are to be applied as broadly and liberally as possible, the privilege limitation must be restricted to its narrowest bounds. On the premise that the attorney-client privilege is the one involved in this case, petitioner argues that it must be strictly confined to confidential communications made by a client to his attorney. And since the materials here in issue were secured by Fortenbaugh from third persons rather than from his clients, the tug owners, the conclusion is reached that these materials are proper subjects for discovery under Rule 26.

As additional support for this result, petitioner claims that to prohibit discovery under these circumstances would give a corporate defendant a tremendous advantage in a suit by an individual plaintiff. Thus in a suit by an injured employee against a

railroad or in a suit by an insured person against an insurance company the corporate defendant could pull a dark veil of secrecy over all the pertinent facts it can collect after the claim arises merely on the assertion that such facts were gathered by its large staff of attorneys and claim agents. At the same time, the individual plaintiff, who often has direct knowledge of the matter in issue and has'no counsel until some time after his claim arises could be compelled to disclose all the intimate details of his case. By endowing with *507immunity from disclosure all that á lawyer discovers in the course of his duties, it is said, the rights of individual litigants in such cases are drained of vitality and the lawsuit becomes more of a battle of deception than a search for truth.

But framing the problem in terms of assisting individual plaintiffs in their suits against corporate defendants is unsatisfactory. Discovery concededly may work to the disadvantage as well as to the advantage of individual plaintiffs. Discovery, in other words, is not a one-way proposition. It is available in all types of cases at the behest of any party, individual or corporate, plaintiff or defendant. The problem thus far transcends the situation confronting- this petitioner. And we must view that problem in light of the limitless situations where the particular kind of discovery sought by petitioner might be used.

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.8 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. As indicated by Rules 30 (b) and (d) and 31 (d), limitations inevitably arise when it can be shown *508that the examination is being conducted in bad faith or in such a manner as to annoy, embarrass or oppress the person subject to the inquiry. And as Rule 26 (b) provides, further limitations come into existence when the inquiry touches upon the irrelevant or encroaches upon the recognized domains of privilege.

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 memo-randa, 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 *509pertinent

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.

The District Court, after hearing objections to petitioner's request, commanded Fortenbaugh to produce all written statements of witnesses and to state in substance any facts learned through oral statements of witnesses to him. Fortenbaugh was to submit any memoranda he had made of the oral statements so that the court might determine what portions should be revealed to petitioner. All of this was ordered without any showing by petitioner, or any requirement that he make a proper showing, of the necessity for the production of any of this material or any demonstration that denial of production would cause hardship or injustice. The court simply ordered production on the theory that the facts sought were material and were not privileged as constituting attorney-client communications.

In our opinion, neither Rule 26 nor any other rule dealing with discovery contemplates production under such circumstances. That is not because the subject matter is privileged or irrelevant, as those concepts are used in these *510rules.9 Here is simply 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. As such, it falls outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims. 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 coun*511sel. 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. Were production of written statements and documents to be precluded under *512such circumstances, the liberal ideals of the deposition-discovery portions of the Federal Rules of Civil Procedure would be stripped of much of their meaning. But the general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order. That burden, we believe, is necessarily implicit in the rules as now constituted.10

Rule 30 (b), as presently written, gives the trial judge the requisite discretion to make a judgment as to whether discovery should be allowed as to written statements secured from witnesses. But in the instant case there was no room for that discretion to operate in favor of the petitioner. No attempt was made to establish any reason why Fortenbaugh should be forced to produce the written statements. There was only a naked, general demand for these materials as of right and a finding by the District Court that no recognizable privilege was involved. That was insufficient to justify discovery under these circumstances and the court should have sustained the refusal of the tug owners and Fortenbaugh to produce.

But as to oral statements made by witnesses to Forten-baugh, 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. Under ordinary conditions, forcing an attorney to repeat or write out all that witnesses have told him and to deliver the account *513to his adversary gives rise to grave dangers of inaccuracy and untrustworthiness. No legitimate purpose is served by such production. The practice forces the attorney to testify as to what he remembers or what he saw fit to write down regarding witnesses' remarks. Such testimony could not qualify as evidence; and to use it for impeachment or corroborative purposes would make the attorney much less an officer of the court and much more an ordinary witness. The standards of the profession would thereby suffer.

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.11 It is a problem that rests on what *514has 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.

The narrow question in this case concerns only one of thirty-nine interrogatories which defendants and their counsel refused to answer. As there was persistence in refusal after the court ordered them to answer it, counsel and clients were committed to jail by the district court until they should purge themselves of contempt.

The interrogatory asked whether statements were taken from the crews of the tugs involved in the accident, or of any other vessel, and demanded "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." The question is simply whether such a demand is authorized by the rules relating to various aspects of "discovery."

The primary effect of the practice advocated here would be on the legal profession itself. But it too often is over*515looked that the lawyer and the law office are indispensable parts of our administration of justice. Law-abiding people can go nowhere else to learn the ever changing and constantly multiplying rules by which they must behave and to obtain redress for their wrongs. The welfare and tone of the legal profession is therefore of prime consequence to society, which would feel the consequences of such a practice as petitioner urges secondarily but certainly.

"Discovery" is one of the working tools of the legal profession. It traces back to the equity bill of discovery in English Chancery practice and seems to have had a forerunner in Continental practice. See Ragland, Discovery Before Trial (1932) 13-16. Since 1848 when the draftsmen of New York's Code of Procedure recognized the importance of a better system of discovery, the impetus to extend and expand discovery, as well as the opposition to it, has come from within the Bar itself. It happens in this case that it is the plaintiff's attorney who demands such unprecedented latitude of discovery and, strangely enough, *amicus* briefs in his support have been filed by several labor unions representing plaintiffs as a class. It is the history of the movement for broader discovery, however, that in actual experience the chief opposition to its extension has come from lawyers who specialize in representing plaintiffs, because defendants have made liberal use of it to force plaintiffs to disclose their cases in advance. See Report of the Commission on the Administration of Justice in New York State (1934) *330-31;* Ragland, Discovery Before Trial (1932) 35-36. Discovery is a two-edged sword and we cannot decide this problem on any doctrine of extending help to one class of litigants.

It seems clear and long has been recognized that discovery should provide a party access to anything that is evidence in his case. *Cf.* Report of Commission on the Administration of Justice in New York State (1934) 41-42. *516It seems equally clear

that discovery should not nullify the privilege of confidential communication between attorney and client. But those principles give us no real assistance here because what is being sought is neither evidence nor is it a privileged communication between attorney and client.

To consider first the most extreme aspect of the requirement in litigation here, we find it calls upon counsel, if he has had any conversations with any of the crews of the vessels in question or of any other, to "set forth in detail the exact provision of any such oral statements or reports." Thus the demand is not for the production of a transcript in existence but calls for the creation of a written statement not in being. But the statement by counsel of what a witness told him is not evidence when written. Plaintiff could not introduce it to prove his case. What, then, is the purpose sought to be served by demanding this of adverse counsel?

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. Even if his recollection were perfect, the statement would be his lan*517guage, permeated with his inferences. Every one who has tried it knows that it is almost impossible so fairly to record the expressions and emphasis of a witness that when he testifies in the environment of the court and under the influence of the leading question there will not be departures in some respects. Whenever the testimony of the witness would differ from the "exact" statement the lawyer had delivered, the lawyer's statement would be whipped out to impeach the witness. Counsel producing his adversary's "inexact" statement could lose nothing by saying, "Here is a contradiction, gentlemen of the jury. I do not know whether it is my adversary or his witness who is not telling the truth, but one is not." Of course, if this practice were adopted, that scene would be repeated over and over again. The lawyer who delivers such statements often would find himself branded a deceiver afraid to take the stand to support his own version of the witness's conversation with him, or else he will have to go on the stand to defend his own credibility — perhaps against that of his chief witness, or possibly even his client.

Every lawyer dislikes to take the witness stand and will do so only for grave reasons. This is partly because it is not his *role;* he is almost invariably a poor witness. But he steps out of professional character to do it. He regrets it; the profession discourages it. But the practice advocated here is one which would force him to be a witness, not as to what he has seen or done but as to other witnesses' stories, and not because he wants to do so but in self-defense.

And what is the lawyer to do who has interviewed one whom he believes to be a biased, lying or hostile witness to get his unfavorable statements and know what to meet? He must record and deliver such statements even though he would not vouch for the credibility of the witness by calling him. Perhaps the other side would not want to *518call him either, but the attorney is open to the charge of suppressing evidence at the trial if he fails to call such a hostile witness even though he never regarded him as reliable or truthful.

Having been supplied the names of the witnesses, petitioner's lawyer gives no reason why he cannot interview them himself. If an employee-witness refuses to tell his story, he, too, may be examined under the Rules. He may be compelled on discovery, as fully as on the trial, to disclose his version of the facts. But that is his own disclosure — it can be used to impeach him if he contradicts it and such a deposition is not useful to promote an unseemly disagreement between the witness and the counsel in the case.

It is true that the literal language of the Rules would admit of an interpretation that would sustain the district court's order. So the literal language of the Act of Congress which makes "any writing or record . . . made as a memorandum or record of any . . . occurrence, or event" admissible as evidence, would have allowed the railroad company to put its engineer's accident statements in evidence. *Cf. Palmer* v. *Hoffman,* 318 U. S. 109, 111. But all such procedural measures have a background of custom and practice which was assumed by those who wrote and should be by those who apply them. We reviewed the background of the Act and the consequences on the trial of negligence cases of allowing railroads and others to put in their statements and thus to shield the crew from cross-examination. We said, "Such a major change which opens wide the door to avoidance of cross-examination should not be left to implication." 318 U. S. at 114. We pointed out that there, as here, the "several hundred years of history behind the Act . . . indicate the nature of the reforms which it was designed to effect." *519318 U. S. at 115. We refused to apply it beyond that point. We should follow the same course of reasoning here. Certainly nothing in the tradition or practice of discovery up to the time of these Rules would have suggested that they would authorize such a practice as here proposed.

The question remains as to signed statements or those written by witnesses. Such statements are not evidence for the defendant. *Palmer* v. *Hoffman,* 318 U. S. 109. Nor should I think they ordinarily could be evidence for the plaintiff. But such a statement might be useful for impeachment of the witness who signed it, if he is called and if he departs from the statement. There might be circumstances, too, where impossibility or difficulty of access to the witness or his refusal to respond to requests for information or other facts would show that the interests of justice require that such statements be made available. Production of such statements are governed by Rule 34 and on "showing good cause therefor" the court may order their inspection, copying or photographing. No such application has here been made; the demand is made on the basis of right, not on showing of cause.

I agree to the affirmance of the judgment of the Circuit Court of Appeals which reversed the district court.

Mr. Justice Frankfurter joins in this opinion.

8.5 Rule 26(b)(3) - The Work Product Doctrine

(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.

8.6 Sanctions and Judicial Supervision

Rule 37 governs what a court does when a party fails to comply with discovery. These sanctions can be significant, and even outcome determinative. The *Zubulake* case is a leading trial court case dealing with failure to preserve evidence when it is recognized that litigation is coming.

8.7 Zubulake v. UBS Warburg LLC

Laura ZUBULAKE, Plaintiff, v. UBS WARBURG LLC, UBS Warburg, and UBS Ag, Defendants.
No. 02 Civ. 1243(SAS).
United States District Court, S.D. New York.
July 20, 2004.

[…]

OPINION AND ORDER

SCHEINDLIN, District Judge.

Commenting on the importance of speaking clearly and listening closely, Phillip Roth memorably quipped, "The English language is a form of communication! ... Words aren't only bombs and bullets — no, they're little gifts, containing meanings!"[1] 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,"[2] 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. In order to decide whether sanctions are warranted, the following question must be answered: Did UBS fail to preserve and timely produce relevant information and, if so, did it act negligently, recklessly, or willfully?

This decision addresses counsel's obligation to ensure that relevant information is preserved by giving clear instructions to the client to preserve such information and, perhaps more importantly, a client's obligation to heed those instructions. Early on in this litigation, UBS's counsel — both in-house and outside — instructed UBS personnel to retain relevant electronic

information. Notwithstanding these instructions, certain UBS employees deleted relevant e-mails. Other employees never produced relevant information to counsel. As a result, many discoverable emails were not produced to Zubulake until recently, even though they were responsive to a document request propounded on June 3, 2002.3 In addition, a number of e-mails responsive to that document request were deleted and have been lost altogether.

Counsel, in turn, failed to request retained information from one key employee and to give the litigation hold instructions to another. They also failed to adequately communicate with another employee about how she maintained her computer files. Counsel also failed to safeguard backup tapes that might have contained some of the deleted e-mails, and which would have mitigated the damage done by UBS's destruction of those e-mails.

The conduct of both counsel and client thus calls to mind the now-famous words of the prison captain in *Cool Hand Luke:* "What we've got here is a failure to communicate."4 Because of this failure by *both* UBS and its counsel, Zubulake has been prejudiced. As a result, sanctions are warranted.

II. FACTS

The allegations at the heart of this lawsuit and. the history of the parties' discovery disputes have been well-documented in the Court's prior decisions,5 familiarity with which is presumed. In short, Zubulake is an *425equities 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, 2001.6 Well before that, however — as early as April 2001 — UBS employees were on notice of Zubulake's impending court action.7 After she received a right-to-sue letter from the EEOC, Zubulake filed this lawsuit on February 15, 2002.8

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.9 This warning pertained to both electronic and hard-copy files, but did *not* specifically pertain to so-called "backup tapes," maintained by UBS's information technology personnel.10 In particular, UBS's in-house counsel, Robert L. Salzberg, "advised relevant UBS employees to preserve and turn over to counsel all files, records or other written memoranda or documents concerning the allegations raised in the [EEOC] charge or any aspect of [Zubulake's] employment."11 Subsequently— but still in August 2001 — UBS's outside counsel met with a number of the key players in the litigation and reiterated Mr. Salzberg's instructions, reminding them to preserve relevant documents, "including emails."12 Salzberg reduced these instructions to writing in e-mails dated February 22, 200213 — immediately after Zubulake filed her complaint — and September 25, 2002.14 Finally, in August 2002, after Zubulake propounded a document request that specifically called for e-mails stored on backup tapes, UBS's outside counsel instructed UBS information technology personnel to stop recycling backup tapes.15 *Every* UBS employee mentioned in this Opinion (with the exception of Mike Davies) either personally spoke to UBS's outside counsel about the duty to preserve e-mails, or was a recipient of one of Salzberg's e-mails.16

B. Procedural History

In *Zubulake I,* I addressed Zubulake's claim that relevant e-mails had been deleted from UBS's active servers and existed only on "inaccessible" archival media *(ie.,* backup tapes).17 Arguing that e-mail correspondence that she needed to prove her case existed only on those backup tapes, Zubulake called for their production. UBS moved for a protective order shielding it from discovery *426altogether or, in the alternative, shifting the cost of backup tape restoration onto Zubulake. Because the evidentiary record was sparse, I ordered UBS to bear the costs of restoring a sample of the backup tapes.18

After the sample tapes were restored, UBS continued to press for cost shifting with respect to any further restoration of backup tapes. In *Zubulake III,* I ordered UBS to bear the lion's share of restoring certain backup tapes because Zubulake was able to demonstrate that those tapes were likely to contain relevant information.19 Specifically, Zubulake had demonstrated that UBS had failed to maintain all relevant information (principally e-mails) in its active files. After *Zubulake III,* Zubulake chose to restore sixteen backup tapes.20 "In the restoration effort, the parties discovered that certain backup tapes [were] missing."21 They also discovered a number of e-mails on the backup tapes that were missing from UBS's active files, confirming Zubulake's suspicion that relevant e-mails were being deleted or otherwise lost.22

Zubulake III begat *Zubulake IV,* where Zubulake moved for sanctions as a result of UBS's failure to preserve all relevant backup tapes, and UBS's deletion, of relevant e-mails. Finding fault in UBS's document preservation strategy but lacking evidence that the lost tapes and deleted e-mails were particularly favorable to Zubulake, I ordered UBS to pay for the re-deposition of several key UBS employees — Varsano, Chapin, Hardisty, Kim, and Tong — so that Zubulake could inquire about the newly-restored e-mails.23

C. The Instant Dispute

The essence of the current dispute is that during the re-depositions required by *Zubulake IV,* Zubulake learned about more deleted e-mails and about the existence of e-mails preserved on UBS's active servers that were, to that point, never produced. In sum, Zubulake has now presented evidence that UBS personnel deleted relevant e-mails, some of which were subsequently recovered from backup tapes (or elsewhere) and thus produced to Zubulake long after her initial document requests, and some of which were lost altogether. Zubulake has also presented evidence that some UBS personnel did not produce responsive documents to counsel until recently, depriving Zubulake of the documents for almost two years.

1. Deleted E-Mails

Notwithstanding the clear and repeated warnings of counsel, Zubulake has proffered evidence that a number of key UBS employees — Orgill, Hardisty, Holland, Chapin, Varsano, and Amone — failed to retain e-mails germane to Zubulake's claims. Some of the deleted e-mails were restored from backup tapes (or other sources) and have been produced to Zubulake, others have been altogether lost, though there is strong evidence that they once existed. Although I have long been aware that certain e-mails were deleted,24 the re-depositions demonstrate the scope and importance of those documents.

a. At Least One E-Mail Has Never Been Produced

At least one e-mail has been irretrievably lost; the existence of that e-mail is known only because of oblique references to it in other correspondence. It has already been shown that Chapin — the alleged primary discriminator' — deleted relevant e-mails.25 In addition to those e-mails, Zubulake has evidence suggesting that Chapin deleted at least one other e-mail that has been lost *entirely.* An e-mail from Chapin sent at 10:47 AM on September 21, 2001, asks Kim to send him a *427"document"

recounting a conversation between Zubulake and a co-worker.26 Approximately 45 minutes later, Chapin sent an email complaining about Zubulake to his boss and to the human resources employees handling Zubulake's case purporting to contain a verbatim recitation of a conversation between Zubulake and her co-worker, as overheard by Kim.27 This conversation allegedly took place on September 18, 2001, at 10:58 AM.28 There is reason to believe that immediately after that conversation, Kim sent Chapin an e-mail that contained the verbatim quotation that appears in Chapin's September 21 email — the "document" that Chapin sought from Kim just prior to sending that e-mail— and that Chapin deleted it.29 That e-mail, however, has never been recovered and is apparently lost.

Although Zubulake has only been able to present concrete evidence that this one email was irretrievably lost, there may well be others. Zubulake has presented extensive proof, detailed below, that UBS personnel were deleting relevant e-mails. Many of those e-mails were recovered from backup tapes. The UBS record retention policies called for monthly backup tapes to be retained for three years.30 The tapes covering the relevant time period (circa August 2001) should have been available to UBS in August 2002, when counsel instructed UBS's information technology personnel that backup tapes were also subject to the litigation hold.

Nonetheless, many backup tapes for the most relevant time periods are missing, including: Tong's tapes for June, July, August, and September of 2001; Hardist/s tapes for May, June, and August of 2001; Clarke and Vinay Datta's tapes for April and September 2001; and Chapin's tape for April 2001.31 Zubulake did not even learn that four of these tapes were missing until after *Zubulake IV*. Thus, it is impossible to know just how many relevant e-mails have been lost in their entirety.32

b. Many E-Mails Were Deleted and Only Later Recovered from Alternate Sources

Other e-mails were deleted in contravention of counsel's "litigation hold" instructions, but were subsequently recovered from alternative sources — such as backup tapes — and thus produced to Zubulake, albeit almost two years after she propounded her initial document requests. For example, an e-mail from Hardisty to Holland (and on which Chapin was copied) reported that Zubulake said "that all she want[ed] is to be treated like the *428other 'guys' on the desk."33 That e-mail was recovered from Hardisty's August 2001 backup tape — and thus it was on his active server as late as August 31, 2001, when the backup was generated — but was not in his active files. That e-mail therefore *must have* been deleted subsequent to counsel's warnings.34

Another e-mail, from Varsano to Hardisty dated August 31, 2001 — the very day that Hardisty met with outside counsel — forwarded an earlier message from Hardisty dated June 29, 2001, that recounted a conversation in which Hardisty "warned" Chapin about his management of Zubulake, and in which Hardisty reminded Chapin that Zubulake could "be a good broker."35 This e-mail was absent from UBS's initial production and had to be restored from backup; apparently neither Varsano nor Hardisty had retained it.36 This deletion is especially surprising because Varsano retained the June 29, 2001 e-mail for over two months before he forwarded it to Hardisty.37 Indeed, Varsano testified in his deposition that he "definitely" "saved all of the e-mails that [he] received concerning Ms. Zubulake" in 2001, that they were saved in a separate "very specific folder," and that "all of those e-mails" were produced to counsel.38

As a final example, an e-mail from Hardisty to Varsano and Orgill, dated September 1, 2001, specifically discussed Zubulake's termination. It read: "LZ — ok once lawyers have been signed off, probably one month, but most easily done in combination

with the full Asiapc [downsizing] announcement. We will need to document her performance post her warning HK. Matt [Chapin] is doing that."39 Thus, Orgill and Hardisty had decided to terminate Zubulake as early as September 1, 2001. Indeed, two days later Or-gill replied, "It's a pity we can't act on LZ earlier."40 Neither the authors nor any of the recipients of these e-mails retained any of them, even though these e-mails were sent within days of Hardisty's meeting with outside counsel. They were not even preserved on backup tapes, but were only recovered because Kim happened to have retained copies.41 Rather, all three people (Hardisty, Orgill and Varsano) deleted these e-mails from their computers by the end of September 2001. Apart from their direct relevance to Zubulake's claims, these e-mails may also serve to rebut Orgill and Hardisty's deposition testimony. Orgill testified that he played no role in the decision to terminate Zubulake.42 And Hardisty testified that he did not recall discussing Zubulake's termination with Orgill.43

*429These are merely examples. The proof is clear: UBS personnel unquestionably deleted relevant e-mails from their computers after August 2001, even though they had received at least two directions from counsel not to. Some of those e-mails were recovered (Zubulake has pointed to at least 45),44 but some — and no one can say how many— were not. And even those e-mails that were recovered were produced to Zubulake well after she originally asked for them.

2. Retained, But Unproduced, E-Mails

Separate and apart from the deleted material are a number of e-mails that were absent from UBS's initial production even though they were not deleted. These e-mails existed in the active, on-line files of two UBS employees — Kim and Tong — but were not produced to counsel and thus not turned over to Zubulake until she learned of their existence as a result of her counsel's questions at deposition. Indeed, these e-mails were not produced until after Zubulake had conducted thirteen depositions and four re-depositions.45

During her February 19, 2004, deposition, Kim testified that she was *never* asked to produce her files regarding Zubulake to counsel, nor did she ever actually produce them,46 although she was asked to retain them.47 One week after Kim's deposition, UBS produced seven new e-mails. The obvious inference to be drawn is that, subsequent to the deposition, counsel for the first time asked Kim to produce her files. Included among the new e-mails produced from Kim's computer was one (dated September 18, 2001) that recounts a conversation between Zubulake and Kim in which Zubulake complains about the way women are treated at UBS.48 Another e-mail recovered from Kim's computer contained the correspondence, described above, in which Hardisty and Orgill discuss Zubulake's termination, and in which Orgill laments that she could not be fired sooner than she was.

On March 29, 2004, UBS produced several new e-mails, and three new e-mail retention policies, from Tong's active files.49 At her deposition two weeks earlier, Tong explained (as she had at her first deposition, a year previous) that she kept a separate "archive" file on her computer with documents pertaining to Zubulake.50 UBS admits that until the March 2004 deposition, it misunderstood Tong's use of the word "archive" to mean backup tapes; after her March 2004 testimony, it was clear that she meant active data. Again, the inference is that UBS's counsel then, for the first time, asked her to produce her active computer files.

Among the new e-mails recovered from Tong's computer was one, dated August 21, 2001, at 11:06 AM, from Mike Davies51 to Tong that read, "received[.] thanks[,] mike,"52 and which was in response to an email from Tong, sent eleven minutes

earlier, that read, "Mike, I have just faxed over to you the 7 pages of Laura's [EEOC] charge against the bank."53 While Davies' three-word e-mail seems insignificant in isolation, it is actually quite important.

Three hours after sending that three word response, Davies sent an e-mail to Tong with the subject line "Laura Zubulake" that reads:

> I spoke to Brad [Orgill] — he's looking to exit her asap [by the end of month], and looking for guidance from us following letter? we sent her re her performance [or does he mean PMM]
>
> *430I said you were on call with U.S. yesterday and that we need U.S. legal advise etc, but be aware he's looking to finalise quickly!— said if off by end August then no bonus consideration, but if still employed after aug consideration should be given?54

Davies testified that he was unaware of Zubulake's EEOC charge when he spoke with Orgill.55 The timing of his e-mails, however — the newly produced e-mail that acknowledges receiving Zubulake's EEOC charge coming three hours before the e-mail beginning "I spoke to Brad" — strongly undercuts this claim. The new e-mail, therefore, is circumstantial evidence that could support the inference that Davies knew about the EEOC charge when he spoke with Orgill, and suggests that Orgill knew about the EEOC charge when the decision was made to terminate Zubulake.56 Its relevance to Zubulake's retaliation claim is unquestionable, and yet it was not produced until April 20, 2004.57

* * * * * *

Zubulake now moves for sanctions as a result of UBS's purported discovery failings. In particular, she asks — as she did in *Zubulake IV* — that an adverse inference instruction be given to the jury that eventually hears this case.

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."58 "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-ease basis." 59 The authority to sanction litigants for spoliation arises jointly under the Federal Rules of Civil Procedure and the court's inherent powers.60

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."61 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.62

*431In this circuit, a "culpable state of mind" for purposes of a spoliation inference includes ordinary negligence.63 When evidence is destroyed in bad faith (i.e., intentionally or willfully), that fact alone is sufficient to demonstrate relevance.64 By contrast, when the destruction is negligent, relevance must be proven by the party seeking the sanctions.65

In the context of a request for an adverse inference instruction, the concept of "relevance" encompasses not only the ordinary meaning of the term,66 but also that the destroyed evidence would have been favorable to the movant.67 "This corroboration requirement is even more necessary where the destruction was merely negligent, since in those cases it cannot be inferred from the conduct of the spoliator that the evidence would even have been harmful to him."68 This is equally true in cases of gross negligence or recklessness; only in the case of *willfid* spoliation does the degree of culpability give rise to a presumption of the relevance of the documents destroyed.69

IV. DISCUSSION

In *Zubulake IV,* I held that UBS had a duty to preserve its employees' active files as early as April 2001, and certainly by August 2001, when Zubulake filed her EEOC charge.70 Zubulake has thus satisfied the first element of the adverse inference test. As noted, the central question implicated by this motion is whether UBS and its counsel took all necessary steps to guarantee that relevant data was both preserved and produced. If the answer is "no," then the next question is whether UBS acted wilfully when it deleted or failed to timely produce relevant information — resulting in either a complete loss or the production of responsive information close to two years after it was initially sought. If UBS acted wilfully, this satisfies the mental culpability prong of the adverse inference test and also demonstrates that the deleted material was relevant.71 If UBS acted negligently or even recklessly, then Zubulake must show that the missing or late-produced information was relevant.

A. Counsel's Duty to Monitor Compliance

In *Zubulake IV,* I summarized a litigant's preservation obligations:

> Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruetion 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.72

*432A party's discovery obligations do not end with the implementation of a "litigation hold" — to the contrary, that's only the beginning. Counsel must oversee compliance with the litigation hold, monitoring the party's efforts to retain and produce the relevant documents. Proper communication between a party and her lawyer will ensure (1) that all relevant information (or at least all sources of relevant information) is discovered, (2) that relevant information is retained on a continuing basis; and (3) that relevant non-privileged material is produced to the opposing party.

1. Counsel's Duty to Locate Relevant Information

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.73 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,74 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. A brief conversation with counsel, for example, might have revealed that Tong maintained "archive" copies of e-mails concerning Zubulake, and that "archive" meant a separate on-line computer file, not a backup tape. Had that conversation taken place, Zubulake might have had relevant e-mails from that file two years ago.

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. It may be possible to run a system-wide keyword search; counsel could then preserve a copy of each "hit." Although this sounds burdensome, it need not be. Counsel does not have to review these documents, only see that they are retained. For example, counsel could create a broad list of search terms, run a search for a limited time frame, and then segregate responsive documents.75 When the opposing party propounds its document requests, the parties could negotiate a list of search terms to be used in identifying responsive documents, and counsel would only be obliged to review documents that came up as "hits" on the second, more restrictive search. The initial broad cut merely guarantees that relevant documents are not lost.

In short, it 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.

2. Counsel's Continuing Duty to Ensure Preservation

Once a party and her counsel have identified all of the sources of potentially relevant information, they are under a duty to retain *433that information (as per *Zubulake IV)* and to produce information responsive to the opposing party's requests. Rule 26 creates a "duty to supplement" those responses.76 Although the Rule 26 duty to supplement is nominally the party's, it really falls on counsel. As the Advisory Committee explains,

> Although the party signs the answers, it is his lawyer who understands their significance and bears the responsibility to bring answers up to date. In a complex ease all sorts of information reaches the party, who little understands its bearing on answers previously given to interrogatories. In practice, therefore, the lawyer under a continuing burden must periodically recheck all interrogatories and canvass all new information.77

To ameliorate this burden, the Rules impose a continuing duty to supplement responses to discovery requests *only* when "a party[,] or more frequently his lawyer, obtains actual knowledge that a prior response is incorrect. This exception does not impose a duty to check the accuracy of prior responses, but it prevents knowing concealment by a party or attorney."78

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.79

The tricky question is what that continuing duty entails. What must a lawyer do to make certain that relevant information — especially electronic information — is being retained? Is it sufficient if she periodically re-sends her initial "litigation hold" instructions? What if she communicates with the party's information technology personnel? Must she make occasional on-site inspections?

Above all, the requirement must be reasonable. A lawyer cannot be obliged to monitor her client like a parent watching a child. At some point, the client must bear responsibility for a failure to preserve. At the same time, counsel is more conscious of the contours of the preservation obligation; a party cannot reasonably be trusted to receive the "litigation hold" instruction once and to fully comply with it without the active supervision of counsel.80

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.81 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, *ie.,* the people identified in a party's initial disclosure and any subsequent supplementation thereto.82 Because these "key players" *434are the "employees likely to have relevant information,"83 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. In cases involving a small number of relevant backup tapes, counsel might be advised to take physical possession of backup tapes. In other cases, it might make sense for relevant backup tapes to be segregated and placed in storage. Regardless of what particular arrangement counsel chooses to employ, the point is to separate relevant backup tapes from others. One of the primary reasons that electronic data is lost is ineffective communication with information technology personnel. By taking possession of, or otherwise safeguarding, all potentially relevant backup tapes, counsel eliminates the possibility that such tapes will be inadvertently recycled.

Keir v. UnumProvident Corp.84 provides a disturbing example of what can happen when counsel and client do not effectively communicate. In that ERISA class action, the court entered an order on December 27, 2002, requiring UnumProvident to preserve electronic data, specifically including e-mails sent or received on six particular days. What ensured was a comedy of errors. First, before the court order was entered (but when it was subject to the common law duty to preserve) UnumProvident's technical staff unilaterally decided to take a "snapshot" of its servers instead of restoring backup tapes, which would have recovered the e-mails in question. (In fact, the snapshot was useless for the purpose of preserving these e-mails because most of them had already been deleted by the time the snapshot was generated.) Once the court issued the preservation order, UnumProvident failed to take any further steps to locate the e-mails, believing that the same person who ordered the snapshot would oversee compliance with the court order. But no one told him that.

Indeed, it was not until January 13, when senior UnumProvident legal personnel inquired whether there was any way to locate the e-mails referenced in the December 27 Order, that anyone sent a copy of the Order to IBM, who provided "email, file server, and electronic data related disaster recovery services to UnumProvident."85 By that time, UnumProvident had written over 881 of the 1,498 tapes that contained backup data for the relevant time period. All of this led to a stern rebuke from the court.86 Had counsel in *Keir* promptly taken the precautions set out above, the e-mails would not have been lost.87

3. What Happened at UBS After August 2001?

As more fully described above, UBS's in-house counsel issued a litigation hold in August 2001 and repeated that instruction sev*435eral 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.88 Other employees, notwithstanding counsel's request that they produce their files on Zubulake, did not do so.

a. UBS's Discovery Failings

UBS's counsel — both in-house and outside — repeatedly advised UBS of its discovery obligations. In fact, counsel came very close to taking the precautions laid out above. *First,* outside counsel issued a litigation hold in August 2001. The hold order was circulated to many of the key players in this litigation, and reiterated in e-mails in February 2002, when suit was filed, and again in September 2002. Outside counsel made clear that the hold order applied to backup tapes in August 2002, as soon as backup tapes became an issue in this case. *Second,* outside counsel communicated directly with many of the key players in August 2001 and attempted to impress upon them their preservation obligations. *Third,* and finally, counsel instructed UBS employees to produce copies of their active computer files.89

To be sure, counsel did not fully comply with the standards set forth above. Nonetheless, under the standards existing at the time, counsel acted reasonably to the extent that they directed UBS to implement a litigation hold. Yet notwithstanding the clear instructions of counsel, UBS personnel failed to preserve plainly relevant e-mails.

b. Counsel's Failings

On the other hand, UBS's counsel are not entirely blameless. "While, of course, it is true that counsel need not supervise every step of the document production process and may rely on their clients in some respects,"90 counsel is responsible for coordinating her client's discovery efforts. In this case, counsel failed to properly oversee UBS in a number of important ways, both in terms of its duty to locate relevant information and its duty to preserve and timely produce that information.

With respect to locating relevant information, counsel failed to adequately communicate with Tong about how she stored data. Although counsel determined that Tong kept her files on Zubulake in an "archive," they apparently made no effort to learn what that meant. A few simple questions — like the ones that Zubulake's counsel asked at Tong's redeposition — would have revealed that she kept those files in a separate *active* file on her computer.

With respect to making sure that relevant data was retained, counsel failed in a number of important respects. *First,* neither in-house nor outside counsel communicated the litigation hold instructions to Mike Davies, a senior human resources employee who was intimately involved in Zubulake's termination. *Second,* even though the litigation hold instructions were

communicated to Kim, no one ever asked her to produce her files. And *third,* counsel failed to protect relevant backup tapes; had they done so, Zubulake might have been able to recover some of the e-mails that UBS employees deleted.

In addition, if Varsano's deposition testimony is to be credited, he turned over "all of the e-mails that [he] received concerning Ms. *436Zubulake."91 If Varsano turned over these e-mails, then counsel must have failed to produce some of them.92

In sum, while UBS personnel deleted emails, copies of many of these e-mails were lost or belatedly produced as a result of counsel's failures.

c. Summary

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.

Because UBS personnel continued to delete relevant e-mails, Zubulake was denied access to e-mails to which she was entitled. Even those e-mails that were deleted but ultimately salvaged from other sources {*e.g.,* backup tapes or Tong and Kim's active files) were produced 22 months after they were initially requested. The effect of losing potentially relevant e-mails is obvious, but the effect of late production cannot be underestimated either. "[A]s a discovery deadline ... draws near, discovery conduct that might have been considered 'merely' discourteous at an earlier point in the litigation may well breach a party's duties to its opponent and to the court."93 Here, as UBS points out, Zubulake's instant motion "comes more than a year after the Court's previously imposed March 3, 2003 discovery cutoff."94 Although UBS attempts to portray this fact as evidence that Zubulake is being overly litigious, it is in fact a testament to the time wasted by UBS's failure to timely produce all relevant and responsive information. With the discovery deadline long past, UBS "was under an obligation to be as *cooperative as possible."* 95 Instead, the extent of UBS's spoliation was uncovered by Zubulake during court-ordered re-depositions.

I therefore conclude that UBS acted wilfully in destroying potentially relevant information, which resulted either in the absence of such information or its tardy production (because duplicates were recovered from Kim or Tong's active files, or restored from backup tapes). Because UBS's spoliation was willful, the lost information is presumed to be relevant.96

B. Remedy

Having concluded that UBS was under a duty to preserve the e-mails and that it *437deleted presumably relevant e-mails wilfully, I now consider the full panoply of available sanctions.97 In doing so, I recognize that a major consideration in choosing an appropriate sanction — along with punishing UBS and deterring future misconduct — is to restore Zubulake to the position that she would have been in had UBS faithfully discharged its discovery obligations.98 That being so, I find that the following sanctions are warranted.

First, the jury empanelled to hear this case will be given an adverse inference instruction with respect to e-mails deleted after August 2001, and in particular, with respect to e-mails that were irretrievably lost when UBS's backup tapes were recycled. No one can ever know precisely what was on those tapes, but the content of e-mails recovered from other sources — along with the fact that UBS employees wilfully deleted emails — is sufficiently favorable to Zubulake that I am convinced that the contents of the lost tapes would have been similarly, if not more, favorable.99

Second, Zubulake argues that the emails that *were* produced, albeit late, "are brand new and very significant to Ms. Zubulake's retaliation claim and would have affected [her] examination of every witness ... in this case."100 Likewise, Zubulake claims, with respect to the newly produced e-mails from Kim and Tong's active files, that UBS's "failure to produce these e-mails in a timely fashion precluded [her] from questioning any witness about them."101 These arguments stand unrebutted and are therefore adopted in full by the Court. Accordingly, UBS is ordered to pay the costs of any depositions or re-depositions required by the late production.

Third, UBS is ordered to pay the costs of this motion.102

Finally, I note that UBS's belated production has resulted in a self-executing sanction. Not only was Zubulake unable to question UBS's witnesses using the newly produced emails, but UBS was unable to prepare those witnesses with the aid of those e-mails. Some of UBS's witnesses, not having seen these e-mails, have already given deposition testimony that seems to contradict the newly discovered evidence. For example, if Zubulake's version of the evidence is credited, the e-mail from Davies acknowledging receipt of Zubulake's EEOC charge at 11:06 AM on August 21, 2001, puts the lie to Davies' testimony that he had not seen the charge when he spoke to Orgill — a conversation that was reflected in an e-mail sent at 2:02 PM. Zubulake is, of course, free to use this testimony at trial.

These sanctions are designed to compensate Zubulake for the harm done to her by *438the loss of or extremely delayed access to potentially relevant evidence.103 They should also stem the need for any further litigation over the backup tapes.

C. Other Alleged Discovery Abuses

In addition to the deleted (and thus never- or belatedly produced) e-mails, Zubulake complains of two other perceived discovery abuses: the destruction of a September 2001 backup tape from Tong's server, and the belated production of a UBS document retention policy.

1. Tong's September 2001 Backup Tape

Zubulake moves for sanctions because of the destruction of Tong's September 2001 backup tape. In *Zubulake III,* I ordered UBS to pay 75% of the cost of restoring certain backup tapes.104 Understandably, one of the tapes that Zubulake chose to restore was Tong's tape for August 2001, the month that Zubulake filed her EEOC charge. That tape, however, had been recycled by UBS. Zubulake then chose to restore Tong's September 2001 tape, on the theory that "the majority of the e-mails on [the August 2001] tape are preserved on the September 2001 tape."105 When that tape was actually restored, however, it turned out not to be the September 2001 tape at all, but rather Tong's October 2001 tape. This tape, according to UBS, was simply mislabeled.106

Zubulake has already (unintentionally) restored Tong's October 2001 tape, which should contain the majority of the data on the September 2001 tape. In addition, UBS has offered to pay to restore Varsano's backup tape for August 2001, which it has and which has not yet been restored.107 Varsano was Tong's HR counterpart in the United States, and was copied on many (but not all) of the e-mails that went to or from Tong.108 These backup tapes, taken together, should recreate the lion's share of data from Tong's August 2001 tape. UBS must therefore pay for the restoration and production of relevant e-mails from Varsano's August 2001 backup tape, and pay for any re-deposition of Tong or Varsano that is necessitated by new emails found on that tape.

2. The July 1999 Record Management Policy

Zubulake also moves for sanctions in connection with what she refers to as "bad faith discovery tactics" on the part of UBS's counsel.109 In particular, Zubulake complains of a late-produced record management policy.110 The existence of this policy was revealed to Zubulake at Varsano's second deposition on January 26, 2004,111 at which time Zubulake called for its production.112 Zubulake twice reiterated this request in writing, in the hopes that she would have the policy in time for Hardisty's deposition on February 5, 2004. UBS did not produce the policy, however, until February 26, 2004.113

The late production of the July 1999 policy does not warrant sanctions at all. *First,* UBS's production of the policy was not late. Zubulake requested it at Varsano's deposition on January 26, 2004, and UBS produced it one month later, on February 26. The *439Federal Rules afford litigants thirty days to respond to document requests,114 and UBS produced the policy within that time. The fact that Zubulake wanted the document earlier is immaterial — if it was truly necessary to confront Hardisty with the policy, then his deposition should have been rescheduled or Zubulake should have requested relief from the Court.115 Not having done so, Zubulake cannot now complain that UBS improperly delayed its production of that document.

Second, even if UBS was tardy in producing the policy, Zubulake has not demonstrated that she was prejudiced. She suggests that she would have used the policy in the depositions of Hardisty and perhaps Chapin, but does not explain how. Nor is it at all clear how Zubulake might have used the policy. With respect to e-mail, the policy states: "Email is another priority. We will have a separate policy regarding email with appropriate reference or citation in this policy and/or retention schedules."116 Prior to these depositions, Zubulake had a number of UBS document retention policies that postdated the June 1999 Policy.117

V. CONCLUSION

In sum, counsel has a duty to effectively communicate to her client its discovery obligations so that all relevant information is discovered, retained, and produced. In particular, once the duty to preserve attaches, counsel must identify sources of discoverable information. This will usually entail speaking directly with the key players in the litigation, as well as the client's information technology personnel. In addition, when the duty to preserve attaches, counsel must put in place a litigation hold and make that known to all relevant employees by communicating with them directly. The litigation hold instructions must be reiterated regularly and compliance must be monitored. Counsel must also call for employees to produce copies of relevant electronic evidence, and must arrange for the segregation and safeguarding of any archival media *(e.g.,* backup tapes) that the party has a duty to preserve.

Once counsel takes these steps (or once a court order is in place), a party is fully on notice of its discovery obligations. If a party acts contrary to counsel's instructions or to a court's order, it acts at its own peril.

UBS failed to preserve relevant e-mails, even after receiving adequate warnings from counsel, resulting in the production of some relevant e-mails almost two years after they were initially requested, and resulting in the complete destruction of others. For that reason, Zubulake's motion is granted and sanctions are warranted. UBS is ordered to:

> 1. Pay for the re-deposition of relevant UBS personnel, limited to the subject of the newly-discovered e-mails;
>
> 2. Restore and produce relevant documents from Varsano's August 2001 backup tape;
>
> 3. Pay for the re-deposition of Varsano and Tong, limited to the new material produced from Varsano's August 2001 backup tape;118 and
>
> 4. Pay all "reasonable expenses, including attorney's fees,"119 incurred by Zubulake in connection with the making of this motion.

In addition, I will give the following instruction to the jury that hears this case:

> You have heard that UBS failed to produce some of the e-mails sent or received by UBS personnel in August and September 2001. Plaintiff has argued that this evi*440dence was in defendants' control and would have proven facts material to the matter in controversy.
>
> If you find that UBS could have produced this evidence, and that the evidence was within its control, and that the evidence would have been material in deciding facts in dispute in this case, you are permitted, but not required, to infer that the evidence would have been unfavorable to UBS.
>
> In deciding whether to draw this inference, you should consider whether the evidence not produced would merely have duplicated other evidence already before you. You may also consider whether you are satisfied that UBS's failure to produce this information was reasonable. Again, any inference you decide to draw should be based on all of the facts and circumstances in this case.120

The Clerk is directed to close this motion [number 43 on the docket sheet]. Fact discovery shall close on October 4, 2004. A final pretrial conference is scheduled for 4:30 PM on October 13, 2004, in Courtroom 15C. If either party believes that a dispositive motion is appropriate, that date will be converted to a pre-motion conference.

VI. POSTSCRIPT

The subject of the discovery of electronically stored information is rapidly evolving. When this case began more than two years ago, there was little guidance from the judiciary, bar associations or the academy as to the governing standards. Much has changed in that time. There have been a flood of recent opinions — including a number from appellate courts — and there are now several treatises on the subject.121 In addition, professional groups such as the American Bar Association and the Sedona Conference have provided very useful guidance on thorny issues relating to the discovery of electronically stored

information.122 Many courts have adopted, or are considering adopting, local rules addressing the subject.123 Most recently, the Standing Committee on Rules and Procedures has approved for publication and public comment a proposal for revisions to the Federal Rules of Civil Procedure designed to address many of the issues raised by the discovery of electronically stored information.124

Now that the key issues have been addressed and national standards are developing, parties and their counsel are fully on notice of their responsibility to preserve and produce electronically stored information. The tedious and difficult fact finding encompassed in this opinion and others like it is a great burden on a court's limited resources. The time and effort spent by counsel to *441litigate these issues has also been time-consuming and distracting. This Court, for one, is optimistic that with the guidance now provided it will not be necessary to spend this amount of time again. It is hoped that counsel will heed the guidance provided by these resources and will work to ensure that preservation, production and spoliation issues are limited, if not eliminated.

SO ORDERED.

[…]

9 Judgments and Adjudication Without Trial

9.1 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.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 2007, eff. Dec. 1, 2007; Mar. 26, 2009, eff. Dec. 1, 2009; Apr. 28, 2010, eff. Dec. 1, 2010.)

9.2 Summary Judgment Introduction

The broad discovery allowed under the federal rules effectively permits the full development of all factual issues prior to trial. This was not the case under the writs or under code pleading, where both parties might discover important factual developments only in the midst of trial. The broad scope of discovery in federal cases was designed to prevent 'trial by ambush,' and to allow the parties to enter trial fully aware of the important facts.

While the broad expansion of discovery was aimed at allowing trials to proceed more fairly, it has had a number of unintended and unexpected consequences. One has been allowing parties to voluntarily settle the case through negotiation. Once the legal and factual issues have been fully exposed, the parties often are able to price the claims and resolve matters without the expense and delay of trial.

Another development has been the expansion of summary judgment practice. Summary judgment did not exist in the common law but entered English practice in the mid-1800s as part of procedural reforms. Even then, it was generally limited to situations such as liquidated claims on certain forms of commercial paper. The use of summary judgment expanded over the next three quarters of a century and was used by many courts in the United States prior to the adoption of the rules. Again, however, use of the device might be limited to certain causes of action or certain settings.

Rule 56 expanded the use of summary judgment in the federal courts. Unlike many prior state versions, it allowed the use of the device without regard to the cause of action involved in the claim or counterclaim. That said, old habits die hard, and some time passed before the use of summary judgment took on its modern form.

The cases we are about to read will trace the development of summary judgment as a way of resolving lawsuits. Without spoiling any surprises that might await you, be on the lookout for two settings were summary judgment might apply. One is a situation where a fact is definitively established without any ability to contradict it that will prevent the other party from prevailing on its claim. This fact can be established by an admission, an interrogatory answer, uncontroverted deposition testimony, or any other of the fruits of discovery. The other situation to look for is where we have a situation similar to a motion to dismiss under Rule 12(b)(6). A motion to dismiss looks to the burden of pleading; summary judgment can address much the same question at the burden of production stage. Look for situations where summary judgment allows the party to argue that taking into account all the evidence that has been unearthed through discovery essential elements of the cause of action simply cannot be established with the facts available.

Summary judgment can be partial or complete. It can be used to dispose of the entire lawsuit, or it can be used to reduce the scope of a claim or the level of damages.

Summary judgment can also be used by any party. It can be used by the plaintiff to establish a claim if the facts required to prove the claim are not contested. It can be used by a plaintiff to defeat a counterclaim. It can be used by defendant in the same way to establish a counterclaim or to defeat a claim by the plaintiff.

Another issue to look for in summary judgment is the standard of proof to be applied. When we look at the evidence involved, does the showing at summary judgment track the burden of proof that needs to be met at trial?

Summary judgment is now a critical part of modern American litigation practice, and summary judgment motions are routinely made in complex US litigation. Summary judgment allows the parties to avoid the cost and delay of trial in those situations when there is no dispute as to the material facts. In some ways, summary judgment can be viewed as a response to the relatively permissive entry to the courts allowed under American rules of pleading. It allows resolution without trial if after discovery the critical facts have not been developed.

That said, summary judgment has been controversial. In the United States, as we will see later in this quarter, litigants have the right to a jury trial in many civil cases, which means they have a right to have ordinary citizens rather than judges decide the facts and determine what level of damages is appropriate. Some claim that summary judgment interferes with this right to a jury trial. As you read the following cases, ask yourself if there are among the cases decided by summary judgment some where the facts were less absolute than the court seem to believe, and whether a litigant might have a fair claim that a jury should have been allowed to resolve the case.

There is also a distributive element to summary judgment, since even though any party can make a motion for summary judgment, in reality they most often are made by defendants, who are the beneficiaries if the case is dismissed or reduced thanks to summary judgment practice. Some claim that this skews results toward defendants. Summary judgment also affects the negotiation of lawsuits, because the possibility that summary judgment might be granted will affect the risk adjusted value of the plaintiff's claim, and hence settlement results.

9.3 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 [147] teaching that summer. Unlike Miss Adickes, the students were offered service, and were not arrested.

Petitioner's complaint had two counts,[2] 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 first count charged that Miss Adickes had been refused service by Kress because she was a "Caucasian in the company of Negroes." Petitioner sought, *inter alia,* to prove that the refusal to serve her was pursuant to a "custom of the community to segregate the races in public eating places." However, in a pretrial decision, […]the District Court ruled that to recover under this count, Miss Adickes would have to prove that at the time she was refused service, there was a specific "custom . . . of refusing service to whites in the company of Negroes" and that this custom was "enforced by the State" under Mississippi's criminal trespass statute.[3] Because petitioner was unable to prove at the trial that there were other instances in Hattiesburg of a white person having been refused service while in the company of Negroes, [148] the District Court directed a verdict in favor of respondent. A divided panel of the Court of Appeals affirmed on this ground, also holding that § 1983 "requires that the discriminatory custom or usage be proved to exist in the locale where the discrimination took place, and in the State generally," and that petitioner's "proof on both points was deficient," […]

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 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 both in directing a verdict on the substantive count, and in granting summary judgment on the conspiracy count. Last Term we granted certiorari, […] and we 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. With respect to the substantive count, for reasons explained in Part II, we think petitioner will have made out a claim under § 1983 for violation of her equal protection rights if she proves that she was refused service by Kress because of a state-enforced custom requiring racial segregation in Hattiesburg restaurants. We think the courts below erred (1) in assuming that the only proof relevant to showing that a custom was state-enforced related to the

Mississippi criminal trespass statute; (2) in defining the relevant [149] state-enforced custom as requiring proof of a practice both in Hattiesburg and throughout Mississippi, of refusing to serve white persons in the company of Negroes rather than simply proof of state-enforced segregation of the races in Hattiesburg restaurants.

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"; [150] and (2) to cause her arrest "on the false charge of vagrancy."

A. CONSPIRACIES BETWEEN PUBLIC OFFICIALS AND PRIVATE PERSONS—GOVERNING PRINCIPLES

The terms of § 1983 make plain two elements that are necessary for recovery. First, the plaintiff must prove that the defendant has deprived him of a right secured by the "Constitution and laws" of the United States. Second, the plaintiff must show that the defendant deprived him of this constitutional right "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory." This second element requires that the plaintiff show that the defendant acted "under color of law."[4]

As noted earlier we read both counts of petitioner's complaint to allege discrimination based on race in violation of petitioner's equal protection rights.[5] Few principles [151] of law are more firmly stitched into our constitutional fabric than the proposition that a State must not discriminate against a person because of his race [152] or the race of his companions, or in any way act to compel or encourage racial segregation.[6] Although this is a lawsuit against a private party, not the State or one of its officials, our cases make clear that petitioner will have made out a violation of her Fourteenth Amendment rights and will be entitled to relief under § 1983 if she can prove that a Kress employee, in the course of employment, and a Hattiesburg policeman somehow reached an understanding to deny Miss Adickes service in the Kress store, or to cause her subsequent arrest because she was a white person in the company of Negroes.

The involvement of a state official in such a conspiracy plainly provides the state action essential to show a direct violation of petitioner's Fourteenth Amendment equal protection rights, whether or not the actions of the police were officially authorized, or lawful; […]Moreover, a private party involved in such a conspiracy, even though not an official of the State, can be liable under § 1983. "Private persons, jointly engaged with state officials in the prohibited action, are acting `under color' of law for

purposes of the statute. To act `under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents," *[…]*

B. 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,[8] and that (b) he had, by a prearranged tacit [154] signal,[9] 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.[10] Kress also relied on affidavits from the Hattiesburg [155] chief of police,[11] and the two arresting officers,[12] 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 [156] 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,[13] and an unsworn statement by a Kress employee,[14] 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 [157] 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.[15] 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,[16] or from [158] Miss Freeman,[17] 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 [159] 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).[19]

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 (c) to show initially the absence of a genuine issue concerning any material fact.[20] The Advisory Committee [160] 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.*"[21] 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.[22]

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 (f) explaining why at that time it was impractical to do so. Even though not essential here to defeat [161] 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:

"It has always been perilous for the opposing party neither to proffer any countering evidentiary materials nor file a 56 (f) 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."[…]

II

There remains to be discussed the substantive count of petitioner's complaint, and the showing necessary for petitioner to prove that respondent refused her service "under color of any . . . custom, or usage, of [the] State" in violation of her rights under the Equal Protection Clause of the Fourteenth Amendment.[23]

[162]

A. CUSTOM OR USAGE

We are first confronted with the issue of whether a "custom" for purposes of § 1983 must have the force of law, or whether, as argued in dissent, no state involvement is required. Although this Court has never explicitly decided this question, we do not interpret the statute against an amorphous backdrop.

What is now 42 U. S. C. § 1983 came into existence as § 1 of the Ku Klux Klan Act of April 20, 1871, 17 Stat. 13. The Chairman of the House Select Committee which drafted this legislation described[24] § 1 as modeled after § 2 of the Civil Rights Act of 1866—a criminal provision that also contained language that forbade certain acts by any person "under color of any law, statute, ordinance, regulation, or custom," […] In the *Civil Rights Cases,* 109 U. S. 3, 16 (1883), the Court said of this 1866 statute: "This law is clearly corrective in its [163] character, intended to counteract and furnish redress against State laws and proceedings, and *customs having the force of law,* which sanction the wrongful acts specified." (Emphasis added.) Moreover, after an exhaustive examination of the legislative history of the 1866 Act, both the majority and dissenting opinions[25] in *Jones* v. *Alfred H. Mayer Co.,* 392 U. S. 409 (1968), concluded that § 2 of the 1866 Civil Rights Act was intended to be limited to "deprivations perpetrated `under color of *law*.' "[26][…]

Quite apart from this Court's construction of the identical "under color of" provision of § 2 of the 1866 Act, the legislative history of § 1 of the 1871 Act, the lineal ancestor of § 1983, also indicates that the provision in question here was intended to encompass only conduct supported by state action. That such a limitation was intended for § 1 can be seen from an examination of the statements and actions of both the supporters and opponents of the Ku Klux Klan Act.

[164] In first reporting the Committee's recommendations to the House, Representative Shellabarger, the Chairman of the House Select Committee which drafted the Ku Klux Klan Act, said that § 1 was "*in its terms carefully confined to giving a civil action for such wrongs against citizenship as are done under color of State laws* which abridge these rights."[27] […] Senator Edmunds, Chairman of the Senate Committee on the Judiciary, and also a supporter of the bill, said of this provision: "The first section is one that I believe nobody objects to, as defining the rights secured by the Constitution of the United States when they are *assailed by any State law or under color of any State law,* and it is merely carrying out the principles of the civil rights bill, which have since become a part of the Constitution."[28] […]Thus, in each House, the leader of those favoring the bill expressly stated his understanding that § 1 was limited to deprivations of rights done under color of law.

That Congress intended to limit the scope of § 1 to actions taken under color of law is further seen by contrasting its legislative history with that of other sections of the same Act. On the one hand, there was comparatively little debate over § 1

of the Ku Klux Klan Act, and it was eventually enacted in form identical to that in which it was introduced in the House.[29] Its history thus stands in sharp contrast to that of other sections [165] of the Act.[30] For example, § 2 of the 1871 Act,[31] a provision aimed at private conspiracies with no "under color of law" requirement, created a great storm of controversy, in part because it was thought to encompass private conduct. Senator Thurman, for example, one of the leaders of the opposition to the Act, although objecting to § 1 on other grounds, admitted its constitutionality[32] and characterized it as "refer[ring] to a deprivation under color of law, either statute law *or `custom or usage' which has become common law.*"[33][…]This same Senator insisted vociferously on the absence of congressional power under § 5 of the Fourteenth [166] Amendment to penalize a conspiracy of private individuals to violate state law.[34] The comparative lack of controversy concerning § 1, in the context of the heated debate over the other provisions, suggests that the opponents of the Act, with minor exceptions, like its proponents understood § 1 to be limited to conduct under color of law.

In addition to the legislative history, there exists an unbroken line of decisions, extending back many years, in which this Court has declared that action "under color of *law*" is a predicate for a cause of action under § 1983,[35] or its criminal counterpart, 18 U. S. C. § 242.[36] Moreover, with the possible exception of an exceedingly opaque district court opinion,[37] every lower court opinion of which we are aware that has considered the issue, has concluded that a "custom or usage" for purposes of § 1983 requires state involvement and is not simply a practice that reflects longstanding social habits, generally [167] observed by the people in a locality.[38] Finally, the language of the statute itself points in the same direction for it expressly requires that the "custom or usage" be that "of any *State,*" not simply of the people living in a state. In sum, against this background, we think it clear that a "custom, or usage, of [a] State" for purposes of § 1983 must have the force of law by virtue of the persistent practices of state officials.

Congress included customs and usages within its definition of law in § 1983 because of the persistent and widespread discriminatory practices of state officials in some areas of the post-bellum South. As Representative Garfield said: "[E]ven where the laws are just and equal on their face, yet, by a systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them."[39] Although not authorized by written law, such [168] practices of state officials could well be so permanent and well settled as to constitute a "custom or usage" with the force of law.

This interpretation of custom recognizes that settled practices of state officials may, by imposing sanctions or withholding benefits, transform private predilections into compulsory rules of behavior no less than legislative pronouncements. If authority be needed for this truism, it can be found in *Nashville, C. & St. L. R. Co.* v. *Browning,* 310 U. S. 362 (1940), where the Court held that although a statutory provision suggested a different note, the "law" in Tennessee as established by longstanding practice of state officials was that railroads and public utilities were taxed at full cash value. What Justice Frankfurter wrote there seems equally apt here:

"It would be a narrow conception of jurisprudence to confine the notion of `laws' to what is found written on the statute books, and to disregard the gloss which life has written upon it. Settled state practice . . . can establish what is state law. The Equal Protection Clause did not write an empty formalism into the Constitution. Deeply embedded traditional ways of carrying out state policy, such as those of which petitioner complains, are often tougher and truer law than the dead words of the written text." *Id.,* at 369.

And in circumstances more closely analogous to the case at hand, the statements of the chief of police and mayor of New Orleans, as interpreted by the Court [169] in *Lombard* v. *Louisiana,* 373 U. S. 267 (1963), could well have been taken by restaurant proprietors as articulating a custom having the force of law. […]

B. STATE ACTION—14TH AMENDMENT VIOLATION

For petitioner to recover under the substantive count of her complaint, she must show a deprivation of a right guaranteed to her by the Equal Protection Clause of the Fourteenth Amendment. Since the "action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States," *[…]* we must decide, for purposes of this case, the following "state action" issue: Is there sufficient state action to prove a violation of petitioner's Fourteenth Amendment rights if she shows that Kress refused her service because of a state-enforced custom compelling segregation of the races in Hattiesburg restaurants?

In analyzing this problem, it is useful to state two polar propositions, each of which is easily identified and resolved. On the one hand, the Fourteenth Amendment plainly prohibits a State itself from discriminating because of race. On the other hand, § 1 of the Fourteenth Amendment does not forbid a private party, not acting against a backdrop of state compulsion or involvement, to discriminate on the basis of race in his personal affairs as an expression of his own personal predilections. As was said in *Shelley* v. *Kraemer, supra,* § 1 of "[t]hat Amendment erects no shield against merely private conduct, however discriminatory or wrongful." […]

[170] At what point between these two extremes a State's involvement in the refusal becomes sufficient to make the private refusal to serve a violation of the Fourteenth Amendment, is far from clear under our case law. If a State had a law requiring a private person to refuse service because of race, it is clear beyond dispute that the law would violate the Fourteenth Amendment and could be declared invalid and enjoined from enforcement. Nor can a State enforce such a law requiring discrimination through either convictions of proprietors who refuse to discriminate, or trespass prosecutions of patrons who, after being denied service pursuant to such a law, refuse to honor a request to leave the premises.[40]

The question most relevant for this case, however, is a slightly different one. It is whether the decision of an owner of a restaurant to discriminate on the basis of race under the compulsion of state law offends the Fourteenth Amendment. Although this Court has not explicitly decided the Fourteenth Amendment state action issue implicit in this question, underlying the Court's decisions in the sit-in cases is the notion that a State is responsible for the discriminatory act of a private party when the State, by its law, has compelled the act. As the Court said in *Peterson* v. *City of Greenville,* 373 U. S. 244, 248 (1963): "When the State has commanded a particular result, it has saved to itself the power to determine that result and thereby `to a significant extent' has `become involved' in it." Moreover, there is much support in lower court opinions for the conclusion that discriminatory acts by private parties done under the compulsion of state law offend the Fourteenth [171] Amendment. In *Baldwin* v. *Morgan, supra,* the Fifth Circuit held that "[t]he very act of posting and maintaining separate [waiting room] facilities when done by the [railroad] Terminal as commanded by these state orders is action by the state." The Court then went on to say: "As we have pointed out above the State may not use race or color as the basis for distinction. *It may not do so by direct action or through the medium of others who are under State compulsion to do so.*" *[…]*We think the same principle governs here.

For state action purposes it makes no difference of course whether the racially discriminatory act by the private party is compelled by a statutory provision or by a custom having the force of law—in either case it is the State that has commanded the result by its law. Without deciding whether less substantial involvement of a State might satisfy the state action requirement of the Fourteenth Amendment, we conclude that petitioner would show an abridgment of her equal protection right, if she proves that Kress refused her service because of a state-enforced custom of segregating the races in public restaurants.

C. THREE ADDITIONAL POINTS

For purposes of remand, we consider it appropriate to make three additional points.

First, the District Court's pretrial opinion seems to suggest that the exclusive means available to petitioner for demonstrating that state enforcement of the custom relevant here would be by showing that the State used its criminal trespass statute for this purpose. We disagree with the District Court's implicit assumption that a custom can have the force of law only if it is enforced [172] by a state statute.[41] Any such limitation is too restrictive, for a state official might act to give a custom the force of law in a variety of ways, at least two examples of which are suggested by the record here. For one thing, petitioner may be able to show that the police subjected her to false arrest for vagrancy for the purpose of harassing and punishing her for attempting to eat with black people.[42] Alternatively, it might be shown on remand that the Hattiesburg police would intentionally tolerate violence or threats of violence directed toward those who violated the practice of segregating the races at restaurants.[43]

[173] Second, we think the District Court was wrong in ruling that the only proof relevant to showing a custom in this case was that demonstrating a specific practice of not serving white persons who were in the company of black persons in public restaurants. As Judge Waterman pointed out in his dissent below, petitioner could not possibly prove a "long and unvarying" habit of serving only the black persons in a "mixed" party of whites and blacks for the simple reason that "it was only after the Civil Rights Act of 1964 became law that Afro-Americans had an opportunity to be served in Mississippi `white' restaurants" at all[…]. Like Judge Waterman we think the District Court viewed the matter too narrowly, for under petitioner's complaint the relevant inquiry is whether at the time of the episode in question there was a longstanding and still prevailing state-enforced custom of segregating the races in public eating places. Such a custom, of course, would perforce encompass the particular kind of refusal to serve challenged in this case.

Third, both the District Court and the majority opinion in the Court of Appeals suggested that petitioner would have to show that the relevant custom existed throughout the State, and that proof that it had the force of law in Hattiesburg—a political subdivision of the State—was insufficient. This too we think was error. In the same way that a law whose source is a town ordinance can offend the Fourteenth Amendment even though it has less than state-wide application, so too can a custom with the force of law in a political subdivision of a State offend the Fourteenth Amendment even though it lacks state-wide application.

In summary, if petitioner can show (1) the existence of a state-enforced custom of segregating the races in public eating places in Hattiesburg at the time of the incident [174] in question; and (2) that Kress' refusal to serve her was motivated by that state-enforced custom, she will have made out a claim under § 1983.[44]

For the foregoing reasons we think petitioner is entitled to a new trial on the substantive count of her complaint.

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.

[…]

9.4 Celotex Corp. v. Catrett

477 U.S. 317 (1986)

[…]

[319] JUSTICE REHNQUIST delivered the opinion of the Court.

The United States District Court for the District of Columbia granted the motion of petitioner Celotex Corporation for summary judgment against respondent Catrett because the latter was unable to produce evidence in support of her allegation in her wrongful-death complaint that the decedent had been exposed to petitioner's asbestos products. A divided panel of the Court of Appeals for the District of Columbia Circuit reversed, however, holding that petitioner's failure to support its motion with evidence tending to *negate* such exposure precluded the entry of summary judgment in its favor. *Catrett* v. *Johns-Manville Sales Corp.,* 244 U. S. App. D. C. 160, 756 F. 2d 181 (1985). This view conflicted with that of the Third Circuit in *In re Japanese Electronic Products,* 723 F. 2d 238(1983), rev'd on other grounds *sub nom. Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.,* 475 U. S. 574 (1986).[2] We granted certiorari to resolve the conflict, 474 U. S. 944 (1985), and now reverse the decision of the District of Columbia Circuit.

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. Two of the defendants filed motions challenging the District Court's *in personam* jurisdiction, and the remaining 13, including petitioner, filed motions for summary judgment. Petitioner's motion, which was first filed in September 1981, 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 within the jurisdictional [320] limits of [the District] Court." 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.

In July 1982, almost two years after the commencement of the lawsuit, the District Court granted all of the motions filed by the various defendants. The court explained that it was granting petitioner's summary judgment 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." App. 217.[3] Respondent [321] appealed only the grant of summary judgment in favor of petitioner, and a divided panel of the District of Columbia Circuit reversed. The majority of the Court of Appeals held that petitioner's summary judgment motion was rendered "fatally defective" by the fact that petitioner "made no effort to adduce *any* evidence, in the form of affidavits or otherwise, to support its motion." […]According to the majority, Rule 56(e) of the Federal Rules of Civil Procedure,[4] 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. *Ibid.* The dissenting judge argued that "[t]he majority errs in supposing that a party seeking summary judgment must always make an affirmative evidentiary showing, even in cases where there is not a triable, factual dispute." *[…]*According to the dissenting judge, the majority's decision "undermines the traditional authority of trial judges to grant summary judgment in meritless cases." *[…]*

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(c) of the Federal Rules of Civil Procedure.[5] Under Rule 56(c), summary judgment is proper "if 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 and that the moving party is entitled to a judgment as a matter of law." In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, 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, [323] 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. "[T]h[e] 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., ante,* at 250.

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 "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact. 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*" […], 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"* […]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 [324] claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose.[6]

Respondent argues, however, that Rule 56(e), by its terms, places on the nonmoving party the burden of coming forward with rebuttal affidavits, or other specified kinds of materials, only in response to a motion for summary judgment "made and supported as provided in this rule." According to respondent's argument, since petitioner did not "support" its motion with affidavits, summary judgment was improper in this case. But as we have already explained, a motion for summary judgment may be made pursuant to Rule 56 "with or without supporting affidavits." In cases like the instant one, where the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the "pleadings, depositions, answers to interrogatories, and admissions on file." Such a motion, whether or not accompanied by affidavits, will be "made and supported as provided in this rule," and Rule 56(e) therefore requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial."

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, and it is from this list that one would normally expect the nonmoving party to make the showing to which we have referred.

[325] The Court of Appeals in this case felt itself constrained, however, by language in our decision in *Adickes* v. *S. H. Kress & Co.,* 398 U. S. 144 (1970). 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, since we fully agree with the *Adickes* Court that the 1963 amendment to Rule 56(e) was not designed to modify the burden of making the showing generally required by Rule 56(c). It also appears to us that, on the basis of the showing before the Court in *Adickes,* the motion for summary judgment in that case should have been denied. 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.

The last two sentences of Rule 56(e) were added, as this Court indicated in *Adickes,* to disapprove a line of cases allowing a party opposing summary judgment to resist a properly made motion by reference only to its pleadings. While the *Adickes* Court was undoubtedly correct in concluding that these two sentences were not intended to *reduce* the burden of the moving party, it is also obvious that they were not adopted to *add to* that burden. Yet that is exactly the result which the reasoning of the Court of Appeals would produce; in effect, an amendment to Rule 56(e) designed to [326] *facilitate* the granting of motions

for summary judgment would be interpreted to make it *more difficult* to grant such motions. Nothing in the two sentences themselves requires this result, for the reasons we have previously indicated, and we now put to rest any inference that they do so.

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. See […]10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2720, pp. 28-29 (1983). 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),[7] 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 [327] made as to the proposition that no such showing should have been required. But the Court of Appeals declined to address either the adequacy of the showing made by respondent in opposition to petitioner's motion for summary judgment, or the question whether such a showing, if reduced to admissible evidence, would be sufficient to carry respondent's burden of proof at trial. 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.

The Federal Rules of Civil Procedure have for almost 50 years authorized motions for summary judgment upon proper showings of the lack of a genuine, triable issue of material fact. 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.

[328] 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 that the Court of Appeals was wrong in holding that the moving defendant must always support his motion with evidence or affidavits showing the absence of a genuine dispute about a material fact. I also agree that the movant may rely on depositions, answers to interrogatories, and the like, to demonstrate that the plaintiff has no evidence to prove his case and hence that there can be no factual dispute. But 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.

A plaintiff need not initiate any discovery or reveal his witnesses or evidence unless required to do so under the discovery Rules or by court order. Of course, he must respond if required to do so; but he need not also depose his witnesses or obtain their affidavits to defeat a summary judgment motion asserting only that he has failed to produce any support for his case. It is the defendant's task to negate, if he can, the claimed basis for the suit.

Petitioner Celotex does not dispute that if respondent has named a witness to support her claim, summary judgment should not be granted without Celotex somehow showing that the named witness' possible testimony raises no genuine issue of material fact. Tr. of Oral Arg. 43, 45. 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 [329] 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.

This case requires the Court to determine whether Celotex satisfied its initial burden of production in moving for summary judgment on the ground that the plaintiff lacked evidence to establish an essential element of her case at trial. I do not disagree with the Court's legal analysis. The Court clearly rejects the ruling of the Court of Appeals that the defendant must provide affirmative evidence disproving the plaintiff's case. Beyond this, however, the Court has not clearly explained what is required of a moving party seeking summary judgment on the ground that the nonmoving party cannot prove its case.[8] This lack of clarity is unfortunate: district courts must routinely decide summary judgment motions, and the Court's opinion will very likely create confusion. For this reason, even if I agreed with the Court's result, I would have written separately to explain more clearly the law in this area. However, because I believe that Celotex did not meet its burden of production under Federal Rule of Civil Procedure 56, I respectfully dissent from the Court's judgment.

[330] I

Summary judgment is appropriate where the court is satisfied "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. Rule Civ. Proc. 56(c). The burden of establishing the nonexistence of a "genuine issue" is on the party moving for summary judgment. 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2727, p. 121 (2d ed. 1983) (hereinafter Wright) (citing cases); […]This burden has two distinct components: an initial burden of production, which shifts to the nonmoving party if satisfied by the moving party; and an ultimate burden of persuasion, which always remains on the moving party. See 10A Wright § 2727. The court need not decide whether the moving party has satisfied its ultimate burden of persuasion[9] unless and until the court finds that the

moving party has discharged its initial [331] burden of production. *Adickes* v. *S. H. Kress & Co.,* 398 U. S. 144, 157-161 (1970); 1963 Advisory Committee's Notes on Fed. Rule Civ. Proc. 56(e), 28 U. S. C. App., p. 626.

The burden of production imposed by Rule 56 requires the moving party to make a prima facie showing that it is entitled to summary judgment. 10A Wright § 2727. The manner in which this showing can be made depends upon which party will bear the burden of persuasion on the challenged claim at trial. If the *moving* party will bear the burden of persuasion at trial, that party must support its motion with credible evidence — using any of the materials specified in Rule 56(c) — that would entitle it to a directed verdict if not controverted at trial. *Ibid.* Such an affirmative showing shifts the burden of production to the party opposing the motion and requires that party either to produce evidentiary materials that demonstrate the existence of a "genuine issue" for trial or to submit an affidavit requesting additional time for discovery. *Ibid.;* Fed. Rules Civ. Proc. 56(e), (f).

If the burden of persuasion at trial would be on the *nonmoving* party, the party moving for summary judgment may satisfy Rule 56's burden of production in either of two ways. First, the moving party may submit affirmative evidence that negates an essential element of the nonmoving party's claim. Second, the moving party may demonstrate to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim. See 10A Wright § 2727, pp. 130-131; […]If the nonmoving party cannot muster sufficient evidence to make out its claim, a trial would be useless and the moving party is entitled to summary judgment as a matter of law. *Anderson* v. *Liberty Lobby, Inc., ante,* at 249.

Where the moving party adopts this second option and seeks summary judgment on the ground that the nonmoving party — who will bear the burden of persuasion at trial — has [332] no evidence, the mechanics of discharging Rule 56's burden of production are somewhat trickier. Plainly, a conclusory assertion that the nonmoving party has no evidence is insufficient. […]Such a "burden" of production is no burden at all and would simply permit summary judgment procedure to be converted into a tool for harassment. See Louis 750-751. Rather, as the Court confirms, a party who moves for summary judgment on the ground that the nonmoving party has no evidence must affirmatively show the absence of evidence in the record. *Ante,* at 323. This may require the moving party to depose the nonmoving party's witnesses or to establish the inadequacy of documentary evidence. If there is literally no evidence in the record, the moving party may demonstrate this by reviewing for the court the admissions, interrogatories, and other exchanges between the parties that are in the record. Either way, however, the moving party must affirmatively demonstrate that there is no evidence in the record to support a judgment for the nonmoving party.

If the moving party has not fully discharged this initial burden of production, its motion for summary judgment must be denied, and the court need not consider whether the moving party has met its ultimate burden of persuasion. Accordingly, the nonmoving party may defeat a motion for summary judgment that asserts that the nonmoving party has no evidence by calling the court's attention to supporting evidence already in the record that was overlooked or ignored by the moving party. In that event, the moving party must respond by making an attempt to demonstrate the inadequacy of this evidence, for it is only by attacking all the record evidence allegedly supporting the nonmoving party that a party seeking summary judgment satisfies Rule 56's burden of production.[10] Thus, if the record disclosed that the moving [333] party had overlooked a witness who would provide relevant testimony for the nonmoving party at trial, the court could not find that the moving party had discharged its initial burden of production unless the moving party sought to demonstrate the inadequacy of this witness'

testimony. Absent such a demonstration, summary judgment would have to be denied on the ground that the moving party had failed to meet its burden of production under Rule 56.

The result in *Adickes* v. *S. H. Kress & Co., supra,* is fully consistent with these principles. In that case, petitioner was refused service in respondent's lunchroom and then was arrested for vagrancy by a local policeman as she left. Petitioner brought an action under 42 U. S. C. § 1983 claiming that the refusal of service and subsequent arrest were the product of a conspiracy between respondent and the police; as proof of this conspiracy, petitioner's complaint alleged that the arresting officer was in respondent's store at the time service was refused. Respondent subsequently moved for summary judgment on the ground that there was no actual evidence in the record from which a jury could draw an inference of conspiracy. In response, petitioner pointed to a statement from her own deposition and an unsworn statement by a Kress employee, both already in the record and both ignored by respondent, that the policeman who arrested petitioner was in the store at the time she was refused service. We agreed that "[i]f a policeman were present, . . . it would be open to a jury, in light of the sequence that followed, [334] to infer from the circumstances that the policeman and Kress employee had a `meeting of the minds' and thus reached an understanding that petitioner should be refused service."[…] Consequently, we held that it was error to grant summary judgment "on the basis of this record" because respondent had "failed to fulfill its initial burden" of demonstrating that there was no evidence that there was a policeman in the store. *[…]*

The opinion in *Adickes* has sometimes been read to hold that summary judgment was inappropriate because the respondent had not submitted affirmative evidence to negate the possibility that there was a policeman in the store.[…]The Court of Appeals apparently read *Adickes* this way and therefore required Celotex to submit evidence establishing that plaintiff's decedent had not been exposed to Celotex asbestos. I agree with the Court that this reading of *Adickes* was erroneous and that Celotex could seek summary judgment on the ground that plaintiff could not prove exposure to Celotex asbestos at trial. However, Celotex was still required to satisfy its initial burden of production.

II

I do not read the Court's opinion to say anything inconsistent with or different than the preceding discussion. My disagreement with the Court concerns the application of these principles to the facts of this case.

Defendant Celotex sought summary judgment on the ground that plaintiff had "failed to produce" any evidence that her decedent had ever been exposed to Celotex asbestos.[11] App. 170. Celotex supported this motion with a [335] two-page "Statement of Material Facts as to Which There is No Genuine Issue" and a three-page "Memorandum of Points and Authorities" which asserted that the plaintiff had failed to identify any evidence in responding to two sets of interrogatories propounded by Celotex and that therefore the record was "totally devoid" of evidence to support plaintiff's claim. […]

Approximately three months earlier, Celotex had filed an essentially identical motion. Plaintiff responded to this earlier motion by producing three pieces of evidence which she claimed "[a]t the very least . . . demonstrate that there is a genuine factual dispute for trial," *id.,* at 143: (1) a letter from an insurance representative of another defendant describing asbestos products to which plaintiff's decedent had been exposed, *id.,* at 160; (2) a letter from T. R. Hoff, a former supervisor of decedent, describing asbestos products to which decedent had been exposed, *id.,* at 162; and (3) a copy of decedent's deposition from

earlier workmen's compensation proceedings, *id.,* at 164. Plaintiff also apparently indicated [336] at that time that she intended to call Mr. Hoff as a witness at trial. Tr. of Oral Arg. 6-7, 27-29.

Celotex subsequently withdrew its first motion for summary judgment. See App. 167.[12] However, as a result of this motion, when Celotex filed its second summary judgment motion, the record *did* contain evidence — including at least one witness — supporting plaintiff's claim. Indeed, counsel for Celotex admitted to this Court at oral argument that Celotex was aware of this evidence and of plaintiff's intention to call Mr. Hoff as a witness at trial when the second summary judgment motion was filed. Tr. of Oral Arg. 5-7. Moreover, plaintiff's response to Celotex' second motion pointed to this evidence — noting that it had already been provided to counsel for Celotex in connection with the first motion — and argued that Celotex had failed to "meet its burden of proving that there is no genuine factual dispute for trial." App. 188.

On these facts, there is simply no question that Celotex failed to discharge its initial burden of production. Having chosen to base its motion on the argument that there was no evidence in the record to support plaintiff's claim, Celotex was not free to ignore supporting evidence that the record clearly contained. Rather, Celotex was required, as an initial matter, to attack the adequacy of this evidence. Celotex' failure to fulfill this simple requirement constituted a failure to discharge its initial burden of production under Rule 56, and thereby rendered summary judgment improper.[13]

[337] This case is indistinguishable from *Adickes.* Here, as there, the defendant moved for summary judgment on the ground that the record contained no evidence to support an essential element of the plaintiff's claim. Here, as there, the plaintiff responded by drawing the court's attention to evidence that was already in the record and that had been ignored by the moving party. Consequently, here, as there, summary judgment should be denied on the ground that the moving party failed to satisfy its initial burden of production.[14]

JUSTICE STEVENS, dissenting.

As the Court points out, *ante,* at 319-320, petitioner's motion for summary judgment was based on the proposition that respondent could not prevail unless she proved that her deceased husband had been exposed to petitioner's products "within the jurisdictional limits" of the District of Columbia.[15] [338] Respondent made an adequate showing — albeit possibly not in admissible form[16] — that her husband had been exposed to petitioner's product in Illinois.[17] Although the basis of the motion and the argument had been the lack of exposure *in the District of Columbia,* the District Court stated at the end of the argument: "The Court will grant the defendant Celotex's motion for summary judgment there being no showing that the plaintiff was exposed to the defendant Celotex's product in the District of Columbia *or elsewhere* within the statutory period." App. 217 (emphasis added). The District Court offered no additional explanation and no written opinion. The Court of Appeals reversed on the basis that Celotex had not met its burden; the court noted the incongruity of the District Court's opinion in the context of the motion and argument, but did not rest on that basis because of the "or elsewhere" language.[18]

Taken in the context of the motion for summary judgment on the basis of no exposure in the District of Columbia, the [339] District Court's decision to grant summary judgment was palpably erroneous. The court's bench reference to "or elsewhere" neither validated that decision nor raised the complex question addressed by this Court today. In light of the District Court's plain error, therefore, it is perfectly clear that, even after this Court's abstract exercise in Rule construction, we should nonetheless affirm the reversal of summary judgment on that narrow ground.[19]

I respectfully dissent.

[…]

[3] JUSTICE STEVENS, in dissent, argues that the District Court granted summary judgment only because respondent presented no evidence that the decedent was exposed to Celotex asbestos products *in the District of Columbia.* See *post,* at 338-339. According to JUSTICE STEVENS, we should affirm the decision of the Court of Appeals, reversing the District Court, on the "narrower ground" that respondent "made an adequate showing" that the decedent was exposed to Celotex asbestos products in Chicago during 1970-1971. See *ibid.*

JUSTICE STEVENS' position is factually incorrect. The District Court expressly stated that respondent had made no showing of exposure to Celotex asbestos products "in the District of Columbia *or elsewhere.*" App. 217 (emphasis added). Unlike JUSTICE STEVENS, we assume that the District Court meant what it said. The majority of the Court of Appeals addressed the very issue raised by JUSTICE STEVENS, and decided that "[t]he District Court's grant of summary judgment must therefore have been based on its conclusion that there was `no showing that the plaintiff was exposed to defendant Celotex's product in the District of Columbia *or elsewhere* within the statutory period.' " *Catrett* v. *Johns-Manville Sales Corp.,* 244 U. S. App. D. C. 160, 162, n. 3, 756 F. 2d 181, 183, n. 3 (1985) (emphasis in original). In other words, no judge involved in this case to date shares JUSTICE STEVENS' view of the District Court's decision.

[9] The burden of persuasion imposed on a moving party by Rule 56 is a stringent one. 6 Moore ¶ 56.15[3], p. 56-466; 10A Wright § 2727, p. 124. Summary judgment should not be granted unless it is clear that a trial is unnecessary, *Anderson* v. *Liberty Lobby, Inc., ante,* at 255, and any doubt as to the existence of a genuine issue for trial should be resolved against the moving party, *Adickes* v. *S. H. Kress & Co.,* 398 U. S. 144, 158-159 (1970). In determining whether a moving party has met its burden of persuasion, the court is obliged to take account of the entire setting of the case and must consider all papers of record as well as any materials prepared for the motion. […]As explained by the Court of Appeals for the Third Circuit in *In re Japanese Electronic Products Antitrust Litigation,* 723 F. 2d 238 (1983), rev'd on other grounds *sub nom. Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.,* 475 U. S. 574 (1986), "[i]f . . . there is any evidence in the record from any source from which a reasonable inference in the [nonmoving party's] favor may be drawn, the moving party simply cannot obtain a summary judgment . . . ." 723 F. 2d, at 258.

[10] Once the moving party has attacked whatever record evidence — if any — the nonmoving party purports to rely upon, the burden of production shifts to the nonmoving party, who must either (1) rehabilitate the evidence attacked in the moving party's papers, (2) produce additional evidence showing the existence of a genuine issue for trial as provided in Rule 56(e), or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f). See 10A Wright § 2727, pp. 138-143. Summary judgment should be granted if the nonmoving party fails to respond in one or more of these ways, or if, after the nonmoving party responds, the court determines that the moving party has met its ultimate burden of persuading the court that there is no genuine issue of material fact for trial. See, *e. g., First National Bank of Arizona* v. *Cities Service Co.,* 391 U. S. 253, 289 (1968).

9.5 Matsushita Elec. Industrial Co. v. Zenith Radio Corp.

475 U.S. 574 (1986)

JUSTICE POWELL delivered the opinion of the Court.

This case requires that we again consider the standard district courts must apply when deciding whether to grant summary judgment in an antitrust conspiracy case.

I

Stating the facts of this case is a daunting task. The opinion of the Court of Appeals for the Third Circuit runs to 69 pages; the primary opinion of the District Court is more than three times as long. *In re Japanese Electronic Products* [577] *Antitrust Litigation,* 723 F. 2d 238 (CA3 1983); 513 F. Supp. 1100 (ED Pa. 1981). Two respected District Judges each have authored a number of opinions in this case; the published ones alone would fill an entire volume of the Federal Supplement. In addition, the parties have filed a 40-volume appendix in this Court that is said to contain the essence of the evidence on which the District Court and the Court of Appeals based their respective decisions.

We will not repeat what these many opinions have stated and restated, or summarize the mass of documents that constitute the record on appeal. Since we review only the standard applied by the Court of Appeals in deciding this case, and not the weight assigned to particular pieces of evidence, we find it unnecessary to state the facts in great detail. What follows is a summary of this case's long history.

A

Petitioners, defendants below, are 21 corporations that manufacture or sell "consumer electronic products" (CEPs) — for the most part, television sets. Petitioners include both Japanese manufacturers of CEPs and American firms, controlled by Japanese parents, that sell the Japanese-manufactured products. Respondents, plaintiffs below, are Zenith Radio Corporation (Zenith) and National Union Electric Corporation (NUE). Zenith is an American firm that manufactures and sells television sets. NUE is the corporate successor to Emerson Radio Company, an American firm that manufactured and sold television sets until 1970, when it withdrew from the market after sustaining substantial losses. Zenith and NUE began this lawsuit in 1974,[2] claiming that petitioners had illegally conspired to drive [578] American firms from the American CEP market. According to respondents, the gist of this conspiracy was a " `scheme to raise, fix and maintain artificially *high* prices for television receivers sold by [petitioners] in Japan and, at the same time, to fix and maintain *low* prices for television receivers exported to and sold in the United States.' " 723 F. 2d, at 251 (quoting respondents' preliminary pretrial memorandum). These "low prices" were allegedly at levels that produced substantial losses for petitioners. 513 F. Supp., at 1125. The conspiracy allegedly began as early as 1953, and according to respondents was in full operation by sometime in the late 1960's. Respondents claimed that various portions of this scheme violated §§ 1 and 2 of the Sherman Act, § 2(a) of the Robinson-Patman Act, § 73 of the Wilson Tariff Act, and the Antidumping Act of 1916.

After several years of detailed discovery, petitioners filed motions for summary judgment on all claims against them. The District Court directed the parties to file, with preclusive effect, "Final Pretrial Statements" listing all the documentary evidence that would be offered if the case proceeded to trial. Respondents filed such a statement, and petitioners responded with a series of motions challenging the admissibility of respondents' evidence. In three detailed opinions, the District Court found the bulk of the evidence on which Zenith and NUE relied inadmissible.[3]

The District Court then turned to petitioners' motions for summary judgment. In an opinion spanning 217 pages, the court found that the admissible evidence did not raise a genuine issue of material fact as to the existence of the alleged [579] conspiracy. At bottom, the court found, respondents' claims rested on the inferences that could be drawn from petitioners' parallel conduct in the Japanese and American markets, and from the effects of that conduct on petitioners' American competitors. 513 F. Supp., at 1125-1127. After reviewing the evidence both by category and *in toto,* the court found that any inference of conspiracy was unreasonable, because (i) some portions of the evidence suggested that petitioners conspired in ways that did not injure respondents, and (ii) the evidence that bore directly on the alleged price-cutting conspiracy did not rebut the more plausible inference that petitioners were cutting prices to compete in the American market and not to monopolize it. Summary judgment therefore was granted on respondents' claims under § 1 of the Sherman Act and the Wilson Tariff Act. Because the Sherman Act § 2 claims, which alleged that petitioners had combined to monopolize the American CEP market, were functionally indistinguishable from the § 1 claims, the court dismissed them also. Finally, the court found that the Robinson-Patman Act claims depended on the same supposed conspiracy as the Sherman Act claims. Since the court had found no genuine issue of fact as to the conspiracy, it entered judgment in petitioners' favor on those claims as well.[4]

[580] B

The Court of Appeals for the Third Circuit reversed.[5] The court began by examining the District Court's evidentiary rulings, and determined that much of the evidence excluded by the District Court was in fact admissible. 723 F. 2d, at 260-303. These evidentiary rulings are not before us. See 471 U. S. 1002 (1985) (limiting grant of certiorari).

On the merits, and based on the newly enlarged record, the court found that the District Court's summary judgment decision was improper. The court acknowledged that "there are legal limitations upon the inferences which may be drawn from circumstantial evidence," 723 F. 2d, at 304, but it found that "the legal problem . . . is different" when "there is direct evidence of concert of action." *Ibid.* Here, the court concluded, "there is both direct evidence of certain kinds of concert of action and circumstantial evidence having some tendency to suggest that other kinds of concert of action may have occurred." *Id.,* at 304-305. Thus, the court reasoned, cases concerning the limitations on inferring conspiracy from ambiguous evidence were not dispositive. *Id.,* at 305. Turning to the evidence, the court determined that a factfinder reasonably could draw the following conclusions:

1. The Japanese market for CEPs was characterized by oligopolistic behavior, with a small number of producers meeting regularly and exchanging information on price and other matters. *Id.,* at 307. This created the opportunity for a stable combination to raise both prices and profits in Japan. American firms could not attack such a combination because the Japanese Government imposed significant barriers to entry. *Ibid.*

2. Petitioners had relatively higher fixed costs than their American counterparts, and therefore needed to [581] operate at something approaching full capacity in order to make a profit. *Ibid.*

3. Petitioners' plant capacity exceeded the needs of the Japanese market. *Ibid.*

4. By formal agreements arranged in cooperation with Japan's Ministry of International Trade and Industry (MITI), petitioners fixed minimum prices for CEPs exported to the American market. *Id.,* at 310. The parties refer to these prices as the "check prices," and to the agreements that require them as the "check price agreements."

5. Petitioners agreed to distribute their products in the United States according to a "five company rule": each Japanese producer was permitted to sell only to five American distributors. *Ibid.*

6. Petitioners undercut their own check prices by a variety of rebate schemes. *Id.,* at 311. Petitioners sought to conceal these rebate schemes both from the United States Customs Service and from MITI, the former to avoid various customs regulations as well as action under the antidumping laws, and the latter to cover up petitioners' violations of the check-price agreements.

Based on inferences from the foregoing conclusions,[6] the Court of Appeals concluded that a reasonable factfinder could find a conspiracy to depress prices in the American market in order to drive out American competitors, which conspiracy was funded by excess profits obtained in the Japanese market. The court apparently did not consider whether it was as plausible to conclude that petitioners' price-cutting behavior was independent and not conspiratorial.

[582] The court found it unnecessary to address petitioners' claim that they could not be held liable under the antitrust laws for conduct that was compelled by a foreign sovereign. The claim, in essence, was that because MITI required petitioners to enter into the check-price agreements, liability could not be premised on those agreements. The court concluded that this case did not present any issue of sovereign compulsion, because the check-price agreements were being used as "evidence of a low export price conspiracy" and not as an independent basis for finding antitrust liability. The court also believed it was unclear that the check prices in fact were mandated by the Japanese Government, notwithstanding a statement to that effect by MITI itself. *Id.,* at 315.

We granted certiorari to determine (i) whether the Court of Appeals applied the proper standards in evaluating the District Court's decision to grant petitioners' motion for summary judgment, and (ii) whether petitioners could be held liable under the antitrust laws for a conspiracy in part compelled by a foreign sovereign. 471 U. S. 1002 (1985). We reverse on the first issue, but do not reach the second.

II

We begin by emphasizing what respondents' claim is *not*. Respondents cannot recover antitrust damages based solely on an alleged cartelization of the Japanese market, because American antitrust laws do not regulate the competitive conditions of other nations' economies. […]Nor can respondents recover damages for [583] any conspiracy by petitioners to charge higher than competitive prices in the American market. Such conduct would indeed violate the Sherman Act, *United States* v. *Trenton Potteries Co.,* 273 U. S. 392 (1927); *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 223 (1940), but it could not injure respondents: as petitioners' competitors, respondents stand to gain from any conspiracy to raise the market price in CEPs. […]Finally, for the same reason, respondents cannot recover for a conspiracy to impose non-price restraints that have the effect of either raising market price or limiting output. Such restrictions, though harmful to competition, actually *benefit* competitors by making supra-competitive pricing more attractive. Thus, neither petitioners' alleged supracompetitive pricing in Japan, nor the five company rule that limited distribution in this country, nor the check prices insofar as they established minimum prices in this country, can by themselves give respondents a cognizable claim against petitioners for antitrust damages. The Court of Appeals therefore erred to the extent that it found evidence of these alleged conspiracies to be "direct evidence" of a conspiracy that injured respondents. See 723 F. 2d, at 304-305.

[584] Respondents nevertheless argue that these supposed conspiracies, if not themselves grounds for recovery of antitrust damages, are circumstantial evidence of another conspiracy that *is* cognizable: a conspiracy to monopolize the American market by means of pricing below the market level.[8] The thrust of respondents' argument is that petitioners used their monopoly profits from the Japanese market to fund a concerted campaign to price predatorily and thereby drive respondents and other American manufacturers of CEPs out of business. Once successful, according to respondents, petitioners would cartelize the American CEP market, restricting output and raising prices above the level that fair competition would produce. The resulting monopoly profits, respondents contend, would more than compensate petitioners for the losses they incurred through years of pricing below market level.

The Court of Appeals found that respondents' allegation of a horizontal conspiracy to engage in predatory pricing,[9] [585] if proved,[10] would be a *per se* violation of § 1 of the Sherman Act. 723 F. 2d, at 306. Petitioners did not appeal from that conclusion. The issue in this case thus becomes whether respondents adduced sufficient evidence in support of their theory to survive summary judgment. We therefore examine the principles that govern the summary judgment determination.

III

To survive petitioners' motion for summary judgment,[11] respondents must establish that there is a genuine issue of material [586] fact as to whether petitioners entered into an illegal conspiracy that caused respondents to suffer a cognizable injury. Fed. Rule Civ. Proc. 56(e);[12]*First National Bank of Arizona* v. *Cities Service Co.,* 391 U. S. 253, 288-289 (1968). This showing has two components. First, respondents must show more than a conspiracy in violation of the antitrust laws; they must show an injury to them resulting from the illegal conduct. Respondents charge petitioners with a whole host of conspiracies in restraint of trade. *Supra,* at 582-583. Except for the alleged conspiracy to monopolize the American market through predatory pricing, these alleged conspiracies could not have caused respondents to suffer an "antitrust injury," *[…]*because they actually tended to benefit respondents. *Supra,* at 582-583. Therefore, unless, in context, evidence of these "other" conspiracies raises a genuine issue concerning the existence of a predatory pricing conspiracy, that evidence cannot defeat petitioners' summary judgment motion.

Second, the issue of fact must be "genuine." Fed. Rules Civ. Proc. 56(c), (e). When the moving party has carried its burden under Rule 56(c),[13] its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. […]In the language of the Rule, the nonmoving party must come forward with "specific facts showing that there is a *genuine issue for trial.*" Fed. Rule Civ. Proc. 56(e) (emphasis added). See also Advisory Committee Note to 1963 Amendment of Fed. Rule Civ. Proc. 56(e), 28 U. S. C. App., p. 626 (purpose of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial"). Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no "genuine issue for trial." *Cities Service, supra,* at 289.

It follows from these settled principles that if the factual context renders respondents' claim implausible — if the claim is one that simply makes no economic sense — respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary. *Cities Service* is instructive. The issue in that case was whether proof of the defendant's refusal to deal with the plaintiff supported an inference that the defendant willingly had joined an illegal boycott. Economic factors strongly suggested that the defendant had no motive to join the alleged conspiracy. 391 U. S., at 278-279. The Court acknowledged that, in isolation, the defendant's refusal to deal might well have sufficed to create a triable issue. *Id.,*

at 277. But the refusal to deal had to be evaluated in its factual context. Since the defendant lacked any rational motive to join the alleged boycott, and since its refusal to deal was consistent with the defendant's independent interest, the refusal to deal could not by itself support a finding of antitrust liability. *Id.,* at 280.

Respondents correctly note that "[o]n summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." *[…]* But antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case. Thus, in *Monsanto Co.* v. *Spray-Rite Service Corp.,* 465 U. S. 752 (1984), we held that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. *Id.,* at 764. See also *Cities Service, supra,* at 280. To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently. 465 U. S., at 764. Respondents in this case, in other words, must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents. See *Cities Service, supra,* at 280.

Petitioners argue that these principles apply fully to this case. According to petitioners, the alleged conspiracy is one that is economically irrational and practically infeasible. Consequently, petitioners contend, they had no motive to engage in the alleged predatory pricing conspiracy; indeed, they had a strong motive *not* to conspire in the manner respondents allege. Petitioners argue that, in light of the absence of any apparent motive and the ambiguous nature of the evidence of conspiracy, no trier of fact reasonably could find that the conspiracy with which petitioners are charged actually existed. This argument requires us to consider the nature of the alleged conspiracy and the practical obstacles to its implementation.

IV

A

A predatory pricing conspiracy is by nature speculative. Any agreement to price below the competitive level requires the conspirators to forgo profits that free competition would offer them. The forgone profits may be considered an investment in the future. For the investment to be rational, [589] the conspirators must have a reasonable expectation of recovering, in the form of later monopoly profits, more than the losses suffered. As then-Professor Bork, discussing predatory pricing by a single firm, explained:

"Any realistic theory of predation recognizes that the predator as well as his victims will incur losses during the fighting, but such a theory supposes it may be a rational calculation for the predator to view the losses as an investment in future monopoly profits (where rivals are to be killed) or in future undisturbed profits (where rivals are to be disciplined). The future flow of profits, appropriately discounted, must then exceed the present size of the losses." R. Bork, The Antitrust Paradox 145 (1978).

See also McGee, Predatory Pricing Revisited, 23 J. Law & Econ. 289, 295-297 (1980). As this explanation shows, the success of such schemes is inherently uncertain: the short-run loss is definite, but the long-run gain depends on successfully neutralizing the competition. Moreover, it is not enough simply to achieve monopoly power, as monopoly pricing may breed quick entry by new competitors eager to share in the excess profits. The success of any predatory scheme depends on *maintaining* monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain. Absent some assurance that the hoped-for monopoly will materialize, *and* that it can be sustained for a significant period of time,

"[t]he predator must make a substantial investment with no assurance that it will pay off." Easter-brook, Predatory Strategies and Counterstrategies, 48 U. Chi. L. Rev. 263, 268 (1981). For this reason, there is a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful.[…]

These observations apply even to predatory pricing by a *single firm* seeking monopoly power. In this case, respondents allege that a large number of firms have conspired over a period of many years to charge below-market prices in order to stifle competition. Such a conspiracy is incalculably more difficult to execute than an analogous plan undertaken by a single predator. The conspirators must allocate the losses to be sustained during the conspiracy's operation, and must also allocate any gains to be realized from its success. Precisely because success is speculative and depends on a willingness to endure losses for an indefinite period, each conspirator has a strong incentive to cheat, letting its partners suffer the losses necessary to destroy the competition while sharing in any gains if the conspiracy succeeds. The necessary allocation is therefore difficult to accomplish. Yet if conspirators cheat to any substantial extent, the conspiracy must fail, because its success depends on depressing the market price for *all* buyers of CEPs. If there are too few goods at the artificially low price to satisfy demand, the would-be victims of the conspiracy can continue to sell at the "real" market price, and the conspirators suffer losses to little purpose.

Finally, if predatory pricing conspiracies are generally unlikely to occur, they are especially so where, as here, the prospects of attaining monopoly power seem slight. In order to recoup their losses, petitioners must obtain enough market power to set higher than competitive prices, and then must sustain those prices long enough to earn in excess profits [591] its what they earlier gave up in below-cost prices.[…]Two decades after their conspiracy is alleged to have commenced,[14] petitioners appear to be far from achieving this goal: the two largest shares of the retail market in television sets are held by RCA and respondent Zenith, not by any of petitioners. 6 App. to Brief for Appellant in No. 81-2331 (CA3), pp. 2575a-2576a. Moreover, those shares, which together approximate 40% of sales, did not decline appreciably during the 1970's. *Ibid.* Petitioners' collective share rose rapidly during this period, from one-fifth or less of the relevant markets to close to 50%. 723 F. 2d, at 316.[15] Neither the District Court nor the Court of Appeals found, however, that petitioners' share presently allows them to charge monopoly prices; to the contrary, respondents contend that the conspiracy is ongoing — that petitioners are still artificially *depressing* the market price in order to drive Zenith out of the market. The data in the record strongly suggest that that goal is yet far distant.[16]

[592] The alleged conspiracy's failure to achieve its ends in the two decades of its asserted operation is strong evidence that the conspiracy does not in fact exist. Since the losses in such a conspiracy accrue before the gains, they must be "repaid" with interest. And because the alleged losses have accrued over the course of two decades, the conspirators could well require a correspondingly long time to recoup. Maintaining supracompetitive prices in turn depends on the continued cooperation of the conspirators, on the inability of other would-be competitors to enter the market, and (not incidentally) on the conspirators' ability to escape antitrust liability for their *minimum* price-fixing cartel.[17] Each of these factors weighs more heavily as the time needed to recoup losses grows. If the losses have been substantial — as would likely be necessary [593] in order to drive out the competition[18] — petitioners would most likely have to sustain their cartel for years simply to break even.

Nor does the possibility that petitioners have obtained supracompetitive profits in the Japanese market change this calculation. Whether or not petitioners have the *means* to sustain substantial losses in this country over a long period of time, they have no

motive to sustain such losses absent some strong likelihood that the alleged conspiracy in this country will eventually pay off. The courts below found no evidence of any such success, and — as indicated above — the facts actually are to the contrary: RCA and Zenith, not any of the petitioners, continue to hold the largest share of the American retail market in color television sets. More important, there is nothing to suggest any relationship between petitioners' profits in Japan and the amount petitioners could expect to gain from a conspiracy to monopolize the American market. In the absence of any such evidence, the possible existence of supracompetitive profits in Japan simply cannot overcome the economic obstacles to the ultimate success of this alleged predatory conspiracy.[19]

B

In *Monsanto,* we emphasized that courts should not permit factfinders to infer conspiracies when such inferences are implausible, because the effect of such practices is often to deter procompetitive conduct. *[…]*Respondents, petitioners' competitors, seek to hold petitioners liable for damages caused by the alleged conspiracy to cut prices. Moreover, they seek to establish this conspiracy indirectly, through evidence of other combinations (such as the check-price agreements and the five company rule) whose natural tendency is to raise prices, and through evidence of rebates and other price-cutting activities that respondents argue tend to prove a combination to suppress prices.[20] But cutting prices in order to increase business often is the very essence of competition. Thus, mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect. […]"[W]e must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition." *[…]*

In most cases, this concern must be balanced against the desire that illegal conspiracies be identified and punished. That balance is, however, unusually one-sided in cases such as this one. As we earlier explained, *supra,* at 588-593, predatory pricing schemes require conspirators to suffer losses in order eventually to realize their illegal gains; moreover, the [595] gains depend on a host of uncertainties, making such schemes more likely to fail than to succeed. These economic realities tend to make predatory pricing conspiracies self-deterring: unlike most other conduct that violates the antitrust laws, failed predatory pricing schemes are costly to the conspirators. See Easterbrook, The Limits of Antitrust, 63 Texas L. Rev. 1, 26 (1984). Finally, unlike predatory pricing by a single firm, *successful* predatory pricing conspiracies involving a large number of firms can be identified and punished once they succeed, since some form of minimum price-fixing agreement would be necessary in order to reap the benefits of predation. Thus, there is little reason to be concerned that by granting summary judgment in cases where the evidence of conspiracy is speculative or ambiguous, courts will encourage such conspiracies.

V

As our discussion in Part IV-A shows, petitioners had no motive to enter into the alleged conspiracy. To the contrary, as presumably rational businesses, petitioners had every incentive *not* to engage in the conduct with which they are charged, for its likely effect would be to generate losses for petitioners with no corresponding gains. […]The Court of Appeals did not take account of the absence of a plausible motive to enter into the alleged predatory pricing conspiracy. It focused instead on whether there was "direct evidence of concert of action." […] The Court of Appeals erred in two respects: (i) the "direct evidence" on which the court relied had little, if any, relevance to the alleged predatory pricing conspiracy; and (ii) the court failed to consider the absence of a plausible motive to engage in predatory pricing.

The "direct evidence" on which the court relied was evidence of *other* combinations, not of a predatory pricing conspiracy. Evidence that petitioners conspired to raise prices in Japan provides little, if any, support for respondents' [596] claims: a conspiracy to increase profits in one market does not tend to show a conspiracy to sustain losses in another. Evidence that petitioners agreed to fix *minimum* prices (through the check-price agreements) for the American market actually works in petitioners' favor, because it suggests that petitioners were seeking to place a floor under prices rather than to lower them. The same is true of evidence that petitioners agreed to limit the number of distributors of their products in the American market — the so-called five company rule. That practice may have facilitated a horizontal territorial allocation, see *United States* v. *Topco Associates, Inc.,* 405 U. S. 596 (1972), but its natural effect would be to raise market prices rather than reduce them.[21] Evidence that tends to support any of these collateral conspiracies thus says little, if anything, about the existence of a conspiracy to charge below-market prices in the American market over a period of two decades.

That being the case, the absence of any plausible motive to engage in the conduct charged is highly relevant to whether a "genuine issue for trial" exists within the meaning of Rule 56(e). Lack of motive bears on the range of permissible conclusions that might be drawn from ambiguous evidence: if petitioners had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, [597] the conduct does not give rise to an inference of conspiracy. See *Cities Service, supra,* at 278-280. Here, the conduct in question consists largely of (i) pricing at levels that succeeded in taking business away from respondents, and (ii) arrangements that may have limited petitioners' ability to compete with each other (and thus kept prices from going even lower). This conduct suggests either that petitioners behaved competitively, or that petitioners conspired to *raise* prices. Neither possibility is consistent with an agreement among 21 companies to price below market levels. Moreover, the predatory pricing scheme that this conduct is said to prove is one that makes no practical sense: it calls for petitioners to destroy companies larger and better established than themselves, a goal that remains far distant more than two decades after the conspiracy's birth. Even had they succeeded in obtaining their monopoly, there is nothing in the record to suggest that they could recover the losses they would need to sustain along the way. In sum, in light of the absence of any rational motive to conspire, neither petitioners' pricing practices, nor their conduct in the Japanese market, nor their agreements respecting prices and distribution in the American market, suffice to create a "genuine issue for trial." Fed. Rule Civ. Proc. 56(e).[22]

On remand, the Court of Appeals is free to consider whether there is other evidence that is sufficiently unambiguous to permit a trier of fact to find that petitioners conspired to price predatorily for two decades despite the absence of any apparent motive to do so. The evidence must "ten[d] to exclude the possibility" that petitioners underpriced respondents to compete for business rather than to implement an economically [598] senseless conspiracy. *Monsanto,* 465 U. S., at 764. In the absence of such evidence, there is no "genuine issue for trial" under Rule 56(e), and petitioners are entitled to have summary judgment reinstated.

VI

Our decision makes it unnecessary to reach the sovereign compulsion issue. The heart of petitioners' argument on that issue is that MITI, an agency of the Government of Japan, required petitioners to fix minimum prices for export to the United States, and that petitioners are therefore immune from antitrust liability for any scheme of which those minimum prices were an integral part. As we discussed in Part II, *supra,* respondents could not have suffered a cognizable injury from any action that

raised prices in the American CEP market. If liable at all, petitioners are liable for conduct that is distinct from the check-price agreements. The sovereign compulsion question that both petitioners and the Solicitor General urge us to decide thus is not presented here.

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

It is so ordered.

JUSTICE WHITE, with whom JUSTICE BRENNAN, JUSTICE BLACKMUN, and JUSTICE STEVENS join, dissenting.

It is indeed remarkable that the Court, in the face of the long and careful opinion of the Court of Appeals, reaches the result it does. The Court of Appeals faithfully followed the relevant precedents, including *First National Bank of Arizona* v. *Cities Service Co.,* 391 U. S. 253 (1968), and *Monsanto Co.* v. *Spray-Rite Service Corp.,* 465 U. S. 752 (1984), and it kept firmly in mind the principle that proof of a conspiracy should not be fragmented, see *Continental Ore Co.* v. *Union Carbide & Carbon Corp.,* 370 U. S. 690, 699 (1962). After surveying the massive record, including very [599] significant evidence that the District Court erroneously had excluded, the Court of Appeals concluded that the evidence taken as a whole creates a genuine issue of fact whether petitioners engaged in a conspiracy in violation of §§ 1 and 2 of the Sherman Act and § 2(a) of the Robinson-Patman Act. In my view, the Court of Appeals' opinion more than adequately supports this judgment.

The Court's opinion today, far from identifying reversible error, only muddies the waters. In the first place, the Court makes confusing and inconsistent statements about the appropriate standard for granting summary judgment. Second, the Court makes a number of assumptions that invade the factfinder's province. Third, the Court faults the Third Circuit for nonexistent errors and remands the case although it is plain that respondents' evidence raises genuine issues of material fact.

I

The Court's initial discussion of summary judgment standards appears consistent with settled doctrine. I agree that "[w]here 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.' " *Ante,* at 587 (quoting *Cities Service, supra,* at 289). I also agree that " `[o]n summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion.' " *Ante,* at 587 (quoting *United States* v. *Diebold, Inc.,* 369 U. S. 654, 655 (1962)). But other language in the Court's opinion suggests a departure from traditional summary judgment doctrine. Thus, the Court gives the following critique of the Third Circuit's opinion:

"[T]he Court of Appeals concluded that a reasonable factfinder could find a conspiracy to depress prices in the American market in order to drive out American competitors, which conspiracy was funded by excess profits obtained in the Japanese market. The court apparently did not consider whether it was as plausible to conclude [600] that petitioners' price-cutting behavior was independent and not conspiratorial." *Ante,* at 581.

In a similar vein, the Court summarizes *Monsanto Co.* v. *Spray-Rite Service Corp., supra,* as holding that "courts should not permit factfinders to infer conspiracies when such inferences are implausible . . . ." *Ante,* at 593. Such language suggests that a judge hearing a defendant's motion for summary judgment in an antitrust case should go beyond the traditional summary judgment

inquiry and decide for himself whether the weight of the evidence favors the plaintiff. *Cities Service* and *Monsanto* do not stand for any such proposition. Each of those cases simply held that a particular piece of evidence standing alone was insufficiently probative to justify sending a case to the jury.[23] These holdings in no way undermine [601] the doctrine that all evidence must be construed in the light most favorable to the party opposing summary judgment.

If the Court intends to give every judge hearing a motion for summary judgment in an antitrust case the job of determining if the evidence makes the inference of conspiracy more probable than not, it is overturning settled law. If the Court does not intend such a pronouncement, it should refrain from using unnecessarily broad and confusing language.

II

In defining what respondents must show in order to recover, the Court makes assumptions that invade the factfinder's province. The Court states with very little discussion that respondents can recover under § 1 of the Sherman Act only if they prove that "petitioners conspired to drive respondents out of the relevant markets by (i) pricing below the level necessary to sell their products, or (ii) pricing below some appropriate measure of cost." *Ante,* at 585, n. 8. This statement is premised on the assumption that "[a]n agreement without these features would either leave respondents in the same position as would market forces or would actually benefit respondents by raising market prices." *Ibid.* In making this assumption, the Court ignores the contrary conclusions of respondents' expert DePodwin, whose report in very relevant part was erroneously excluded by the District Court.

The DePodwin Report, on which the Court of Appeals relied along with other material, indicates that respondents were harmed in two ways that are independent of whether petitioners priced their products below "the level necessary to sell their products or . . . some appropriate measure of cost." *Ibid.* First, the Report explains that the price-raising scheme in Japan resulted in lower consumption of petitioners' goods in that country and the exporting of more of petitioners' goods to this country than would have occurred had prices in Japan been at the competitive level. Increasing [602] exports to this country resulted in depressed prices here, which harmed respondents.[24] Second, the DePodwin Report indicates that petitioners exchanged confidential proprietary information and entered into agreements such as the five company rule with the goal of avoiding intragroup competition in the United States market. The Report explains that petitioners' restrictions on intragroup competition caused respondents to lose business that they would not have lost had petitioners competed with one another.[25]

[603] The DePodwin Report alone creates a genuine factual issue regarding the harm to respondents caused by Japanese cartelization and by agreements restricting competition among petitioners in this country. No doubt the Court prefers its own economic theorizing to Dr. DePodwin's, but that is not a reason to deny the factfinder an opportunity to consider Dr. DePodwin's views on how petitioners' alleged collusion harmed respondents.[26]

[604] The Court, in discussing the unlikelihood of a predatory conspiracy, also consistently assumes that petitioners valued profit-maximization over growth. See, *e. g., ante,* at 595. In light of the evidence that petitioners sold their goods in this country at substantial losses over a long period of time, see Part III-B, *infra,* I believe that this is an assumption that should be argued to the factfinder, not decided by the Court.

III

In reversing the Third Circuit's judgment, the Court identifies two alleged errors: "(i) [T]he `direct evidence' on which the [Court of Appeals] relied had little, if any, relevance to the alleged predatory pricing conspiracy; and (ii) the court failed to consider the absence of a plausible motive to engage in predatory pricing." *Ante,* at 595. The Court's position is without substance.

A

The first claim of error is that the Third Circuit treated evidence regarding price fixing in Japan and the so-called five company rule and check prices as " `direct evidence' of a conspiracy that injured respondents." *Ante,* at 583 (citing *In re Japanese Electronics Products Antitrust Litigation,* 723 F. 2d 238, 304-305 (1983)). The passage from the Third [605] Circuit's opinion in which the Court locates this alleged error makes what I consider to be a quite simple and correct observation, namely, that this case is distinguishable from traditional "conscious parallelism" cases, in that there is direct evidence of concert of action among petitioners. *Ibid.* The Third Circuit did not, as the Court implies, jump unthinkingly from this observation to the conclusion that evidence regarding the five company rule could support a finding of antitrust injury to respondents.[27] The Third Circuit twice specifically noted that horizontal agreements allocating customers, though illegal, do not ordinarily injure competitors of the agreeing parties. *Id.,* at 306, 310-311. However, after reviewing evidence of cartel activity in Japan, collusive establishment of dumping prices in this country, and longterm, below-cost sales, the Third Circuit held that a factfinder could reasonably conclude that the five company rule was not a simple price-raising device:

"[A] factfinder might reasonably infer that the allocation of customers in the United States, combined with price-fixing in Japan, was intended to permit concentration of the effects of dumping upon American competitors while eliminating competition among the Japanese manufacturers in either market." *Id.,* at 311.

I see nothing erroneous in this reasoning.

B

The Court's second charge of error is that the Third Circuit was not sufficiently skeptical of respondents' allegation that petitioners engaged in predatory pricing conspiracy. But [606] the Third Circuit is not required to engage in academic discussions about predation; it is required to decide whether respondents' evidence creates a genuine issue of material fact. The Third Circuit did its job, and remanding the case so that it can do the same job again is simply pointless.

The Third Circuit indicated that it considers respondents' evidence sufficient to create a genuine factual issue regarding long-term, below-cost sales by petitioners. *Ibid.* The Court tries to whittle away at this conclusion by suggesting that the "expert opinion evidence of below-cost pricing has little probative value in comparison with the economic factors. . . that suggest that such conduct is irrational." *Ante,* at 594, n. 19. But the question is not whether the Court finds respondents' experts persuasive, or prefers the District Court's analysis; it is whether, viewing the evidence in the light most favorable to respondents, a jury or other factfinder could reasonably conclude that petitioners engaged in long-term, below-cost sales. I agree with the Third Circuit that the answer to this question is "yes."

It is misleading for the Court to state that the Court of Appeals "did not disturb the District Court's analysis of the factors that substantially undermine the probative value of [evidence in the DePodwin Report respecting below-cost sales]." *Ibid.* The Third Circuit held that the exclusion of the portion of the DePodwin Report regarding below-cost pricing was erroneous

because "the trial court ignored DePodwin's uncontradicted affidavit that all data relied on in his report were of the type on which experts in his field would reasonably rely." 723 F. 2d, at 282. In short, the Third Circuit found DePodwin's affidavit sufficient to create a genuine factual issue regarding the correctness of his conclusion that petitioners sold below cost over a long period of time. Having made this determination, the court saw no need — nor do I — to address the District Court's analysis point by point. The District Court's criticisms of DePodwin's [607] methods are arguments that a factfinder should consider.

IV

Because I believe that the Third Circuit was correct in holding that respondents have demonstrated the existence of genuine issues of material fact, I would affirm the judgment below and remand this case for trial.

[…]

9.6 Anderson v. Liberty Lobby Inc.

477 U.S. 242 (1986)

[…]

JUSTICE WHITE delivered the opinion of the Court.

In *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 279-280 (1964), we held that, in a libel suit brought by a public official, the First Amendment requires the plaintiff to show that in publishing the defamatory statement the defendant acted with actual malice — "with knowledge that it was false or with reckless disregard of whether it was false or not." We held further that such actual malice must be shown with "convincing clarity." *Id.,* at 285-286. […]These *New York Times* requirements we have since extended to libel suits brought by public figures as well. […]

This case presents the question whether the clear-and-convincing-evidence requirement must be considered by a court ruling on a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure in a case to which *New York Times* applies. The United States Court of Appeals for the District of Columbia Circuit held that that requirement need not be considered at the summary judgment stage.[…] We granted certiorari, 471 U. S. 1134 (1985), because that holding was in conflict with decisions of several other Courts of Appeals, which had held that the *New York Times* requirement of clear and convincing evidence must be considered on a motion for summary judgment.[2] We now reverse.

I

Respondent Liberty Lobby, Inc., is a not-for-profit corporation and self-described "citizens' lobby." Respondent Willis Carto is its founder and treasurer. In October 1981, [245] The Investigator magazine published two articles: "The Private World of Willis Carto" and "Yockey: Profile of an American Hitler." These articles were introduced by a third, shorter article entitled "America's Neo-Nazi Underground: Did *Mein Kampf* Spawn Yockey's *Imperium,* a Book Revived by Carto's Liberty Lobby?" These articles portrayed respondents as neo-Nazi, anti-Semitic, racist, and Fascist.

Respondents filed this diversity libel action in the United States District Court for the District of Columbia, alleging that some 28 statements and 2 illustrations in the 3 articles were false and derogatory. Named as defendants in the action were petitioner

Jack Anderson, the publisher of The Investigator, petitioner Bill Adkins, president and chief executive officer of the Investigator Publishing Co., and petitioner Investigator Publishing Co. itself.

Following discovery, petitioners moved for summary judgment pursuant to Rule 56. In their motion, petitioners asserted that because respondents are public figures they were required to prove their case under the standards set forth in *New York Times*. Petitioners also asserted that summary judgment was proper because actual malice was absent as a matter of law. In support of this latter assertion, petitioners submitted the affidavit of Charles Bermant, an employee of petitioners and the author of the two longer articles.[3] In this affidavit, Bermant stated that he had spent a substantial amount of time researching and writing the articles and that his facts were obtained from a wide variety of sources. He also stated that he had at all times believed and still believed that the facts contained in the articles were truthful and accurate. Attached to this affidavit was an appendix in which Bermant detailed the sources for each of the statements alleged by respondents to be libelous.

[246] Respondents opposed the motion for summary judgment, asserting that there were numerous inaccuracies in the articles and claiming that an issue of actual malice was presented by virtue of the fact that in preparing the articles Bermant had relied on several sources that respondents asserted were patently unreliable. Generally, respondents charged that petitioners had failed adequately to verify their information before publishing. Respondents also presented evidence that William McGaw, an editor of The Investigator, had told petitioner Adkins before publication that the articles were "terrible" and "ridiculous."

In ruling on the motion for summary judgment, the District Court first held that respondents were limited-purpose public figures and that *New York Times* therefore applied.[4] The District Court then held that Bermant's thorough investigation and research and his reliance on numerous sources precluded a finding of actual malice. Thus, the District Court granted the motion and entered judgment in favor of petitioners.

On appeal, the Court of Appeals affirmed as to 21 and reversed as to 9 of the allegedly defamatory statements. Although it noted that respondents did not challenge the District Court's ruling that they were limited-purpose public [247] figures and that they were thus required to prove their case under *New York Times,* the Court of Appeals nevertheless held that for the purposes of summary judgment the requirement that actual malice be proved by clear and convincing evidence, rather than by a preponderance of the evidence, was irrelevant: To defeat summary judgment respondents did not have to show that a jury could find actual malice with "convincing clarity." The court based this conclusion on a perception that to impose the greater evidentiary burden at summary judgment "would change the threshold summary judgment inquiry from a search for a minimum of facts supporting the plaintiff's case to an evaluation of the weight of those facts and (it would seem) of the weight of at least the defendant's uncontroverted facts as well."[…] The court then held, with respect to nine of the statements, that summary judgment had been improperly granted because "a jury could reasonably conclude that the . . . allegations were defamatory, false, and made with actual malice." *Id.,* at 260, 746 F. 2d, at 1577.

II

A

Our inquiry is whether the Court of Appeals erred in holding that the heightened evidentiary requirements that apply to proof of actual malice in this *New York Times* case need not be considered for the purposes of a motion for summary judgment. Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if 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 and that the moving party is entitled to a judgment as a matter of law." By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported [248] motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.

As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted. See generally 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2725, pp. 93-95 (1983). This materiality inquiry is independent of and separate from the question of the incorporation of the evidentiary standard into the summary judgment determination. That is, while the materiality determination rests on the substantive law, it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs. Any proof or evidentiary requirements imposed by the substantive law are not germane to this inquiry, since materiality is only a criterion for categorizing factual disputes in their relation to the legal elements of the claim and not a criterion for evaluating the evidentiary underpinnings of those disputes.

More important for present purposes, summary judgment will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. In *First National Bank of Arizona* v. *Cities Service Co.,* 391 U. S. 253 (1968), we affirmed a grant of summary judgment for an antitrust defendant where the issue was whether there was a genuine factual dispute as to the existence of a conspiracy. We noted Rule 56(e)'s provision that a party opposing a properly supported motion for summary judgment " `may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial.' " We observed further that

"[i]t is true that the issue of material fact required by Rule 56(c) to be present to entitle a party to proceed to [249] trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." 391 U. S., at 288-289.

We went on to hold that, in the face of the defendant's properly supported motion for summary judgment, the plaintiff could not rest on his allegations of a conspiracy to get to a jury without "any significant probative evidence tending to support the complaint." *Id.,* at 290.

Again, in *Adickes* v. *S. H. Kress & Co.,* 398 U. S. 144 (1970), the Court emphasized that the availability of summary judgment turned on whether a proper jury question was presented. There, one of the issues was whether there was a conspiracy between private persons and law enforcement officers. The District Court granted summary judgment for the defendants, stating that there was no evidence from which reasonably minded jurors might draw an inference of conspiracy. We reversed, pointing out that the moving parties' submissions had not foreclosed the possibility of the existence of certain facts from which "it would be open to a jury . . . to infer from the circumstances" that there had been a meeting of the minds. *Id.,* at 158-159.

Our prior decisions may not have uniformly recited the same language in describing genuine factual issues under Rule 56, but it is clear enough from our recent cases that at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. As *Adickes, supra,*

and *Cities Service, supra,* indicate, there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. *Cities Service, supra,* at 288-289. If the evidence is merely colorable, *Dombrowski* v. *Eastland,* 387 U. S. 82 (1967) *(per curiam),* or is not significantly probative, [250] *Cities Service, supra,* at 290, summary judgment may be granted.

That this is the proper focus of the inquiry is strongly suggested by the Rule itself. Rule 56(e) provides that, when a properly supported motion for summary judgment is made,[5] the adverse party "must set forth specific facts showing that there is a genuine issue for trial."[6] And, as we noted above, Rule 56(c) provides that the trial judge shall then grant summary judgment if there is no genuine issue as to any material fact and if the moving party is entitled to judgment as a matter of law. There is no requirement that the trial judge make findings of fact.[7] The inquiry performed is the threshold inquiry of determining whether there is the need for a trial — whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.

Petitioners suggest, and we agree, that this standard mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. *Brady* v. *Southern R. Co.,* 320 U. S. 476, 479-480 (1943). If reasonable minds could differ as to the import of the evidence, however, [251] a verdict should not be directed. *Wilkerson* v. *McCarthy,* 336 U. S. 53, 62 (1949). As the Court long ago said in *Improvement Co.* v. *Munson,* 14 Wall. 442, 448 (1872), and has several times repeated:

"Nor are judges any longer required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party. Formerly it was held that if there was what is called a *scintilla* of evidence in support of case the judge was bound to leave it to the jury, but recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed." (Footnotes omitted.)

[…]

The Court has said that summary judgment should be granted where the evidence is such that it "would require a directed verdict for the moving party."[…]And we have noted that the "genuine issue" summary judgment standard is "very close" to the "reasonable jury" directed verdict standard: "The primary difference between the two motions is procedural; summary judgment motions are usually made before trial and decided on documentary evidence, while directed verdict motions are made at trial and decided on the evidence that has been admitted." […]In essence, though, the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission [252] to a jury or whether it is so one-sided that one party must prevail as a matter of law.

B

Progressing to the specific issue in this case, we are convinced that the inquiry involved in a ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits. If the defendant in a run-of-the-mill civil case moves for summary judgment or for a directed verdict based

on the lack of proof of a material fact, the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict — "whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed." *Munson, supra,* at 448.

In terms of the nature of the inquiry, this is no different from the consideration of a motion for acquittal in a criminal case, where the beyond-a-reasonable-doubt standard applies and where the trial judge asks whether a reasonable jury could find guilt beyond a reasonable doubt. See *Jackson* v. *Virginia,* 443 U. S. 307, 318-319 (1979). Similarly, where the First Amendment mandates a "clear and convincing" standard, the trial judge in disposing of a directed verdict motion should consider whether a reasonable factfinder could conclude, for example, that the plaintiff had shown actual malice with convincing clarity.

[253] The case for the proposition that a higher burden of proof should have a corresponding effect on the judge when deciding whether to send the case to the jury was well made by the Court of Appeals for the Second Circuit in *United States* v. *Taylor,* 464 F. 2d 240 (1972), which overruled *United States* v. *Feinberg,* 140 F. 2d 592 (1944), a case holding that the standard of evidence necessary for a judge to send a case to the jury is the same in both civil and criminal cases even though the standard that the jury must apply in a criminal case is more demanding than in civil proceedings. Speaking through Judge Friendly, the Second Circuit said: "It would seem at first blush — and we think also at second — that more `facts in evidence' are needed for the judge to allow [reasonable jurors to pass on a claim] when the proponent is required to establish [the claim] not merely by a preponderance of the evidence but . . . beyond a reasonable doubt." 464 F. 2d, at 242. The court could not find a "satisfying explanation in the *Feinberg* opinion why the judge should not place this higher burden on the prosecution in criminal proceedings before sending the case to the jury." *Ibid.* The *Taylor* court also pointed out that almost all the Circuits had adopted something like Judge Prettyman's formulation in *Curley* v. *United States,* 160 F. 2d 229, 232-233 (1947):

"The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond reasonable doubt, the motion must be granted. If he concludes that either of the [254] two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter."

This view is equally applicable to a civil case to which the "clear and convincing" standard applies. Indeed, the *Taylor* court thought that it was implicit in this Court's adoption of the clear-and-convincing-evidence standard for certain kinds of cases that there was a "concomitant duty on the judge to consider the applicable burden when deciding whether to send a case to the jury." 464 F. 2d, at 243. Although the court thought that this higher standard would not produce different results in many cases, it could not say that it would never do so.

Just as the "convincing clarity" requirement is relevant in ruling on a motion for directed verdict, it is relevant in ruling on a motion for summary judgment. When determining if a genuine factual issue as to actual malice exists in a libel suit brought by a public figure, a trial judge must bear in mind the actual quantum and quality of proof necessary to support liability under *New York Times.* For example, there is no genuine issue if the evidence presented in the opposing affidavits is of insufficient caliber or quantity to allow a rational finder of fact to find actual malice by clear and convincing evidence.

Thus, in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden. This conclusion is mandated by the nature of this determination. The question here is whether a jury could reasonably find *either* that the plaintiff proved his case by the quality and quantity of evidence required by the governing law *or* that he did not. Whether a jury could reasonably find for either party, however, cannot be defined except by the criteria governing what evidence would enable the jury to find for either the plaintiff or the defendant: It makes no sense to say that a jury could reasonably find for either party without some [255] benchmark as to what standards govern its deliberations and within what boundaries its ultimate decision must fall, and these standards and boundaries are in fact provided by the applicable evidentiary standards.

Our holding that the clear-and-convincing standard of proof should be taken into account in ruling on summary judgment motions does not denigrate the role of the jury. It by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. *Adickes,* 398 U. S., at 158-159. Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial. *Kennedy* v. *Silas Mason Co.,* 334 U. S. 249 (1948).

In sum, we conclude that the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case. This is true at both the directed verdict and summary judgment stages. Consequently, where the *New York Times* "clear and convincing" evidence requirement applies, the trial judge's summary judgment inquiry as to whether a genuine issue exists will be whether the evidence presented is such that a jury applying that evidentiary standard could reasonably find for either the plaintiff or the defendant. Thus, where the factual dispute concerns actual malice, clearly a material issue in a *New York Times* case, the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding [256] either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not.[8]

III

Respondents argue, however, that whatever may be true of the applicability of the "clear and convincing" standard at the summary judgment or directed verdict stage, the defendant should seldom if ever be granted summary judgment where his state of mind is at issue and the jury might disbelieve him or his witnesses as to this issue. They rely on *Poller* v. *Columbia Broadcasting Co.,* 368 U. S. 464 (1962), for this proposition. We do not understand *Poller,* however, to hold that a plaintiff may defeat a defendant's properly supported motion for summary judgment in a conspiracy or libel case, for example, without offering any concrete evidence from which a reasonable juror could return a verdict in his favor and by merely asserting that

the jury might, and legally could, disbelieve the defendant's denial of a conspiracy or of legal malice. The movant has the burden of showing that there is no genuine issue of fact, but the plaintiff is not thereby relieved of his own burden of producing in turn evidence that would support a jury verdict. Rule 56(e) itself provides that a party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial. Based on that Rule, *Cities Service,* 391 U. S., at 290, held that the plaintiff could not defeat the properly supported summary judgment motion of a defendant charged with a conspiracy without offering "any significant probative evidence tending to support the complaint." As we have recently said, "discredited testimony [257] is not [normally] considered a sufficient basis for drawing a contrary conclusion."[…]Instead, the plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment. This is true even where the evidence is likely to be within the possession of the defendant, as long as the plaintiff has had a full opportunity to conduct discovery. We repeat, however, that the plaintiff, to survive the defendant's motion, need only present evidence from which a jury might return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial.

IV

In sum, a court ruling on a motion for summary judgment must be guided by the *New York Times* "clear and convincing" evidentiary standard in determining whether a genuine issue of actual malice exists — that is, whether the evidence presented is such that a reasonable jury might find that actual malice had been shown with convincing clarity. Because the Court of Appeals did not apply the correct standard in reviewing the District Court's grant of summary judgment, we vacate its decision and remand the case for further proceedings consistent with this opinion.

It is so ordered.

9.7 Scott v. Harris

SCOTT *v.* HARRIS

No. 05-1631.

Argued February 26, 2007

Decided April 30, 2007

[…]

*374Justice Scalia

delivered the opinion of the Court.

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 *375is 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." Brief for Petitioner 4. Having radioed his supervisor for permission, Scott was told to "'[g]o ahead and take him out.'" *Harris* v. *Coweta Cty.,* 433 F. 3d 807, 811 (CA11 2005). Instead, Scott applied his push bumper to the rear of respondent's vehicle.1 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 *376of 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." *Harris* v. *Coweta Cty.,* No. 3:01-CV-148-WBH (ND Ga., Sept. 23,2003), App. to Pet. for Cert. 41a-42a. On interlocutory appeal,2 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.3 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,* 471 U. S. 1 (1985), 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." 433 F. 3d, at 816. 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." *Id.,* at 817. The Court of Appeals thus concluded that Scott was not entitled to qualified immunity. We granted certiorari, 549 U. S. 991 (2006), and now reverse.

*377II

In resolving questions of qualified immunity, courts are required to resolve a "threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry." *Saucier* v. *Katz,* 533 U. S. 194, 201 (2001). If, and only if, the court finds a violation of a constitutional right, "the next, sequential step is to ask whether the right was clearly established ... in light of the specific context of the case." *Ibid.* Although this ordering contradicts "[o]ur policy of avoiding unnecessary adjudication of constitutional issues," *United States* v. *Treasury Employees,* 513 U. S. 454, 478 (1995) (citing *Ash-wander* v. *TVA,* 297 U. S. 288,

346-347 (1936) (Brandeis, J., concurring)), we have said that such a departure from practice is "necessary to set forth principles which will become the basis for a [future] holding that a right is clearly established," *Saucier, supra,* at 201.4 We therefore turn to the *378threshold inquiry: whether Deputy Scott's actions violated the Fourth Amendment.

Ill

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." *United States* v. *Diebold, Inc.,* 369 U. S. 654, 655 (1962) *(per curiam); Saucier, supra,* at 201. In qualified immunity cases, this usually means adopting (as the Court of Appeals did here) the plaintiff's version of the facts.

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." 433 F. 3d, at 815. Indeed, reading the lower court's opinion, one gets the impression that respondent, *379rather 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." *Id.,* at 815-816 (citations omitted).

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.6 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 *380maneuvers 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.7

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(c). As we have emphasized, "[w]hen the moving party has carried its burden under Rule 56(c), 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.,* 475 U. S. 574, 586-587 (1986) (footnote omitted). "[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., ATI* U. S. 242, 247-248 (1986). 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 *381on 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. Scott does not contest that his decision to terminate the car chase by ramming his bumper into respondent's vehicle constituted a "seizure." "[A] Fourth Amendment seizure [occurs] . . . when there is a governmental termination of freedom of movement through means intentionally applied." *Brower* v. *County of Inyo,* 489 U. S. 593, 596-597 (1989) (emphasis deleted). See also *id.,* at 597 ("If . . . the police cruiser had pulled alongside the fleeing car and sideswiped it, producing the crash, then the termination of the suspect's freedom of movement would have been a seizure"). It is also conceded, by both sides, that a claim of "excessive force in the course of making [a]... 'seizure' of [the] person ... [is] properly analyzed under the Fourth Amendment's 'objective reasonableness' standard." *Graham* v. *Connor,* 490 U. S. 386, 388 (1989). The question we need to answer is whether Scott's actions were objectively reasonable.8

1

Respondent urges us to analyze this case as we analyzed *Garner,* 471 U. S. 1. See Brief for Respondent 16-29. We must first decide, he says, whether the actions Scott took *382constituted "deadly force." (He defines "deadly force" as "any use of force which creates a substantial likelihood of causing death or serious bodily injury," *id.,* at 19.) If so, respondent claims that *Garner* prescribes certain preconditions that must be met before Scott's actions can survive Fourth Amendment scrutiny: (1) The suspect must have posed an immediate threat of serious physical harm to the officer or others; (2) deadly force must have been necessary to prevent escape;9 and (3) where feasible, the officer must have given the suspect some warning. See Brief for Respondent 17-18 (citing *Garner, supra,* at 9-12). Since these *Garner* preconditions for using deadly force were not met in this case, Scott's actions were *per se* unreasonable.

Respondent's argument falters at its first step; *Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute "deadly force." *Gamer* was simply an application of the Fourth Amendment's "reasonableness" test, *Graham, supra,* at 388, to the use of a particular type of force in a particular situation. *Garner* held that it was unreasonable to kill a "young, slight, and unarmed" burglary suspect, 471 U. S., at 21, by shooting him "in the back of the head" while he was running away on foot, *id.,* at 4, and when the officer "could not reason*383ably have believed that [the suspect]. . . posed any threat," and "never attempted to justify his actions on any basis other than the need to prevent an

escape," *id.,* at 21. Whatever *Gamer* said about the factors that *might have* justified shooting the suspect in that case, such "preconditions" have scant applicability to this case, which has vastly different facts. *"Gamer* had nothing to do with one car striking another or even with car chases in general____ A police car's bumping a fleeing car is, in fact, not much like a policeman's shooting a gun so as to hit a person." *Adams* v. *St. Lucie County Sheriff's Dept.,* 962 F. 2d 1563, 1577 (CA11 1992) (Edmondson, J., dissenting), adopted by 998 F. 2d 923 (CA11 1993) (en banc) *(per curiam).* Nor is the threat posed by the flight on foot of an unarmed suspect even remotely comparable to the extreme danger to human life posed by respondent in this case. Although respondent's attempt to craft an easy-to-apply legal test in the Fourth Amendment context is admirable, in the end we must still slosh our way through the factbound morass of "reasonableness." Whether or not Scott's actions constituted application of "deadly force," all that matters is whether Scott's actions were reasonable.

2

In determining the reasonableness of the manner in which a seizure is effected, "[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *[…]* Scott defends his actions by pointing to the paramount governmental interest in ensuring public safety, and respondent nowhere suggests this was not the purpose motivating Scott's behavior. Thus, in judging whether Scott's actions were reasonable, we must consider the risk of bodily harm that Scott's actions posed to respondent in light of the threat to the public that Scott was trying to eliminate. Although there is no obvious way to quantify *384the risks on either side, it is clear from the videotape that respondent posed an actual and imminent threat to the lives of any pedestrians who might have been present, to other civilian motorists, and to the officers involved in the chase. See Part III-A, *supra.* It is equally clear that Scott's actions posed a high likelihood of serious injury or death to respondent — though not the near *certainty* of death posed by, say, shooting a fleeing felon in the back of the head, see *Garner, supra,* at 4, or pulling alongside a fleeing motorist's car and shooting the motorist, cf. *Vaughan* v. *Cox,* 343 F. 3d 1323, 1326-1327 (CA11 2003). So how does a court go about weighing the perhaps lesser probability of injuring or killing numerous bystanders against the perhaps larger probability of injuring or killing a single person? We think it appropriate in this process to take into account not only the number of lives at risk, but also their relative culpability. It was respondent, after all, who intentionally placed himself and the public in danger by unlawfully engaging in the reckless, high-speed flight that ultimately produced the choice between two evils that Scott confronted. Multiple police cars, with blue lights flashing and sirens blaring, had been chasing respondent for nearly 10 miles, but he ignored their warning to stop. By contrast, those who might have been harmed had Scott not taken the action he did were entirely innocent. We have little difficulty in concluding it was reasonable for Scott to take the action that he did.10

*385But wait, says respondent: Couldn't the innocent public equally have been protected, and the tragic accident entirely avoided, if the police had simply ceased their pursuit? We think the police need not have taken that chance and hoped for the best. Whereas Scott's action — ramming respondent off the road — was *certain* to eliminate the risk that respondent posed to the public, ceasing pursuit was not. First of all, there would have been no way to convey convincingly to respondent that the chase was off, and that he was free to go. Had respondent looked in his rearview mirror and seen the police cars deactivate their flashing lights and turn around, he would have had no idea whether they were truly letting him get away, or simply devising a new strategy for capture. Perhaps the police knew a shortcut he didn't know, and would reappear down the road to

intercept him; or perhaps they were setting up a roadblock in his path. Cf. *Brower,* 489 U. S., at 594. Given such uncertainty, respondent might have been just as likely to respond by continuing to drive recklessly as by slowing down and wiping his brow.* 11

Second, we are loath to lay down a rule requiring the police to allow fleeing suspects to get away whenever they drive so *recklessly* that they put other people's lives in danger. It is obvious the perverse incentives such a rule would create: Every fleeing motorist would know that escape is within his grasp, if only he accelerates to 90 miles per hour, crosses the double-yellow line a few times, and runs a few red lights. The Constitution assuredly does not impose this *386invitation to impunity-earned-by-recklessness. Instead, we lay down a more sensible rule: A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death.

* * *

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.

9.8 Standard Documents: Motion for Summary Judgment

https://1.next.westlaw.com/Document/Ib7ee5bb9758911e8a5b3e3d9e23d7429/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad73aa70000016f039329f337f0211f%3FNav%3DKNOWHOW%26fragmentIdentifier%3DIb7ee5bb9758911e8a5b3e3d9e23d7429%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=31b62475d20a4ba095507a5b4212922c&list=KNOWHOW&rank=1&sessionScopeId=fd4e46612d99949339c3eb0ead7615a18e085d9feb8826799b68f4fc45a98352&originationContext=Search%20Result&transitionType=SearchItem&contextData=(sc.Search)&view=hidealldraftingnotes

9.9 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.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Dec. 4, 1967, eff. July 1, 1968; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 30, 2007, eff. Dec. 1, 2007.)

9.10 Dismissals, Voluntary and Otherwise

Plaintiffs can dismiss their claim if they do so in a timely manner and their case is not a class action or one of the other exceptions to the general rule, but a question arises as to whether they are free to refile. A dismissal 'without prejudice' allows the plaintiff to refile (assuming no issues with statute of limitations, etc.). A dismissal 'with prejudice' operates as a final resolution of the case, barring future actions.

The first voluntary dismissal will normally be without prejudice. The second voluntary dismissal will be with prejudice, unless the court says otherwise.

Dismissals can also be involuntary. If, for example, plaintiff fails to prosecute the case (that is, fails to take those actions necessary to push it along toward resolution) the court may dismiss it under Rule 41(b). Despite the language of the rule making most such dismissals with prejudice, courts are cautious about dismissing with prejudice, and appellate courts will carefully review such dismissals.

9.11 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.

(As amended Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 2007, eff. Dec. 1, 2007; Mar. 26, 2009, eff. Dec. 1, 2009; Apr. 29, 2015, eff. Dec. 1, 2015.)

9.12 Defaults and Default Judgments

Defendant defaults

E.g., fails to file answer or motion within requisite time

Why? Perhaps has decided there is no personal jurisdiction and no assets outside China, and expects US judgment will not be recognized within China

Plaintiff files for entry of default

Entry of default is not the same as default judgment

What it does is cut off the ability of defendant to file a response without first filing a motion and getting leave of court. Not automatic – plaintiff must file.

Plaintiff files for entry of default judgment

Sometimes can be entered by clerk

More often by court

Judgment cannot exceed prayer for relief in complaint. Also, note need for affidavit.

9.13 Practice Questions on Summary Judgment

A motion for summary judgment may be supported or opposed by use of affidavits, depositions, answers to interrogatories, admissions, and admissible documents.

1. True

2. False

Answer: True

Explanation:

All of the above kinds of documents may be used in support or in opositin to a motion for summary judgment. Whether a given document can be used gets a bit more complicated, and involves an examination of what can be used at trial.

[3]

Affidavits are always sufficient evidence to be used in support of or opposition to a motion for summary judgment,

1. True

2. False

Answer: False

Explanation:

The burden of production can be met by pointing to documents which, while not admissible at trial themselves (for example, affidavits), allow a prediction that admissible evidence will be produced at trial. If the affidavit does point to admissible evidence at trial - if, for example, the person who gave the affidavit is dead or otherwise unavailable - the affidavit will not be enough

[4]

Paul Plaintiff has sued Mega Corp, claiming that Mega Corp released toxic chemicals into the environment that caused him to develop liver cancer. Essential elements of his claim under the substantive law require showing that 1) the defendant released chemicals into the environment, 2) that those chemicals were ingested by the plaintiff, and 3) that those chemicals can actually cause cancer. The relevant statute of limitations requires that the claim be filed within two years of the plaintiff's discovery that he was injured by the defendant. In responses to interrogatories, Plaintiff has stated that he obtained information three years before filing, the basis of his claim, that led him to conclude at that time he was injured by the actions of the defendant. Discovery has closed. Plaintiff has developed evidence that defendant released Chemical X onto the ground at its facilities, and that Chemical X in sufficient dosages can cause cancer, but he has developed no evidence showing that the chemicals released by Defendant were ever able to reach and be incorporated in food or drink that he ingested. In support of its motion for summary judgment:

1. Defendant can successfully argue that uncontroverted (not disputed) affirmative evidence shows that the case should be dismissed pursuant to Rule 56.

2. Defendant can successfully argue that plaintiff will not be able to meet its burden of production at trial, and so the case should be dismissed pursuant to Rule 56.

3. Both 1 and 2.

4. Neither 1 nor 2.

Answer: Both 1 and 2.

Explanation:

Plaintiff's admission about when it learned of the injury creates a valid statute of limitations defense, supporting a Rule 56 dismissal. Plaintiff's failure to develop evidence on an essential element of the claim also supports a Rule 56 dismissal under a Celotex approach.

10 Trial and The Right to a Jury Trial

10.1 Seventh Amendment to the Constitution

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 reexamined in any court of the United States, than according to the rules of the common law.

10.2 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).

10.3 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.

10.4 Introduction to Trial

Pretrial Conference. Prior to trial, the parties normally will meet with the judge in a pretrial conference under rule 16. Because the pleading rules are liberal and relaxed, allowing amendments up to trial, this conference is important for determining what issues actually will be contested at trial. It also presents an opportunity for the judge to send signals about his or her evaluation of the case, which can lead to settlement.

It is not unusual in these proceedings for judges to encourage settlement, nor is it unusual for judges to encourage the parties to stipulate to issues so that testimony is not necessary and trial faster and more efficient. That said, the judge cannot require the parties to settle the case, nor can the judge require the parties to stipulate to issues which are reasonably contestable.

Jury Selection. Selecting the jury is an important part of the jury trial process. A list of potential jurors is maintained for a given venue, usually drawn from voter registrations or driver's license registrations. The larger panel must be representative and random – for example, excluding those who get paid by the day was held to skew the jury pool impermissibly. When a trial is scheduled, from this pool a panel is summoned to the court house to undergo jury selection.

Once a jury panel is assembled, from that larger panel the actual jurors sitting on the case will be selected. The normal jury panel is 12 jurors, but in most cases alternate jurors will also be seated, who will hear the case and take a voting place on the jury if any other juror is unable to continue. In cases expected to go for a long time, there can be half a dozen alternates or more.

The jurors will be called before the judge and undergo what is called a *voir dire*, which is old French for "to speak the truth." The purpose of the *voir dire* is to determine whether the jurors have any conflicts or biases that make them unsuitable for jury service, as well as to draw out characteristics that might bear on the exercise of peremptory juror challenges (see below). In some cases, skilled trial lawyers use the *voir dire* as an opportunity to frame the case their way, by subtly portraying the sides with positive or negative associations in questions, or by desensitizing the jurors to large numbers that might be sought in damages. In part to control this, in some courtrooms the judge will conduct *voir dire* herself, but with input from the lawyers on questions to be asked.

As the jurors are examined, they can be accepted for service or challenged. There are two kinds of challenges – for cause or peremptory. For cause challenges are exactly what they sound like. For some reason, the juror cannot be expected to be fair or impartial. Reasons might include an expressed conclusion on how the case should turn out that the juror says he or she cannot set aside, or some kind of relationship with a party or an attorney that might cloud judgment (for example, the lead counsel's husband would normally be excused for cause).

Peremptory challenges can be exercised without need to explain why they are being used. A trial lawyer may simply have a bad feeling about a juror, or may have decided that residents of certain neighborhoods or consumers of certain products are less likely to favor his client.

There are some limits on peremptory challenges. While they can be used for no reason, they cannot be used for improper reasons. Peremptory challenges cannot be used to exclude jurors on the basis of race, *Edmonson v. Leesville Concrete Company*, 500 U.S. 614 (1991), or on the basis of gender, *J. E. B. v. Alabama ex rel. T. B.,* 511 U.S. 127 (1994).

Some experienced trial lawyers claim that once a jury is empaneled they can predict who will win the jury trial, because the make up of the jury and its mix of backgrounds and biases can affect how the decision makers will see the evidence. To make the most strategic use of challenges, trial lawyers will spend much time analyzing what kinds of jurors are most likely to be favorable to their case. In recent decades, jury consultants have arisen that draw on segmentation techniques used in advertising to analyze potential jury pools. Mock jury panels that are expected to be similar to the actual jury pool (but not actually overlapping as that would constitute impermissible interference) are sometimes exposed to a summary version of the trial. Both the outcome of various ways to present the case and the characteristics of favorable jurors are then statistically analyzed. Based on this analysis, which often is combined with advertising demographic research, trial lawyers may be advised on the characteristics of desirable jurors. They may be advised, for example, to select or avoid jurors who drive certain brands of cars.

Scope and Order of Trial. Once a jury has been selected, the trial may begin. The judge typically wlll explain the trial process and the jury's role before the trial begins. They also will receive warnings about discussing the case with outsiders and even with each other before formal deliberations begin.

The order can vary by jurisdiction, by the preference of the judge, or by request of counsel. For example, not often but on occasion a defense counsel may choose to defer its opening statement until the start of the defense case. More commonly, a party may forego cross examination at the time a witness is called, reserving the right to call them in the defense case or the rebuttal phase.

Typically, however, a case will proceed along the lines that follow:

- Plaintiff's opening statement
- Defendant's opening statement
- Plaintiff's presentation of direct evidence

o With cross examination

- Defendant's presentation of direct evidence

o With cross examination

- Plaintiff's presentation of rebuttal evidence (not new areas but limited in scope to rebuttal)

o With cross examination

- Defendant's presentation of rebuttal evidence (not new areas but limited in scope to rebuttal)

o With cross examination

- Opening final argument by plaintiff
- Defendant's final argument
- Closing final argument by plaintiff
- Instructions to the jury by the judge

Common law trials differ from civil law trials in that they tend to happen all at once, and if not all at once then a limited series of presentations. Whereas in civil law systems the judge may hear evidence on an ongoing basis, in a common law trial the evidence typically is presented during the event that is a trial.

Skilled common law trial lawyers, especially in the age of extensive pretrial discovery, treat the trial itself as something very like a dramatic performance. The lawyers look to tell a story, to construct a narrative, and to fit the invidual pieces of evidence into that narrative. The outline of the narrative may begin to be revealed during *voir dire*, presented more directly in opening statements, and then tied to the evidence presented in closing arguments. When in the hands of capable trial lawyers, the jurors are not left to wonder how important bits of evidence fit together.

At the close of trial, the judge will give the jury instructions on the law to be applied to the various claims and defenses. Those of you who have struggled to gasp the law as it has been presented to you in law school might wonder how reliably ordinary jurors grasp the fine points of the legal doctrine they are expected to apply. Samples of judicial legal instructions are in TWEN to give you an idea how this is handled.

One thing the judicial instructions will cover will be which party bears the burden of production and the burden of persuasion on each claim, defense, and response to a defense.

Special Verdict / General Verdict. When sent to the jury room to deliberate the jury may be told to render what is called a 'general verdict' or a 'special verdict.' A general verdict simply asks the jury who prevails on each claim and for the amount of damages, if any. A special verdict breaks out specific questions for the jury to answer, Special verdicts can be used when the legal standards are elusive but the facts bearing on that standard determinative. Examples of a general verdict form where there is both a claim and a counterclaim and a special verdict form used in the courts of Colorado follow.

GENERAL VERDICT

IN THE _____ COURT IN AND FOR THE COUNTY OF _____, STATE OF COLORADO Civil Action No. _____ _____) Plaintiff,) v.) VERDICT

_____) Defendant.)

YOU ARE TO SIGN EITHER PART A. OR PART B. BELOW OF THIS VERDICT, BUT NOT BOTH.

Part A. We, the jury, find for the plaintiff, (name), and award damages of $_____ against the defendant, (name).

_____ _____ Foreperson

_____ _____ _____

_____

Part B. We, the jury, find for the defendant, (name), and against the plaintiff, (name). _____

_____ Foreperson _____

SPECIAL VERDICT (OR SPECIAL INTERROGATORIES)

You are instructed to answer the following questions which will be on a form for Special Verdict:

1. Did the plaintiff, (name), own a white horse?

2. Did the defendant, (name), ride the white horse without the plaintiff's permission?

3. Was the plaintiff damaged as a result of the defendant's riding of the white horse?

4. State the amount of damages, if any, that the plaintiff had that were caused by the conduct of the defendant. Before you return the Special Verdict answering these questions, you must all agree on the answers to each of the questions. Upon arriving at such agreement, your foreperson will insert each answer in the verdict and then he or she and all other jurors will sign it upon completion of all answers.

Right to a Jury. The United States is somewhat exceptional in allowing juries in civil trials. Even the UK, where the right to a jury trial originated, juries in civil cases have all but disappeared.

Either party may demand a jury trial. Rule 38 of the federal rules sets out the process. A party may demand jury trial for all claims for which a jury is proper, or only for certain claims. If neither party demands a jury trial, the judge will try the case without a jury.

The right to a jury in federal court arises from the Seventh Amendment, which in civil cases preserves the right to a jury in those situations where a jury was allowed in common law at the time the Seventh Amendment was adopted in 1791. The Seventh Amendment does not apply to trials conducted in state court, with states able to make their own decisions about whether and when jury should apply in a civil case. The Seventh Amendment also by its terms does not extend the right of a jury to all civil cases, but only preserves the right in those cases where jury could be had in common law. As you will recall, in the equity courts no jury was available. The Seventh Amendment does not preserve any right to a jury trial in equitable actions where no such right ever existed. Because so much has changed since 1791 with regard to both substantive rights of action and procedural devices, the historical test of whether a jury was available in 1791 often provides little guidance.

What happens when a case involves both equitable relief and damages? The Supreme Court faced this issues in *Beacon Theatres v. Westover*, 359 U.S. 500 (1959). In *Beacon Theatres*, the plaintiff had filed for declaratory relief, seeking a declaration that it had not violated the antitrust laws and for an injunction preventing the defendant from instituting any antitrust actions elsewhere. The defendant counterclaimed, seeking damages for an antitrust violation, and demanded a jury trial. The trial court ruled that it would resolve all equitable issues first, and then consider a jury trial. As a practical matter, the court's determination would control the outcome. The Supreme Court reversed, holding that the defendant was entitled to a jury trial on its damages claim before any permanent injunctive relief was entered. The Court was similarly expansive in *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962). In that case, the plaintiff sought injunctions and an 'accounting' for money owed. Even though the term 'damages' was not used, the Court held that the claim was essentially one for damages and a jury was required. Similarly, in *Ross v. Bernhard*, 396 U.S. 531 (1970), the court held that a jury was required in a derivative suit – traditionally an equitable device – when the underlying claim on behalf of the corporation was one for damages.

Footnote ten in *Ross v. Bernhard* summarized the Court's approach: "As our cases indicate, the "legal" nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the remedy sought; and, third, the practical abilities and limitations of juries. Of these factors, the first, requiring extensive and possibly abstruse historical inquiry, is obviously the most difficult to apply."

What happens when the cause of action did not exist at the time the Seventh Amendment was adopted, and it does not fit clearly into either law or equity? The following case illustrates how that is analyzed.

10.5 Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry

CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL NO. 391 *v.* TERRY et al.

No. 88-1719.

[…]

Decided March 20, 1990

*560Marshall, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III — B, and IV, in which Rehnquist, C. J., and Brennan, White, Blackmun, and Stevens, JJ., joined, and an opinion with respect to Part III-A, in which Rehnquist, C. J., and White and Blackmun, JJ., joined. Brennan, J., *post,* p. 574, and Stevens, J., *post,* p. 581, filed opinions concurring in part and concurring in the judgment. Kennedy, J., filed a dissenting opinion, in which O'Connor and Scalia, JJ., joined, *post,* p. 584.

[…]

Justice Marshall delivered the opinion of the Court, except as to Part III-A.

This case presents the question whether an employee who seeks relief in the form of backpay for a union's alleged breach of its duty of fair representation has a right to trial by jury. We hold that the Seventh Amendment entitles such a plaintiff to a jury trial.

I

McLean Trucking Company and the Chauffeurs, Teamsters and Helpers Local No. 391 (Union) were parties to a collective-bargaining agreement that governed the terms and conditions of employment at McLean's terminals. The 27 respondents were employed by McLean as truckdrivers in bargaining units covered by the agreement, and all were members of the Union. In 1982 McLean implemented a change in operations that resulted in the elimination of some of its terminals and the reorganization of others. As part of that change, McLean transferred respondents to the terminal located in Winston-Salem and agreed to give them special seniority rights in relation to "inactive" employees in Winston-Salem who had been laid off temporarily.

After working in Winston-Salem for approximately six weeks, respondents were alternately laid off and recalled several times. Respondents filed a grievance with the Union, contesting the order of the layoffs and recalls. Respondents also challenged McLean's policy of stripping any driver who was laid off of his special seniority rights. Respondents claimed that McLean breached the collective-bargaining agreement by giving inactive drivers preference over respondents. After these proceedings, the grievance committee ordered McLean to recall any respondent who was then laid off and to lay off any inactive driver who had been recalled; in addition, the committee ordered McLean to recognize respondents' special seniority rights until the inactive employees were properly recalled.

*562On the basis of this decision, McLean recalled respondents and laid off the drivers who had been on the inactive list when respondents transferred to Winston-Salem. Soon after this, though, McLean recalled the inactive employees, thereby allowing them to regain seniority rights over respondents. In the next round of layoffs, then, respondents had lower priority than inactive drivers and were laid off first. Accordingly, respondents filed another grievance, alleging that McLean's actions were designed to circumvent the initial decision of the grievance committee.' The Union representative appeared before the grievance committee and presented the contentions of respondents and those of the inactive truckdrivers. At the conclusion of the hearing, the committee held that McLean had not violated the committee's first decision.

McLean continued to engage in periodic layoffs and recalls of the workers at the Winston-Salem terminal. Respondents filed a third grievance with the Union, but the Union declined to refer the charges to a grievance committee on the ground that the relevant issues had been determined in the prior proceedings.

In July 1983, respondents filed an action in District Court, alleging that McLean had breached the collective-bargaining agreement in violation of § 301 of the Labor Management Relations Act, 1947, 61 Stat. 156, 29 U. S. C. §185 (1982 ed.),1 and that the Union had violated its duty of fair representation. Respondents requested a permanent injunction requiring the defendants to cease their illegal acts and to rein*563state them to their proper seniority status; in addition, they sought, *inter alia,* compensatory damages for lost wages and health benefits. In 1986 McLean filed for bankruptcy; subsequently, the action against it was voluntarily dismissed, along with all claims for injunctive relief.

Respondents had requested a jury trial in their pleadings. The Union moved to strike the jury demand on the ground that no right to a jury trial exists in a duty of fair representation suit. The District Court denied the motion to strike. After an interlocutory appeal, the Fourth Circuit affirmed the trial court, holding that the Seventh Amendment entitled respondents to a jury trial of their claim for monetary relief. 863 F. 2d 334 (1988). We granted the petition for certiorari to resolve a Circuit conflict on this issue,2 491 U. S. 903 (1989), and now affirm the judgment of the Fourth Circuit.

II

The duty of fair representation is inferred from unions' exclusive authority under the National Labor Relations Act (NLRA), 49 Stat. 449, 29 U. S. C. § 159(a) (1982 ed.), to represent all employees in a bargaining unit. *Vaca* v. *Sipes,* 386 U. S. 171, 177 (1967). The duty requires a union "to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *[…]*

Ill

We turn now to the constitutional issue presented in this case — whether respondents are entitled to a jury trial.3 The Seventh Amendment provides that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." The right to a jury trial includes more than the common-law forms of action recognized in 1791; the phrase "Suits at common law" refers to "suits in which *legal* rights [are] to be ascertained and determined, in contradistinction to those where equitable rights alone [are] recognized, and equitable remedies [are] administered." *Parsons* v. *Bedford,* 3 Pet. 433, 447 (1830); see also *ibid.* ("[T]he amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights"). The right extends to *565causes of action created by Congress. *Tull* v. *United States,* 481 U. S. 412, 417 (1987). Since the merger of the systems of law and equity, see Fed. Rule Civ. Proc. 2, this Court has carefully preserved the right to trial by jury where legal rights are at stake. As the Court noted in *Beacon Theatres, Inc.* v. *Westover,* 359 U. S. 500, 501 (1959), "'Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care'" (quoting *Dimick* v. *Schiedt,* 293 U. S. 474, 486 (1935)).

To determine whether a particular action will resolve legal rights, we examine both the nature of the issues involved and the remedy sought. "First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature." *Tull, supra,* at 417-418 (citations omitted). The second inquiry is the more important in our analysis. *Granfinanciera, S. A.* v. *Nordberg,* 492 U. S. 33, 42 (1989).4

A

An action for breach of a union's duty of fair representation was unknown in 18th-century England; in fact, collective bar*566gaining was unlawful. See N. Citrine, Trade Union Law 4-7 (2d ed. 1960). We must therefore look for an analogous cause of action that existed in the 18th century to determine whether the nature of this duty of fair representation suit is legal or equitable.

The Union contends that this duty of fair representation action resembles a suit brought to vacate an arbitration award because respondents seek to set aside the result of the grievance process. In the 18th century, an action to set aside an arbitration award was considered equitable. 2 J. Story, Commentaries on Equity Jurisprudence § 1452, pp. 789-790 (13th ed. 1886) (equity courts had jurisdiction over claims that an award should be set aside on the ground of "mistake of the arbitrators"); see, *e. g., Burchell* v. *Marsh,* 17 How. 344 (1855) (reviewing bill in equity to vacate an arbitration award). In support of its characterization of the duty of fair representation claim, the Union cites *United Parcel Service, Inc.* v. *Mitchell,* 451 U. S. 56 (1981), in which we held that, for purposes of selecting from various state statutes an appropriate limitations period for a §301 suit against an employer, such a suit was more analogous to a suit to vacate an arbitration award than to a breach of contract action. *Id.,* at 62.5

The arbitration analogy is inapposite, however, to the Seventh Amendment question posed in this case. No grievance committee has considered respondents' claim that the Union violated its duty of fair representation; the grievance process was concerned only with the employer's alleged breach of the collective-bargaining agreement. Thus, respondents' claim against the Union cannot be characterized as an action to va*567cate an arbitration award because "'[t]he arbitration proceeding did not, and indeed, could not, resolve the employee's claim against the union. . . . Because no arbitrator has decided the primary issue presented by this claim, no arbitration award need be undone, even if the employee ultimately prevails.'" *DelCostello,* 462 U. S., at 167 (quoting *Mitchell, supra,* at 73 (Stevens, J., concurring in part and dissenting in part) (footnotes omitted)).

The Union next argues that respondents' duty of fair representation action is comparable to an action by a trust beneficiary against a trustee for breach of fiduciary duty. Such actions were within the exclusive jurisdiction of courts of equity. 2 Story, *supra,* § 960, p. 266; Restatement (Second) of Trusts § 199(c) (1959). This analogy is far more persuasive than the arbitration analogy. Just as a trustee must act in the best interests of the beneficiaries, 2A W. Fratcher, Scott on Trusts § 170 (4th ed. 1987), a union, as the exclusive representative of the workers, must exercise its power to act on behalf of the employees in good faith, *Vaca* v. *Sipes,* 386 U. S., at 177. Moreover, just as a beneficiary does not directly control the actions of a trustee, 3 Fratcher, *supra,* § 187, an individual employee lacks direct control over a union's actions taken on his behalf, see Cox, The Legal Nature of Collective Bargaining Agreements, 57 Mich. L. Rev. 1, 21 (1958).

The trust analogy extends to a union's handling of grievances. In most cases, a trustee has the exclusive authority to sue third parties who injure the beneficiaries' interest in the trust, 4 Fratcher, *supra,* § 282, pp. 25-29, including any legal claim the trustee holds in trust for the beneficiaries, Restatement (Second) of Trusts, *supra,* § 82, comment *a.* The trustee then has the sole responsibility for determining whether to settle, arbitrate, or otherwise dispose of the claim. Restatement (Second) of Trusts, *supra,* § 192. Similarly, the union typically has broad discretion in its decision whether and how to pursue an employee's grievance against *568an employer. See, *e. g., Vaca* v. *Sipes, supra,* at 185. Just as a trust beneficiary can sue to enforce a contract entered into on his behalf by the trustee only if the trustee "improperly refuses or neglects to bring an action against the third

person," Restatement (Second) of Trusts, *supra,* §282(2), so an employee can sue his employer for a breach of the collective-bargaining agreement only if he shows that the union breached its duty of fair representation in its handling of the grievance, *DelCostello, supra,* at 163-164. See *Bowen* v. *United States Postal Service,* 459 U. S. 212, 243 (1983) (White, J., concurring in judgment in part and dissenting in part).

Respondents contend that their duty of fair representation suit is less like a trust action than an attorney malpractice action, which was historically an action at law, see, *e. g., Russell* v. *Palmer, 2* Wils. K. B. 325, 95 Eng. Rep. 837 (1767). In determining the appropriate statute of limitations for a hybrid § 301/duty of fair representation action, this Court in *DelCostello* noted in dictum that an attorney malpractice action is "the closest state-law analogy for the claim against the union." 462 U. S., at 167. The Court in *DelCostello* did not consider the trust analogy, however. Presented with a more complete range *of* alternatives, we find that, in the context of the Seventh Amendment inquiry, the attorney malpractice analogy does not capture the relationship between the union and the represented employees as fully as the trust analogy does.

The attorney malpractice analogy is inadequate in several respects. Although an attorney malpractice suit is in some ways similar to a suit alleging a union's breach of its fiduciary duty, the two actions are fundamentally different. The natute of an action is in large part controlled by the nature of the underlying relationship between the parties. Unlike employees represented by a union, a client controls the significant decisions concerning his representation. Moreover, a client can fire his attorney if he is dissatisfied with his attor*569ney's performance. This option is not available to an individual employee who is unhappy with a union's representation, unless a majority of the members of the bargaining unit share his dissatisfaction. See *J. I. Case Co.* v. *NLRB,* 321 U. S. 332, 338-339 (1944). Thus, we find the malpractice analogy less convincing than the trust analogy.

Nevertheless, the trust analogy does not persuade us to characterize respondents' claim as wholly equitable. The Union's argument mischaracterizes the nature of our comparison of the action before us to 18th-century forms of action. As we observed in *Ross* v. *Bernhard,* 396 U. S. 531 (1970), "The Seventh Amendment question depends on the nature of the *issue* to be tried rather than the character of the overall action." *Id.,* at 538 (emphasis added) (finding a right to jury trial in a shareholder's derivative suit, a type of suit traditionally brought in courts of equity, because plaintiffs' case presented legal issues of breach of contract and negligence). As discussed above, see *supra,* at 564, to recover from the Union here, respondents must prove both that McLean violated §301 by breaching the collective-bargaining agreement and that the Union breached its duty of fair representation.6 When viewed in isolation, the duty of fair representation issue is analogous to a claim against a trustee for breach of fiduciary duty. The § 301 issue, how*570ever, is comparable to a breach of contract claim — a legal issue.7

Respondents' action against the Union thus encompasses both equitable and legal issues. The first part of our Seventh Amendment inquiry, then, leaves us in equipoise as to whether respondents are entitled to a jury trial.

B

Our determination under the first part of the Seventh Amendment analysis is only preliminary. *Granfinanciera, S. A.* v. *Nordberg,* 492 U. S., at 47. In this case, the only remedy sought is a request for compensatory damages representing backpay and benefits. Generally, an action for money damages was "the traditional form of relief offered in the courts of law." *Curtis* v. *Loether,* 415 U. S. 189, 196 (1974). This Court has not, however, held that "any award of monetary relief must *necessarily* be

'legal' relief." *Ibid.* (emphasis added). See also *Granfinanciera, supra,* at 86, n. 9 (White, J., dissenting). Nonetheless, because we conclude that the remedy respondents seek has none of the attributes that must be present before we will find an exception to the general rule and characterize damages as equitable, we find that the remedy sought by respondents is legal.

First, we have characterized damages as equitable where they are restitutionary, such as in "action[s] for disgorgement of improper profits," *Tull,* 481 U. S., at 424. See also *Curtis* v. *Loether, supra,* at 197; *Porter* v. *Warner Holding Co.,* 328 U. S. 395, 402 (1946). The backpay sought by re*571spondents is not money wrongfully held by the Union, but wages and benefits they would have received from McLean had the Union processed the employees' grievances properly. Such relief is not restitutionary.

Second, a monetary award "incidental to or intertwined with injunctive relief" may be equitable. *Tull, supra,* at 424. See, *e. g., Mitchell* v. *Robert DeMario Jewelry, Inc.,* 361 U. S. 288, 291-292 (1960) (District Court had power, incident to its injunctive powers, to award backpay under the Fair Labor Standards Act; also backpay in that case was restitutionary). Because respondents seek only money damages, this characteristic is clearly absent from the case. FN 8[1]

The Union argues that the backpay relief sought here must nonetheless be considered equitable because this Court has labeled backpay awarded under Title VII of the Civil Rights Act of 1964, 42 U. S. C. §2000e *et seq.* (1982 ed.), as equitable. See *Albemarle Paper Co.* v. *Moody,* 422 U. S. 405, 415-418 (1975) (characterizing backpay awarded against em*572ployer under Title VII as equitable in context of assessing whether judge erred in refusing to award such relief). It contends that the Title VII analogy is compelling in the context of the duty of fair representation because the Title VII backpay provision was based on the NLRA provision governing backpay awards for unfair labor practices, 29 U. S. C. § 160(c) (1982 ed.) ("[W]here an order directs reinstatement of an employee, back pay may be required of the employer or labor organization"). See *Albemarle Paper Co.* v. *Moody, supra,* at 419. We are not convinced.

The Court has never held that a plaintiff seeking backpay under Title VII has a right to a jury trial. See *Lorillard* v. *Pons,* 434 U. S. 575, 581-582 (1978). Assuming, without deciding, that such a Title VII plaintiff has no right to a jury trial, the Union's argument does not persuade us that respondents are not entitled to a jury trial here. Congress specifically characterized backpay under Title VII as a form of "equitable relief." 42 U. S. C. §2000e-5(g) (1982 ed.) ("[T]he court may . . . order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay ... , or any other equitable relief as the court deems appropriate"). See also *Curtis* v. *Loether, supra,* at 196-

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[1] FN 8 Both the Union and the dissent argue that the backpay award sought here is equitable because it is closely analogous to damages awarded to beneficiaries for a trustee's breach of trust. See *post,* at 587. Such damages were available only in courts of equity because those courts had exclusive jurisdiction over actions involving a trustee's breach of his fiduciary duties. See 3 W. Fratcher, Scott on Trusts §205, p. 240 (4th ed. 1987); Restatement (Second) of Trusts § 205(a), and comment *c,* illustration 2 (1959).
The Union's argument, however, conflates the two parts of our Seventh Amendment inquiry. Under the dissent's approach, if the action at issue were analogous to an 18th-century action within the exclusive jurisdiction of the courts of equity, we would necessarily conclude that the remedy sought was also equitable because it would have been unavailable in a court of law. This view would, in effect, make the first part of our inquiry dispositive. We have clearly held, however, that the second part of the inquiry — the nature of the relief — is more important to the Seventh Amendment determination. See *supra,* at 565. The second part of the analysis, therefore, should not replicate the "abstruse historical" inquiry of the first part, *Ross* v. *Bernhard,* 396 U. S. 531, 538, n. 10 (1970), but requires consideration of the general types of relief provided by courts of law and equity.

197 (distinguishing backpay under Title VII from damages under Title VIII, the fair housing provision of the Civil Right Act, 42 U. S. C. §§3601-3619 (1982 ed.), which the Court characterized as "legal" for Seventh Amendment purposes). Congress made no similar pronouncement regarding the duty of fair representation. Furthermore, the Court has noted that backpay sought from an employer under Title VII would generally be restitutionary in nature, see *Curtis* v. *Loether, supra,* at 197, in contrast to the damages sought here from the Union. Thus, the remedy sought in this duty of fair representation case is clearly different from backpay sought for violations of Title VII.

*573Moreover, the fact that Title VII's backpay provision may have been modeled on a provision in the NLRA concerning remedies for unfair labor practices does not require that the backpay remedy available here be considered equitable. The Union apparently reasons that if Title VII is comparable to one labor law remedy it is comparable to all remedies available in the NLRA context. Although both the duty of fair representation and the unfair labor practice provisions of the NLRA are components of national labor policy, their purposes are not identical. Unlike the unfair labor practice provisions of the NLRA, which are concerned primarily with the public interest in effecting federal labor policy, the duty of fair representation targets "'the wrong done the individual employee.'" *Electrical Workers* v. *Foust,* 442 U. S. 42, 49, n. 12 (1979) (quoting *Vaca* v. *Sipes,* 386 U. S., at 182, n. 8) (emphasis deleted). Thus, the remedies appropriate for unfair labor practices may differ from the remedies for a breach of the duty of fair representation, given the need to vindicate different goals. Certainly, the connection between backpay under Title VII and damages under the unfair labor practice provision of the NLRA does not require us to find a parallel connection between Title VII backpay and money damages for breach of the duty of fair representation.

We hold, then, that the remedy of backpay sought in this duty of fair representation action is legal in nature. Considering both parts of the Seventh Amendment inquiry, we find that respondents are entitled to a jury trial on all issues presented in their suit.

IV

On balance, our analysis of the nature of respondents' duty of fair representation action and the remedy they seek convinces us that this action is a legal one. Although the search for an adequate 18th-century analog revealed that the claim includes both legal and equitable issues, the money damages respondents seek are the type of relief traditionally awarded by courts of law. Thus, the Seventh Amendment entitles re*574spondents to a jury trial, and we therefore affirm the judgment of the Court of Appeals.

It is so ordered.

[…]

Justice Brennan,

concurring in part and concurring in the judgment.

I agree with the Court that respondents seek a remedy that is legal in nature and that the Seventh Amendment entitles respondents to a jury trial on their duty of fair representation claims. I therefore join Parts I, II, III — B, and IV of the Court's opinion. I do not join that part of the opinion which reprises the particular historical analysis this Court has employed to

determine whether a claim is a "Sui[t] at common law" under the Seventh Amendment, *ante,* at 564, because I believe the historical test can and should be simplified.

The current test, first expounded in *Curtis* v. *Loether,* 415 U. S. 189, 194 (1974), requires a court to compare the right at issue to 18th-century English forms of action to determine whether the historically analogous right was vindicated in an action at law or in equity, and to examine whether the remedy sought is legal or equitable in nature. However, this Court, in expounding the test, has repeatedly discounted the significance of the analogous form of action for deciding where the Seventh Amendment applies. I think it is time we dispense with it altogether.1 I would decide Seventh Amendment questions on the basis of the relief sought. If the relief is legal in nature, *i. e.,* if it is the kind of relief that historically was available from courts of law, I would hold that the parties have a constitutional right to a trial by jury— unless Congress has permissibly delegated the particular dispute to a non-Article III decisionmaker and jury trials would *575frustrate Congress' purposes in enacting a particular statutory scheme.2

1 believe that our insistence that the jury trial right hinges in part on a comparison of the substantive right at issue to forms of action used in English courts 200 years ago needlessly convolutes our Seventh Amendment jurisprudence. For the past decade and a half, this Court has explained that the two parts of the historical test are not equal in weight, that the nature of the remedy is more important than the nature of the right. See *ante,* at 565; *Granfinanciera, S. A.* v. *Nordberg,* 492 U. S. 33, 42 (1989); *Tull* v. *United States,* 481 U. S. 412, 421 (1987); *Curtis* v. *Loether, supra,* at 196. Since the existence of a right to jury trial therefore turns on the nature of the remedy, absent congressional delegation to a specialized decisionmaker,3 there remains little purpose to our rattling through dusty attics of ancient writs. The time has come to borrow William of Occam's razor and sever this portion of our analysis.

*[…]

Justice Stevens,

concurring in part and concurring in the judgment.

Because I believe the Court has made this case unnecessarily difficult by exaggerating the importance of finding a precise common-law analogue to the duty of fair representation, I do not join Part III-A of its opinion. Ironically, by stressing the importance of identifying an exact analogue, the Court has diminished the utility of looking for any analogue.

[…]

As I had occasion to remark at an earlier proceeding in the same case, the relevant historical question is not whether a suit was "specifically recognized at common law," but whether "the nature of the substantive right asserted ... is analogous to common law rights" and whether the relief sought is "typical of an action at law." *Rogers* v. *Loether,* 467 F. 2d 1110, 1116-1117 (CA7 1972). Duty of fair representation suits are for the most part ordinary civil actions involving the stuff of contract and malpractice disputes. There is accordingly no ground for excluding these actions from the jury right.

In my view, the evolution of this doctrine through suits tried to juries, the useful analogy to common-law malpractice *584cases, and the well-recognized duty to scrutinize any proposed curtailment of the right to a jury trial "with the utmost

care," *ante,* at 565, provide a plainly sufficient basis for the Court's holding today. I therefore join its judgment and all of its opinion except for Part III-A.

[…]

Justice Kennedy,

with whom Justice O'Connor and Justice Scalia join, dissenting.

[…]

I disagree with the analytic innovation of the Court that identification of the trust action as a model for modern duty of fair representation actions is insufficient to decide the case. The Seventh Amendment requires us to determine whether the duty of fair representation action "is more similar to cases that were tried in courts of law than to suits tried in courts of equity." *Tull* v. *United States,* 481 U. S. 412, 417 (1987). Having inade this decision in favor of an equitable action, our inquiry should end. Because the Court disagrees with this proposition, I dissent.

[…]

10.6 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.

10.7 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.

10.8 Post Trial Motions

Is there any way to challenge the outcome of a jury trial? Read Rule 50 carefully. Judgment as a Matter of Law involves the same question as summary judgment - has the burden of production been met - but in the context of the evidence actually produced at trial. Evidence that was expected at the time of summary judgment does not always get entered in to the record at trial, and if no evidence supports the verdict a judge directed dismissal is in order.

Note the timing of Rule 50. The motion must be made in the first instance before the case is submitted to the jury. Failure to make a motion at this time means it will be impossible to renew the motion later.

As a general rule - and as always, there are exceptions - judges are reluctant to grant the first motion for judgment as a matter of law that is made before the case goes to the jury. First, the jury has sat through the trial, and generally wants to make a decision. Second, if the evidence is weak enough for a JMOV motion to be a winner, one would hope that the jury would reach the same result as the judge. This would make action by the judge unnecessary, and would remove the granting of a JMOV motion as a grounds for appeal. As a general rule, JMOV motions are made routinely in any case where there is any possible justification, and as a general rule they are denied.

What if the jury comes to the wrong result, and makes an award that is challengable because the winning party did not meet its burden of production? At this point, the Rule 50 JMOV motion is *renewed.* At this time, it is incumbent upon the judge to decide if the evidence supports the verdict.

The following case arises from a state court, and uses somewhat different language (JNOV for judgment non obstante veredicto in Latin, or judgment notwithstanding the verdict in English), but the standard applied is the same as would be applied under Rule 50.

10.9 Denman v. Spain

Denman, a Minor., Etc. *v.* Spain, Executrix

No. 42070

December 4, 1961

135 So. 2d 195

[…]

Lee, P. J.

Betty Denman, a minor, by her mother and next friend, Joyce H. Denman, sued Mrs. Phina Ross Spain, executrix of the estate of Joseph A. Ross, deceased, to recover damages for personal injuries sustained by her, allegedly resulting from the negligence of the decedent in the operation of an automobile. The issue was submitted to a jury on the evidence of the plaintiff — no evidence being- offered for the defendant — and there was a verdict and judgment for the plaintiff in the sum of $5,000. However, on motion of the defendant, a judgment *non obstante* veredicto, that is, notwithstanding the verdict, was sustained and entered. From that action, the plaintiff has appealed.

*435A like suit had been filed by the same plaintiff in the Circuit Court of the Second Judicial District of Tallahatchie County against Mack L. Denman, administrator of the estate of Mrs. Eva B. Denman, deceased; but, at the close of her evidence, the court sustained a directed verdict for the defendant. On appeal the judgment in that case, being No. 42,003, was affirmed by this Court on November 6, 1961, not yet officially reported.

The appellant contends that the evidence offered by her, together with the reasonable inferences therefrom, was sufficient to make an issue for the jury as to whether the alleged negligence of the deceased driver, Ross, proximately caused or contributed to the collision and the consequent damage; and that it was error to set aside the verdict of the jury and enter the judgment for the defendant, notwithstanding that verdict. Hence, she says that such judgment should be reversed, and that the verdict and judgment of the jury should be reinstated.

A careful scrutiny and analysis of the evidence is therefore necessary:

Sunday, March 23, 1958, was a rainy, foggy day. About six o'clock that afternoon, at dusk, Mrs. Eva B. Denman, accompanied by her granddaughter, Betty, the plaintiff, was driving her Ford car southward on U. S. Highway 49E. At that time, Joseph A. Ross, accompanied by Miss Euna Tanner and Mrs. J. L. Haining, was driving his Plymouth car northward on said highway. Just south of the Town of Sumner, the cars collided. Mrs. Denman, Miss Tanner and Ross were killed. Betty, nearly seven years of age at the time, and Mrs. Haining were injured. Neither had any recollection of what had happened at the time of the collision. Betty, lying in water on her back in a ditch on the east side of the road, cried out and was rescued by some unknown person.

Plaintiff's father, Stuart Denman, who went to the scene shortly after the collision, described the situation *436substantially as follows: Tbe Ford car was about seven yards off the paved surface on the east side in a bar pit ."heading back towards the railroad track, which is in an easterly direction." The engine and transmission were on the opposite side of the road, out of the car and about fifty yards apart. The plymouth was also on the east side, facing west, about fifteen yards north of the Ford.

No proof was offered as to skid marks, or other evidence to show the point of contact between these two vehicles. Eleven photographs of the damaged Plymouth, taken from various positions, and thirteen pictures of the damaged Ford, also taken from various positions, other than being* mute evidence of a terrible tragedy, depict no reasonable or plausible explanation as to why this collision occurred, or who was responsible for it. three other photographs, portraying the topography of this immediate area, afford no excuse whatever for such grievous human error.

Over objection by the defendant, John Barnett testified that he was driving a Dodge pickup north of highway 49E on his way to Tutwiler; that he was traveling at a speed of fifty or fifty-five miles per hour; that the Plymouth, which was in the wreck, passed him about three-fourths of a mile south of where the collision occurred, going at a speed of about seventy miles per hour; that when it passed, it got back in its lane, and neither wavered nor wobbled thereafter; that he followed and observed it for a distance of forty or fifty yards, and that it stayed in its proper lane as long as he saw it. Although another car was on the road ahead of him, he could have seen as far as the place of the accident except for the rain and fog*.

Over objection by the defendant, Hal Buckley, a Negro man, testified that he was also traveling north on 49E on his way to Tutwiler at a speed of forty to fifty miles per hour. About two hundred yards south of the *437place where the collision occurred, a light green Plymouth, which he later saw at the scene of the accident, passed him at a speed of seventy-five or eighty miles an hour. He could see its tail lights after it passed, and "he was just steady going; he wasn't doing no slowing up." He saw it until it ran into the other car. On cross-examination, he said that, after this car passed him, it got hack on its side of the road, drove straight, and he did not notice that it ever went hack over the center. Also on cross-examination, in an effort at impeachment, a part of the transcript in the other trial, containing this question and answer, was read to him as follows: "What do you estimate the speed of that car was when it passed you — the one that was going the same• direction that you were?", and the answer was: "Well, I don't have no idea." When he was asked why he made this difference in his testimony, he hesitated and replied, "I didn't give no sorta idea how fast he was going?" He then admitted that, when the car passed him, it got hack on its side and drove straight ahead, and that he could see the accident, but he could not tell anything about it or on which side of the road it happened. He also did not notice the other car, which came from the other direction.

Since Barnett did not see the car any more after it had gone forty or fifty yards beyond him, and his knowledge of speed was based on what he saw about three-fourths of a mile south of the place where the collision occurred, this evidence was inadmissible under the cases of Bennett v. Hardwell, 214 Miss. 390, 59 So. 2d 82 and Barrett v. Shirley, 231 Miss. 364, 95 So. 2d 471. On the contrary, since Buckley testified the speed of this car, when it passed him, was seventy-five to eighty miles an hour and that it did not slow down in the remaining distance of two hundred yards before the collision, such evidence was competent and admissible under the Bennett and Barrett cases, supra. The at*438tempted impeachment went to its credibility and not its admissibility.

From this evidence, the plaintiff reasons that the jury could, and did, find that the Ross car was being* operated, under inclement weather conditions, at an unlawful and negligent rate of speed, and that, if Ross had had his car under adequate and proper control, in all probability the collision could have been avoided. She voices the opinion that the physical facts, including the pictures of the wrecked vehicles, indicated that the Ford car was probably across the highway at an angle of perhaps forty-five degrees at the time of the collision.

But the testimony of Buckley showed only that the Plymouth was being operated at an excessive and negligent rate of speed. It otherwise showed that the car was in its proper lane. He did not notice it go over the center at any time, but it was driven straight down the road. No eye-witness claimed to have seen what happened. There was no evidence to indicate the place in the road where the vehicles came in contact with each other. There was no showing as to the speed of the Ford, whether fast or slow; or as to whether it was traveling on the right or wrong side of the road; or as to whether it slid or was suddenly driven to the wrong side of the road into the path of the Plymouth. The cars were so badly damaged that the pictures afford no reasonable explanation as to what person or persons were legally responsible for their condition. In other words, just how and why this grievous tragedy occurred is completely shrouded in mystery.

The burden was on the plaintiff to prove, by preponderance of the evidence, not only that the operator of the Plymouth was guilty of negligence but also that such negligence proximately caused or contributed to the collision and consequent damage. By the use of metaphysical learning, speculation and conjecture, one may reach several possible conclusions as to how *439the accident occurred. However such conclusions could only he classed as possibilities; and this Court has many times held that verdicts cannot be based on possibilities. At all events, there is no sound or reasonable basis upon which a jury or this Court can say that the plaintiff met that burden.

The judgment must be affirmed.

Affirmed.

Kyle, Arrington, Ethridge and *Gillespie, JJ.,* concur.

11 Claim and Issue Preclusion - Res Judicata

11.1 Claim Preclusion Generally

At its most basic level, claim preclusion makes perfect sense: having litigated once to a fair and final resolution, a party should not be allowed to bring the same case again in hopes of a better result. Basic fairness and efficient administration of a judicial system argue for finality of result, which necessarily involves not allowing the parties to start with the same suit all over again.

As always, it's not quite as simple as all that. What exactly do we mean by the 'same case' and what might is required for us to conclude that the case was litigated to a fair and final resolution?

Courts require three conditions to be met before claim preclusion applies. First, the claim must be the same as what was litigated in the prior case. That requires that we define what we mean by the claim – are we looking only at the same cause of action or, in the old days, writ, or are we looking at something more akin to an occurrence or transaction test? Second, the first case must have been resolved by a final, valid judgment 'on the merits.' What exactly do we mean by that? Finally, in the area of claim preclusion, the parties must be sufficiently the same parties as those who litigated the first case.

Note that the terms used in this area have shifted. In the old days, the term *res judicata* was used both to cover claim preclusion and preclusion generally. The term bar was used to describe claim preclusion when the plaintiff had won in the original action, and the term merger to describe claim preclusion when the plaintiff had prevailed before. What we now call issue preclusion was once called collateral estoppel.

11.2 Reeder v. Succession of Palmer

O. William REEDER v. The SUCCESSION OF Michael B. PALMER, Lynn Paul Martin, Individually and d/b/a LPM Enterprises and Bank of LaPlace.
Nos. 92-C-2965, 92-C-3002.
Supreme Court of Louisiana.
Sept. 3, 1993.
[…]

DENNIS, Justice.*

The question before us is whether this state court action is barred by res judicata because of a prior federal court judgment in the defendants' favor in a suit based on the same factual transaction or wrong as the *1270instant ease. Reeder sued for damages in federal court under federal securities statutes as the result of an alleged Ponzi or pyramid scheme perpetrated by Martin, Palmer, and others, and included a pendent state securities law claim *(Reeder I)*. The federal district court dismissed Reeder's case with prejudice for failure to state a claim on the ground that post-dated checks, issued to Reeder in return for his investments in a bogus air travel business, did not qualify as "securities" or "investment contracts" under federal or Louisiana securities law. *Reeder v. Succession of Palmer,* 736 F.Supp. 128 (E.D.La.1990). The federal court of appeal affirmed without opinion. *Reeder v. Succession of Palmer,* 917 F.2d 560 (5th Cir.1990).

Reeder then sued Martin and Palmer in a virtually identical action in state court, with the exceptions that his petition did not rely on federal statutes and included not only state securities claims, but also state contract, tort and unfair trade practices claims. *(Reeder* II). The state trial court sustained the defendants' exceptions of res judicata and no cause of action, and dismissed Reed-er's case with prejudice. The state court of appeal affirmed in part and reversed in part, holding that the

federal court's dismissal of the state securities -law claim operated as an adjudication on the merits for res judicata purposes, that the state tort claims had prescribed, that the state unfair trade practices claim was perempted, but that, although Reeder failed to state a cause of action in contract, his state law claim on this ground was not barred by res judicata and, therefore, he would be allowed an opportunity to amend his petition to remedy this deficiency. *Reeder v. Succession of Palmer,* 604 So.2d 1070 (La.App. 5th Cir.1992).

We reverse the court of appeal judgment in part and reinstate the trial court's judgment dismissing Reeder's state case with prejudice. The federal court had pendent jurisdiction over all of Reeder's state law claims because they arose out of the same transaction or wrong as those presented in the federal proceeding. Therefore, Reeder was obligated to file in his first suit all the legal theories he wished to assert. The res judicata effect of the federal court judgment precludes the omitted state law claims because it is not clear that the federal district court would have declined to exercise pendent jurisdiction over them.

1. BACKGROUND

Dr. O. William Reeder filed a complaint in federal court alleging that Lynn Paul Martin, the late Michael B. Palmer, and others had defrauded him in violation of federal and Louisiana securities laws by operating an alleged Ponzi or pyramid scheme, (hereinafter *Reeder* I). Reeder's complaint specifically requested that the federal district court exercise pendent jurisdiction over plaintiffs factually-related state securities law claim filed in the federal proceeding.

According to Reeder's complaint, Palmer initially persuaded him in October of 1986 to invest in Martin's "travel club" and thereafter acted as intermediary between him and Martin. Palmer and Martin allegedly solicited funds from individuals to purchase blocks of advance airline tickets for groups taking gambling trips to Las Vegas casinos, for which the casinos were to reimburse Martin and pay a commission. Martin purportedly promised to return all of the funds invested plus interest at the rate of 6% per month on the total invested. In reality, the "travel club" never engaged in legitimate business, and when the club repaid capital contributions and so-called dividends, the money was covertly taken from capital invested by other victims of the scheme. Reeder alleged that with each investment he received two post-dated checks drawn on Martin's account with the Bank of LaPlaee; one check represented a return of principal, and the other represented a fixed interest payment. Reeder's complaint stated that over the course of one and one-half years, he invested approximately $245,000 in Martin's "travel club" and received only $68,000 in return, for a net loss of $185,000.

In April of 1988, Martin turned himself in to federal authorities and confessed to having operated a Ponzi scheme in violation of federal securities laws. Martin was indicted and pleaded guilty to federal criminal charges in connection with that scheme. See *United States v. Lynn Paul Martin,* No. 89-390 "C"(2) (E.D.La.). Because Palmer commit*1271ted suicide in May of 1988, his succession was named as a defendant in *Reeder I.*

In *Reeder I,* the federal district court concluded that no "securities" as defined under the federal or state securities laws were involved in Martin's "travel club" scheme and dismissed Reeder's case with prejudice. *Reeder v. Succession of Palmer,* 736 F.Supp. 128 (E.D.La.1990). The federal appellate court affirmed. *Reeder v. Succession of Palmer,* 917 F.2d 560 (5th Cir.1990). Reeder then activated a previously-filed state court suit against Martin and Palmer based on a petition virtually identical to his federal court action *(Reeder* II). Reeder sought damages based on factual allegations substantially the same as those in his federal complaint but grounded his suit in state securities law and other state law theories, rather than on federal statutes. The state trial court

sustained the defendants' exceptions of res judicata and no cause of action, and dismissed *Reeder II* with prejudice. The state court of appeal agreed that res judicata barred the state securities law claim, disposed of other claims on different grounds, but held that the contract claim was not barred by the federal court judgment. *Reeder v. Succession of Palmer,* 604 So.2d 1070 (La.App. 5th Cir.1990). We granted certiorari to determine whether the court of appeal correctly applied the principles of res judicata.

2. LAW AND ANALYSIS

When a state court is required to determine the preclusive effects of a judgment rendered by a federal court exercising federal question jurisdiction, it is the federal law of res judicata that must be applied. *McNeal v. Paine, Webber, Jackson & Curtis,* 249 Ga. 662, 293 S.E.2d 331 (1982); *Anderson v. Phoenix Inv. Counsel of Boston,* 387 Mass. 444, 440 N.E.2d 1164 (1982); *Rennie v. Freeway Transport,* 294 Or. 319, 656 P.2d 919 (1982); *Jeanes v. Henderson,* 688 S.W.2d 100 (Tex.1985), reh'g of cause overruled (May 1, 1985); *Commercial Box & Lumber Co. v. Uniroyal, Inc.,* 623 F.2d 371, 373 (5th Cir.1980); *Aerojet-General Corp. v. Askew,* 511 F.2d 710 (5th Cir.), appeal dismissed and cert. denied, 423 U.S. 908, 96 S.Ct. 210, 46 L.Ed.2d 137 (1975); Restatement (Second) of Judgments § 87 (1982); C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure, Jurisdiction § 4468 (1981). Cf. *Pilie & Pilie v. Metz,* 547 So.2d 1305 (La.1989). Federal res judicata principles have been heavily influenced by the great advances in the Restatement Second of Judgments. Federal courts and commentators often cite and rarely depart from the Restatement view. 18 Wright, Miller & Cooper, Federal Practice and Procedure § 4401 (1981).

Under federal precepts, "claim preclusion" or "true res judicata" treats a judgment, once rendered, as the full measure of relief to be accorded between the same parties on the same "claim" or "cause of action." When the plaintiff obtains a judgment in his favor, his claim "merges" in the judgment; he may seek no further relief on that claim in a separate action. Conversely, when a judgment is rendered for a defendant, the plaintiffs claim is extinguished; the judgment then acts as a "bar." Under these rules of claim preclusion, the effect of a judgment extends to the litigation of all issues relevant to the same claim between the same parties, whether or not raised at trial. The aim of claim preclusion is thus to avoid multiple suits on identical entitlements or obligations between the same parties, accompanied, as they would be, by the redetermination of identical issues of duty and breach. *Kaspar Wire Works, Inc. v. Leco Engineering & Mach.,* 575 F.2d 530 (5th Cir.1978) (Rubin, J., citing authorities). See Restatement (Second) of Judgments §§ 18-20 (1982).

Claim preclusion will therefore apply to bar a subsequent action on res judicata principles where parties or their privies have previously litigated the same claim to a valid final judgment. In most cases, the key question to be answered in adjudging the propriety of a claim preclusion defense is whether in fact the claim in the second action is "the same as," or "identical to," one upon which the parties have previously proceeded to judgment. The authorities do not provide a uniform definition of the terms "claim" or "cause of action" in connection with the application of res judicata. The clear trend, however, in the most recent decisions, in harmony with such procedural concepts as the *1272"transaction or occurrence" test for compulsory counterclaims as stated in Federal Rules of Civil Procedure, Rule 13(a) and the "common nucleus of operative fact" standard for pendent federal jurisdiction of *United Mine Workers v. Gibbs,* 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966), has been towards the adoption of § 24 of the Restatement 2d, of Judgments. That Section sets forth a "transactional analysis" as to what constitutes a "claim," the extinguishment of which prohibits subsequent litigation with respect to the transaction(s) from which it arose. A majority of the federal circuit courts, as well as the Claims Court, have thus far expressly adopted the Restatement's transactional approach. Annotation, Proper Test to Determine Identity of Claims for Purposes of Claim

Preclusion by Res Judicata Under Federal Law, 82 A.L.R.Fed. 829, 837 (1987); e.g., *Southmark Properties v. Charles House Corp.,* 742 F.2d 862 (5th Cir.1984). See *Pilie & Pilie v. Metz,* 547 So.2d 1305, 1310 (La.1989) (citing authorities).

Section 24 of the Restatement (Second) of Judgments (1982) adopts a "transactional" view of claim for purposes of the doctrines of merger and bar, as follows:

> § 24. Dimensions of "Claim" for Purposes of Merger or
>
> Bar — General Rule Concerning "Splitting"
>
> (1) When a valid and final judgment rendered in an action extinguishes the plaintiffs claim pursuant to the rules of merger or bar (see §§ 18, 19), the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction,- or series of connected transactions, out of which the action arose.
>
> (2) What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

Illustrations of how the rule of § 24 applies to various situations are set forth in Restatement (Second) of Judgments § 25 (1982) as follows:

> § 25. Exemplifications of General Rule Concerning Splitting
>
> The rule of § 24 applies to extinguish a claim by the plaintiff against the defendant even though the plaintiff is prepared in the second action
>
> (1) To present evidence or grounds or theories of the case not presented in the first action, or
>
> (2) To seek remedies or forms of relief not demanded in the first action.

Comment e of § 25 of the Restatement (Second) of Judgments (1982) explains the effects of the rules of §§ 24 and 25 in a case in which a given claim may be supported by theories or grounds arising from both state and federal law as follows:

> A given claim may find support in theories or grounds arising from both state and federal law. When the plaintiff brings an action on the claim in a court, either state or federal, in which there is no jurisdictional obstacle to his advancing both theories or grounds, but he presents only one of them, and judgment is entered with respect to it, he may not maintain a second action in which he tenders the other theory or ground. If however, the court in the first action would clearly not have had jurisdiction to entertain the omitted theory or ground (or, having jurisdiction, would clearly have declined to exercise it as a matter of discretion), then a second action in a competent court presenting the omitted theory or ground should be held not precluded. * * *

See, e.g., *Texas Employers' Ins. Ass'n v. Jackson,* 862 F.2d 491, 501 (5th Cir.1988); *Langston v. Insurance Co. of North America,* 827 F.2d 1044, 1046-47 (5th Cir.1987); *Ocean Drilling & Explor. Co. v. Mont Boat Rental Serv., Inc.,* 799 F.2d 213, 216, 217 (5th Cir.1986) applying §§ 24 and 25 of Restatement (Second) of Judgments (1982).

Succinctly stated, if a set of facts gives rise to a claim based on both state and federal law, and the plaintiff brings the action in a federal court which had "pendent" jurisdiction to hear the state cause of action, *1273but the plaintiff fails or refuses to assert his state law claim, res judicata prevents him from subsequently asserting the state claim in a state court action, unless the federal court clearly would not have had jurisdiction to entertain the omitted state claim, or, having jurisdiction, clearly would have declined to exercise it as a matter of discretion. Restatement (Second) of Judgments §§ 24, 25 and 25, Comment e. E.g., *Woods Exploration & Producing Co. v. Aluminum Co. of America,* 438 F.2d 1286, 1315 (5th Cir.1971); *Anderson v. Phoenix Inv. Counsel of Boston,* 387 Mass. 444, 440 N.E.2d 1164, 1168 (1982). In cases of doubt, therefore, it is appropriate for the rules of res judicata to compel the plaintiff to bring forward his state theories in the federal action, in order to make it possible to resolve the entire controversy in a single lawsuit. Restatement (Second) of Judgments § 25, Reporter's Note at 228; *Woods Exploration & Producing Co. v. Aluminum Co. of America,* 438 F.2d 1286, 1315 (5th Cir.1971). Applying these precepts to the case at hand, we conclude that each of the state law claims asserted by the plaintiff in *Reeder II* is precluded by the res judicata bar of the federal court judgment dismissing *Reeder I* with prejudice.

First, the present state law claims arise from the same set of facts or transaction as the federal and state securities law claims which the parties litigated to a valid final judgment on the merits in the federal court. The text and substance of the Ponzi scheme transaction or series of connected transactions alleged in the two actions are virtually the same, both involving the alleged intentional and/or negligent misrepresentations by Martin, Palmer and others to Reed-er and other investors disguising the true nature and operations of the alleged travel club pyramid scheme and the preeariousness of their investments.

Second, the federal district court had pendent jurisdiction to hear the state law claims which Reeder chose not to assert in that forum. Pendent jurisdiction, in the sense of judicial power, exists when there is a federal claim of "substance sufficient to confer subject matter jurisdiction on the court", and the relationship between that claim and the state claim is such that they "derive from a common nucleus of operative fact", so that "if, considered without regard to their federal or state character, a plaintiff[ ] ... would ordinarily be expected to try them all in one judicial proceeding...." *United Mine Workers v. Gibbs,* 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966).

The requirement of substantiality does not refer to the value of the interests that are at stake but to whether there is any foundation of plausibility to the claim. *Duke Power v. Carolina Environmental Study Group, Ind.,* 438 U.S. 59, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978); *Garvin v. Rosenau,* 455 F.2d 233 (6th Cir.1972). If the plaintiff raises a substantial federal question, the court has jurisdiction of the case and its decision must go to the merits of the case. A loose factual connection between the claims has been held enough to satisfy the requirements that they arise from a common nucleus of operative fact and that they be such that a plaintiff ordinarily would be expected to try them all in one judicial proceeding. *Tower v. Moss,* 625 F.2d 1161 (5th Cir.1980); *Frye v. Pioneer Logging Machinery, Inc.,* 555 F.Supp. 730 (D.C.S.C.1983), citing Wright, Miller & Cooper, Federal Practice and Procedure. See id., § 3567.1 (1984). Therefore, it is clear that under these principles the federal court in *Reeder I* had pendent jurisdiction, in the sense of judicial power, over Reeder's state law claims arising from the same transaction as his

federal question claim. In fact, Reeder, by his own federal complaint, invoked the *Reeder I* court's exercise of pendent jurisdiction over his state securities law claim.

Third, we cannot say that the federal district court in Reeder I "would clearly have declined to exercise" its pendent jurisdiction over the omitted state law tort, contract, unfair trade practice claims, and other state claims if Reeder had advanced them in that court along -with his state law securities act claim. Pendent jurisdiction is a doctrine of discretion which allows the trial court a wide latitude of choice in deciding whether to exercise that judicial power. See *United Mine Workers v. Gibbs,* 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966). A federal *1274court must consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity in order to decide whether to exercise jurisdiction over a ease brought in that court involving pendent state law claims. When the balance of these factors indicates that a case properly belongs in state court, the federal court should decline the exercise of jurisdiction by dismissing the case without prejudice. The doctrine of pendent jurisdiction thus is a doctrine of flexibility, designed to allow courts to deal with cases involving pendent claims in the manner that most sensibly accommodates a range of concerns and values. *Carnegie-Mellon Univ. v. Cohill,* 484 U.S. 343, 108 S.Ct. 614, 98 L.Ed.2d 720 (1988); *Rosado v. Wyman,* 397 U.S. 397, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970); *United Mine Workers v. Gibbs, supra.*

In *Gibbs,* the Court stated that "if the federal claims are dismissed before trial ... the state claims should be dismissed as well." 383 U.S. at 726, 86 S.Ct. at 1139. More recently, however, the Court has made clear that this statement does not establish a mandatory rule to be applied inflexibly in all cases. Jurisdiction is thus not automatically lost because the court ultimately concludes that the federal claim is without merit. See *Carnegie-Mellon Univ. v. Cohill,* 484 U.S. at 350, n. 7, 108 S.Ct. at 619 n. 7; *Rosado v. Wyman,* 397 U.S. at 403-405, 90 S.Ct. at 1213-1214. In fact, a countervailing policy in favor of hearing pendent state claims was expressed by the Court in *Hagans v. Lavine,* 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974): "[I]t is evident from Gibbs that pendent state law claims are not always, or even almost always, to be dismissed and not adjudicated. On the contrary, given advantages of economy and convenience and no unfairness to litigants, Gibbs contemplates adjudication of these claims." Id. at 545-546, 94 S.Ct. at 1383-1384.

The principles and standards of pendent jurisdiction support and mesh with the principles of res judicata. The plaintiff is required to bring forward his state theories in the federal action in order to make it possible to resolve the entire controversy in a single lawsuit. Restatement (Second) of Judgments § 25, Reporter's Note at 228 (1982); Woods *Exploration & Producing Co. v. Aluminum Co. of America,* 438 F.2d at 1315. The federal district court, exercising its discretion, may decline jurisdiction of some or all of the plaintiffs state law claims if the court finds that the objectives of judicial economy, convenience and fairness to litigants, as well as other factors, will be served better thereby. *United Mine Workers v. Gibbs,* 383 U.S. at 726, 86 S.Ct. at 1139. To insure that this decision will be made fairly and impartially by the court, rather than by a party seeking the tactical advantage of splitting claims, however, the claim preclusion rules further provide that, unless it is clear that the federal court would have declined as' a matter of discretion to exercise its pendent jurisdiction over state law claims omitted by a party, a subsequent state action on those claims is barred. Restatement (Second) of Judgments § 25, Comment e; *Woods Exploration and Producing Co. v. Aluminum Co. of America, supra; Anderson v. Phoenix Inv. Counsel of Boston,* 440 N.E.2d at 1169.

In view of the breadth of the federal trial courts' discretion and the necessary indeterminacy of the discretionary standards, in order for a subsequent court to say that a federal district court clearly would have declined its jurisdiction of a claim not filed,

the subsequent court must find that the previous case was an exceptional one which clearly and unmistakably required declination. The rules do not countenance a plaintiffs action in failing to plead a theory in a federal court with the hope of later litigating the theory in a state court as a second string to his bow. Therefore, the action on such omitted claims is barred if it is merely possible or probable that the federal court would have declined to exercise its pendent jurisdiction. Restatement (Second) of Judgments § 25, Comment e. See also *Anderson v. Phoenix Inv. Counsel of Boston,* 387 Mass. 444, 440 N.E.2d 1164, 1169 (1982).

Reeder I was not an exceptional case in which the federal court clearly or unmistakably would have declined to exercise its pendent jurisdiction over the related state law claims, had Reeder included them in his *1275complaint. In fact, the federal court did not decline to exercise its pendent jurisdiction over the only state law claim that it was asked to adjudicate, *viz.,* Reeder's claim for damages based on state securities law arising out of the same transaction or series of connected transactions as the state tort, contract, and unfair trade practices claims. Because the federal district court had *exclusive* jurisdiction of one of the federal securities law claims, 15 U.S.C. § 78aa, the federal court was the only forum in which it was possible to resolve the entire controversy in a single lawsuit. In these circumstances, the assertion of pendent jurisdiction is especially compelling. Cf., *Aldinger v. Howard,* 427 U.S. 1, 18, 96 S.Ct. 2413, 2422, 49 L.Ed.2d 276 (1976); *Boudreaux v. Puckett,* 611 F.2d 1028, 1031 (5th Cir.1978) (discussing pendent party jurisdiction where the federal court maintains exclusive jurisdiction over the underlying federal claim).

In a very similar case arising out of the same Ponzi scheme, the same federal district court did not decline pendent jurisdiction over state securities, fraud, and negligence law claims even after dismissing the federal securities law claim with prejudice for failure to state a claim. In fact, the federal district court considered and rendered final judgment on the merits on each of the pendent state law claims, ultimately dismissing each claim with prejudice. *Guidry v. Bank of LaPlace,* 740 F.Supp. 1208 (E.D.La.1990). On appeal, the Guidry court of appeal affirmed as to the dismissal of some of the state claims with prejudice, but required that some be dismissed without prejudice. Moreover, that court did not say that the federal district court clearly should have declined to exercise jurisdiction even as to the few pendent state law claims that were dismissed without prejudice. *Guidry v. Bank of LaPlace,* 954 F.2d 278 (5th Cir.1992). Therefore, in the present case, although it may have been *possible* for the district court to decline pendent jurisdiction of the omitted remaining state law claims, we cannot say that it was even probable, much less clear or unmistakable, that the federal court would have done so.

Our conclusion in this regard is bolstered by opinions of other courts which have held that, by the operation of federal res judicata principles, federal judgments under federal securities acts barred subsequent suit between the same parties deriving from a corn-mon nucleus of operative facts presenting state claims omitted from the earlier federal proceeding. See *McNeal v. Paine, Webber, Jackson & Curtis, Inc.,* 249 Ga. 662, 293 S.E.2d 331 (1982) (federal judgment under Securities Exchange Act of 1934 barred negligence, breach of fiduciary duty, and fraud claims in state court); *Anderson v. Phoenix Investment Counsel of Boston, Inc.,* 387 Mass. 444, 440 N.E.2d 1164 (1982) (federal judgment under Investment Advisers Act of 1940 barred unfair and deceptive trade practices claim in state court); *Rennie v. Freeway Transport,* 294 Or. 319, 656 P.2d 919 (1982) (federal judgment under the Securities Exchange Act of 1934 barred fraud claim in state court); *Jeanes v. Henderson,* 688 S.W.2d 100 (Tex.), reh'g of cause overruled (May 1, 1985) (federal judgment under Securities Exchange Act of 1934 barred declaratory judgment action in state court). See also *Browning Debenture Holders Comm. v. DASA Corp.,* 560 F.2d 1078 (2d Cir.1977) (prior final judgment

based on federal securities laws barred litigation of pendent claims, even if the prior judgment did not explicitly rule on state law breach of fiduciary duty claims). In each of these cases, the state court could not find that it was clear, unmistakable or highly probable that the federal district court would have declined to exercise pendent jurisdiction over the factually-related state law claims. Thus, in each of the respective cases, federal res judicata barred the state claims later presented in state court.

DECREE

For these reasons, the judgment of the court of appeal affirming the trial court judgment sustaining the exception of res judicata as to the state securities claim is affirmed. The judgment of the court of appeal reversing the balance of the trial court's judgment is vacated. The trial court's judgment dismissing *Reeder II,* in its entirety, with prejudice is therefore reinstated.

AFFIRMED IN PART; REVERSED IN PART.

*

WATSON, J. not on panel. Rule IV, Part 2, § 3.

11.3 Jones v. Morris Plan Bank

[…]

Gregory, J.,

delivered the opinion of the court.

William B. Jones instituted an action for damages against the Morris Plan Bank of Portsmouth for the conversion of his automobile. The parties will be designated here as they were in the trial court.

After the plaintiff had introduced all of his evidence and before the defendant had introduced any evidence on its behalf, the latter's counsel moved to strike the evidence of the plaintiff and the court sustained the motion. A verdict for the defendant resulted.

The facts are that the plaintiff purchased from J. A. Parker, a dealer in automobiles, a Plymouth sedan, agreeing to pay therefor $595. He paid a part of the purchase price by the delivery of a used car to Parker of the agreed value of $245 and after crediting that amount on the purchase price and adding a finance charge of $78.40, there remained an unpaid balance due the dealer of $428. This latter *288amount was payable in 12 monthly installments of $35.70 each and evidenced by one note in the principal sum of $428.40. The note contained this provision: "The whole amount of this note (less any payments made hereon) becomes immediately due and payable in the event of nonpayment at maturity of any installment thereof." The note was secured by the usual conditional sales contract used in like transactions, in which it was agreed that the title to the car would be retained by the dealer until the entire purchase price was paid in full. One of the provisions in the contract reads thus: "Said note or this contract may be negotiated or assigned or the payment thereof renewed or extended without passing title of said goods to purchaser." Under this provision the contract was assigned to the defendant on the same day it was executed and the note was indorsed by Parker and delivered to the defendant at the same time.

Installment payments due on the note for May and June were not made when payable and for them an action was instituted in the Civil and Police Court of the city of Suffolk. No appearance was made by the defendant (Jones) in that action and

judgment was obtained against him for the two payments. Execution issued upon the judgment and it was satisfied while in the hands of the sergeant of said city, by Jones, the plaintiff here, paying the full amount of the execution to the said sergeant.

Later the defendant instituted another action against Jones in the same court for the July installment which had become due and was unpaid, and to that action Jones filed a plea of *res adjudicata,* whereupon the defendant here (Morris Plan Bank of Portsmouth) took a non-suit.

On September 7, 1935, after the plaintiff had parked the automobile in the street in front of his home and had the key in his possession, the defendant, in the night time, through its agent, took possession of the automobile without the consent of the plaintiff and later sold it and applied the proceeds upon the note.

*289Afterwards, the plaintiff instituted the present action for conversion to recover damages for the loss of the automobile. His action in the court below was founded upon the theory that when the May and June installments became due and were unpaid, then under the acceleration clause in the note, the entire balance due thereon matured and at once became due and the defendant having elected to sue him for only two installments instead of the entire amount of the note, and having obtained a judgment for the two installments and satisfaction of the execution issued thereon, it waived its right to collect the balance. He also contends that the note was satisfied in the manner narrated and that the conditional sales contract, the sole purpose of which was to secure the payment of the note, served its purpose and ceased to exist, and, therefore, the title to the automobile was no longer retained, but upon the satisfaction of the note, passed to the plaintiff and was his property when the agent of the defendant removed it and converted it to its own use.

The position of the defendant is that in an action for conversion it is essential that the plaintiff establish his ownership of the property at the time of the conversion. It asserts that the title to the automobile, which was the subject of the alleged conversion, was not vested in the plaintiff at the time of the action, nor since, because the condition in the contract was that the title should be retained by the seller (whose rights were assigned to the defendant) until the entire purchase price was paid, and that the purchase price had never been paid, and, therefore, the plaintiff has never had title to the automobile and could not maintain the action of conversion.

The defendant also contends that the note and conditional sales contract were divisible; that successive actions could be brought upon the installments as they matured, and that it was not bound, at the risk of waiving its right to claim the balance, to sue for all installments in one action.

The defendant does not deny that the acceleration clause *290matured all installments upon the default in the payment of the May and June payments.

This court has definitely recognized and upheld a provision in a note accelerating its maturity on non-payment of interest or installments. *Nickels* v. *People's Building, Loan & Saving Association,* 93 Va. 380, 382, 25 S. E. 8; *Fant* v. *Thomas,* 131 Va. 38, 108 S. E. 847, 19 A. L. R. 280; *Country Club* v. *Wilkins,* 166 Va. 325, 186 S. E. 23, 24.

We decide that under the unconditional acceleration provision in the note involved here and in the absence of the usual optional provision reserved to the holder, the entire amount due upon the note became due and payable when default was made in paying an installment. Therefore, when the action before the Civil and Police Justice of Suffolk was instituted, all the installments were due and payable.

Was it essential that the defendant here institute an action for all of the installments then due, or could it institute its action for only two of the installments and later institute another action for other installments? The answer to that question depends upon the nature of the transaction. If a transaction is represented by one single and indivisible contract and the breach gives rise to one single cause of action, it cannot be split into distinct parts and separate actions maintained for each.

On the other hand if the contract is divisible, giving rise to more than one cause of action each may be proceeded upon separately.

Was the contract here single and indivisible or was it divisible? Our answer is that the note and conditional sales contract constituted one single contract. The sole purpose of the conditional sales contract was to retain the title in the seller until the note was paid. When that condition was performed, the contract ended.

One of the principal tests in determining whether a demand is single and entire, or whether it is several, so as to give rise to more than one cause of action, is the identity of *291facts necessary to maintain the action. If the same evidence will support both actions there is but one cause of action.

In the case at bar, all of the installments were due. The evidence essential to support the action on the two installments for which the action was brought would be the identical evidence necessary to maintain an action upon all of the installments. All installments having matured at the time the action was begun, under well settled principles, those not embraced in that action are now barred.

The well established rule forbidding the splitting of causes of action is clearly stated in 1 Am. Jur., "Actions," §96. It is there said: "One may bring separate suits on separate causes of action even if joinder of the separate causes in one action is permissible, subject, however, to the power of the court to order consolidation. On the other hand, one who has a claim against another may take a part in the satisfaction of the whole, or maintain an action for a part only, of the claim, although there is some authority to the effect that a part of a demand cannot be waived for the purpose of giving an inferior court jurisdiction. ' But after having brought suit for a part of a claim, the plaintiff is barred from bringing another suit for another part. The law does not permit the owner of a single or entire cause of action or an entire or indivisible demand, without the consent of the person against whom the cause or demand exists to divide or split that cause or demand so as to make it the subject of several actions. The whole cause must be determined in one action. If suit is brought for a part of a claim, a judgment obtained in that action precludes the plaintiff from bringing a second action for the residue of the claim, notwithstanding the second form of action is not identical with the first, or different grounds for relief are set forth in the second suit. This principle not only embraces what was actually determined, but also extends to every other matter which the parties might have litigated in the case. The rule is founded upon the plainest and most substantial justice, namely, that litigation should have an *292end and that no person should be unnecessarily,harassed with a multiplicity of suits."

In the same work, under the same title, § 107, we find the following: "A contract to pay money in installments is divisible in its nature. Hence, each default in the payment of an installment may be the subject of an independent action provided it is brought before the next instalment becomes due, generally speaking, however, a recovery for one installment will bar an action for the recovery of other installments then due. In other words, each action should include every installment due at the time it is commenced, unless a suit is, at the time, pending for the recovery thereof, or other special circumstances exist."

In I Corpus Juris Secundum, *"Actions,"* § 102, page 1308, it is said: "The object of the rule against splitting causes of action is to prevent a multiplicity of suits. The law does not favor such a multiplicity; instead it favors any action that will prevent other actions involving the same transaction. The rule exists mainly for the protection of defendant, is intended to suppress serious grievances, and is applied to prevent vexatious litigation and to avoid the costs and expenses incident to numerous suits on the same cause of action. It is based on the maxims, *Interest reipublicae ut sit finis litium* (It concerns the commonwealth that there be a limit to litigation), and *Nemo debet bis vexari pro una et eadem causa* (No one ought to be twice vexed for one and the same cause)."

Again in the same work and volume at page 1309 the nature of the rule is said to be: "The rule against splitting causes of action is based on principles of public policy. It is a salutary principle. It is a rule of justice, not to be classed among technicalities, and is not altogether a rule of original legal right, but is rather an equitable interposition of the courts to prevent a multiplicity of suits through reasons of public policy. As a defense it is not an estoppel, but a bar."

See also, *Kennedy* v. *New York,* 196 N. Y. 19, 89 N. E. 360, 25 L. R. A. (N. S.) 847; *Matheny* v. *Preston Hotel* *293*Co.,* 140 Tenn. 41, 203 S. E. 327; *Stroud* v. *Conine,* 114 Ark. 304, 169 S. W. 959.

The general rule established in Virginia is the same as that prevailing in the majority of jurisdictions. See Digest of Virginia and West Virginia Reports, vol. 1, page 79; *Hite* v. *Long, 6* Rand. 457, 18 Am. Dec. 719; *Huff* v. *Broyles,* 26 *Gratt.* (67 Va.) 283, 285; *St. Lawrence Boom & Manufacturing Co.* v. *Price,* 49 W. Va. 432, 38 S. E. 526; *Hamilton* v. *Goodridge,* 164 Va. 123, 178 S. E. 874.

In *Hancock* v. *White Hall Tobacco Warehouse Co.,* 102 Va. 239, 46 S. E. 288, it was held that "A demand arising from an entire contract cannot be divided and made the subject of several suits; and if several suits are brought for a breach of such a contract, a judgment upon the merits in either will bar a recovery in the others."

Our conclusion is that the court below erroneously struck the evidence of the plaintiff, because when the defendant instituted its action for only two of the installments (when all of the others were due), obtained a judgment on them and procured satisfaction of the execution issued thereon, it constituted a complete bar to any action for the other installments; therefore, the appellant is not allowed to set up, in defense of the present action for the conversion of the automobile, the fact that other installments have not been paid though they were due when the first action was instituted. At the time the defendant lost its right to institute any action for the remaining installments, the title to the automobile passed to the plaintiff. He was the owner at the time the agent of the defendant took possession of it and exposed it to sale.

It follows that the judgment of the court below will be reversed, and the case will be remanded for the sole purpose of determining the *quantum* of damages.

Reversed and remanded.

11.4 Mitchell v. Federal Intermediate Credit Bank

13402

MITCHELL v. FEDERAL INTERMEDIATE CREDIT BANK OF COLUMBIA *ET AL.*

The opinion of the Court was delivered by

Mr. Justice •StabrEr.

This action was commenced by the plaintiff, a citizen and ■farmer of Beaufort County, in October, 1926, for an accounting between him and the defendants, Federal Intermediate Credit Bank of Columbia, hereinafter referred to as the bank, the South Carolina Agricultural Credit Company, hereinafter referred to as the credit company, and W. E. Richardson, for the proceeds of a crop of potatoes ■*grown* and shipped by him under an alleged agreement with the defendants, and for recovery of any balance due him, after the payment of an indebtedness evidenced by two *460outstanding notes. The plaintiff alleged that the defendant Richardson, acting for and in behalf of the bank, represented to him that, in order to obtain loans from the bank at low rates of interest, it was necessary to discount them through the credit company, and "that all produce of the borrower should be sold through the Beaufort Truck Growers Co-operative Association, and that the proceeds should be assigned for the security of the defendant bank"; that, pursuant to these representations, plaintiff borrowed, in November, 1925, $6,000.00, and in January, 1926, $3,-000.00, executing in favor of the credit company two notes, aggregating $9,000.00, and two agricultural crop mortgages to secure their payment; that in the fall of 1925, and extending up to the summer of 1926, the plaintiff raised crops of vegetables upon his land, and delivered these crops, when harvested, according to the agreement, to the Co-operative Association for sale, and that when sold they netted an amount of not less than $18,000.00, and that one or more of the defendants received this sum of money belonging to him, for which they had refused to account. The bank, answering, denied that the defendant Richardson or any one else was acting as its agent in the making of the loans referred to, and alleged that "it purchased notes and mortgages of the plaintiff of the face value of Nine Thousand ($9,000.00) Dollars, purchasing same before maturity for full value, from South Carolina Agricultural Credit Company." It is agreed that the defendants credit company and Richardson never appeared in the case, are in default, and are insolvent, and for the purposes of this case can be disregarded.

After the pleadings were filed, notice of a motion to frame issues was given by the defendant bank; but, by agreement of the parties, the case was held in abeyance pending the outcome of an action which had been brought in the Federal Court, on August 1, 1926, by the bank against Mitchell to recover on the two notes, which had been transferred to it by the credit company. In that case Mitchell, who was a de*461fendant, raised a jurisdictional question, and pleaded, among other things, as a separate and complete defense to the action, the facts that constitute the basis of his claim in the case at bar, the substance of which is hereinabove set out, but he did not, by way of counterclaim, ask for any affirmative relief. The jurisdictional question was finally decided in favor of the bank in May, 1928, and the trial of the case in January, 1930, resulted in a verdict for Mitchell, the judgment being affirmed later by the Circuit Court of appeals, 46 F. (2d), 301.

After final disposition of the suit in the Federal Court, the bank gave notice to the plaintiff that on March 16, 1931, it would move the presiding Judge of the Court of Common Pleas for Beaufort County for an order requiring him to reply to the supplemental answer of the bank, which it proposed to file by leave of the Court. In its supplemental answer the bank alleged that the action brought by it against the plaintiff in the United States District Court had resulted in a verdict and judgment for the plaintiff, who was the defendant in that action, and on appeal the judgment had been affirmed; and that "this defendant pleads the said action, the verdict and judgment therein, in bar and in abatement of the further maintenance of this action by the plaintiff herein against this defendant." The plaintiff also gave notice that he would move the Court, at the same time and place, for an order permitting him to amend his complaint (1) by adding a paragraph thereto setting up the result of the action in the Federal Court and portions of the opinion of the Circuit Court of Appeals in that case, and (2) as to the amount asked for.

On hearing the matter, in open Court, Judge Dennis granted the motion for the filing of the bank's supplemental answer, which set up the plea in bar. .He then ordered an immediate and separate trial of that defense; and the plaintiff thereupon gave notice, in open Court, of an appeal from this order to the Supreme Court. The trial Judge, however, ruled that such notice of appeal would not operate as a stay *462and proceeded to try the plea in bar upon the record. Through the deputy clerk of the United States District Court, the record of that Court in the suit of the bank against Mitchell was identified and introduced in evidence, this being the only testimony offered. On April 18, 1931, Judge Dennis, having taken the matter under advisement, filed an order sustaining the plea in bar, holding that the cause or causes of action, pleaded in this case by plaintiff for an independent recovery against the bank, were set up by him in the Federal Court as a defense to the bank's suit on the .notes; and that plaintiff could not "thus split up his cause or causes of action, whether in the shape of an answer, defense and counterclaim, or in the shape of a complaint, because the cause or causes of action had a common origin in the same facts"; and that "the final judgment in the cause in the United States District Court is *res adjudicate* as to the causes of action attempted to be raised in this case, and that the plaintiff is barred and estopped from prosecuting this action."

From this order the case comes here on appeal. There are several exceptions, but plaintiffs counsel, in their argument, have grouped them as presenting but two questions,' and in our consideration of the issues made we shall follow the plan adopted by them.

The appellant complains, in the first place, that Judge Dennis committed error in requiring that the special defense of the plea in bar be tried in advance of the general trial of the case, and in ruling that plaintiff's notice of appeal to the Supreme Court did not operate as a stay.

We think the action of the Circuit Judge was proper. Only questions of law were involved in the trial ot the issue made by the plea in bar. It was a matter to be decided by the Court, and, if found to be determinative of the entire case, would render further hearing on the merits useless and would dispose of the necessity of a general trial. In addition, under the provisions of Section 531 of Vol. 1 of the Code 1922, the trial Judge is vested with a *463broad discretion in dealing with questions of procedure like that here presented; and, while such discretion is not unlimited, there was no abuse of it in this case. "The discretion should generally be in favor of trying those issues first which would most probably end the case." *Greene v. Wash*ington, 105 S. C., 137, 89 S. E., 649, 650; *Farmers' & Merchants' Nat. Bank v. Foster,* 132 S. C., 410, 129 S. E., 629. Nor, in keeping with the spirit and tendency of our decisions, was appellant entitled to a stay by reason of his notice of appeal. The trial Court's discretion to separate the plea in bar for advance trial and the beneficial results of such separation would be practically destroyed if notice of appeal from an order for such trial should be held to operate as a stay. Moreover, the plaintiff here lost none of his rights, as the question raised was preserved by such notice, to be heard and passed upon on appeal from the order giving final judgment in the case. We find no error as complained of.

We now come to the main question presented by the appeal, namely, Was the Circuit Judge in error in sustaining the plea in bar to plaintiff's action? Turning to appellant's answer in the Federal Court case, in which he appeared as a defendant, we find that the facts there pleaded by him as a defense to the bank's recovery on its notes are the same as those set out by him in his complaint as the basis of his action in the case at bar, it being alleged that the total amount paid to the bank was in excess of all sums advanced to him on the notes or otherwise, and as a result of the transaction the notes sued upon were fully paid and discharged. In addition, we find in the record of the case before us the following statement by appellant as an admission of

fact on his part: "The transaction out of which the case at bar arises is the same transaction that was pleaded as a defense to the Federal action. The indebtedness of the bank to Mitchell arising from the embezzlement of the proceeds of the crop was used *pro tanto* as an offset to the claim of the bank in the Federal Court. The case at bar *464seeks recovery of the surplusage, over the offset, of the proceeds of the same crop lost by the same embezzlement. The appellant, however, is not seeking to recover, in this action the same money that has already been used as an offset."

The appellant states the issue to be "whether a defendant in a Federal Court action will be debarred from asserting in an independent action in the State' Court a cause of action that he might have asserted (but did not) as counterclaims in the Federal Court proceeding"; and his counsel urge with much earnestness that, under the facts and the applicable principles of the law of pleading, appellant was allowed to set up, if he so elected, in his answer in the case in' the Federal Court, his claim against the bank to the extent necessary only to bar the bank's recovery on the notes sued upon, having the option either to counterclaim in that action to collect the balance owing him by the bank or to bring an independent suit against the bank for that purpose. But in' whatever form stated, the real question is whether Mitchell could split his cause of action, using a portion of it for defense in the Federal Court case and the balance for offense in the case at bar.

The United States Supreme Court, in *Baltimore Steamship Co. v. Phillips,* 274 U. S., 316, 47 S. Ct., 600, 602, 71 L. Ed., 1069, thus defines a cause of action: "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. "The thing, therefore, which in *465contemplation of law as its cause, becomes a ground for action, is not the group of facts alleged in the declaration, bill, or indictment, but the result of these in a legal wrong, the existence of which, if true, they conclusively evince." ' *Chobanian v. Washburn Wire Co.,* 33 R. I., 289, 302, 80 A., 394, 400 (Ann. Cas., 1913-D, 730)."

With regard to splitting causes of action, we find this general statement in 34 C. J., 827:

> "Where a demand or right of action is in its nature entire and indivisible, it cannot be split up into several causes of action and sued piecemeal, or made the basis of as many separate suits; but a recovery for one part will bar a subsequent action for the whole, the residue, or another part. A like rule forbids the splitting of defenses, or set-offs and counterclaims. Neither can a party, by assigning a part of his claim, to another, divide an entire cause of action so as to sustain more than one suit upon it. It is immaterial that the form of the second action is different from the first, or that the demand was divided for the purpose of bringing actions within the jurisdiction of a justice of the peace or other inferior Court."

"But the rule against splitting causes of action cannot be applied unless the two claims separately sued on were both parts of one and the same cause of action, equally available for purposes of suit at the time of the first action, and equally within the scope and purview of that action; and where the Court, in its discretion, limits the recovery in the first action to a part of the

claim, a separate action for the residue is not barred. Nor is the rule applicable to claims omitted because of plaintiff's want of knowledge of their mere existence, or according to some decisions, because of mistake."

At page 862, with reference to a set-off or counterclaim pleaded and adjudicated, the writer has this to say: "If a defendant, having a demand against plaintiff, pleads it as a set-off or .counterclaim in the action, he must make the most *466of his opportunity and exhibit his whole damage, for the judgment in the action will prevent him from afterward using the same matter, or any part of it, as a separate cause of action against the former plaintiff, or as a defense or counterclaim in any subsequent action between them, whether such set-off or counterclaim was allowed or disallowed, although some authorities have held that a part of the items of a counterclaim may be withheld from consideration and afterward be used as a cause of action or set-off."

At page 863 of the same volume it is stated that: "If matters are set up in the first action merely as a defense, and not as a foundation of a claim for affirmative relief * * * the judgment in such case precludes the use of the matter as a set-off or counterclaim in a subsequent action or as the basis of an independent suit against the former plaintiff."

In support of his position, however, appellant cites certain decisions of this Court, which he claims to be conclusive of the issue, relying especially upon *Kirven v. Chemical Co., 77* S. C., 493, 58 S. E., 424, 426; *Greenwood Drug Co. v. Bromonia Co.,* 81 S. C., 516, 62 S. E., 840, 842, 128 Am. St. Rep., 929; *Cannon v. Cox,* 98 S. C., 185, 82 S. E., 399; and *Ludlow v. King & Asbell,* 110 S. C., 88, 96 S. E., 247. These cases we shall now examine.

In *Kirven v. Chemical Company,* the record shows that Kirven had bought from the Chemical Company $2,228.00 worth of fertilizers and had given his note for that amount. The company, upon maturity of the note, brought action against him on his obligation. He at first filed an answer setting up three defenses, the third of which was that the fertilizers furnished were deleterious and destructive to the crops, and that there was an entire failure of consideration for the note. Eater, he was permitted to file a supplemental answer in which he withdrew the third defense. On trial in the Federal Court, the jury rendered a verdict for the Chemical Company. Thereafter, Kirven brought an action against the company in the Court of Common Pleas for *467Darlington Comity, alleging that the defendant caused damage to his crop in the sum of $1,995.00 by reason of the deleterious effect of the fertilizers furnished. The company set up the defense that the issues in this action were or could have been adjudicated in the suit in the Circuit Court of the United States. A verdict was given Kirven in the amount prayed for, and on appeal, as to whether the judgment rendered in the Circuit Court, on the note given for the fertilizers, was an adjudication of all the issues between the same parties in the cause in the State Court, this Court held, speaking through Mr. Justice Gary, that, while the actions were between the same parties, they were upon different claims, "one being upon a promissory note and the other for unliquidated damages." In addition, it was pointed out that the question raised in the State Court was not *actually* litigated and determined in the Federal action, and it appears that the Court, for that reason, took the view that a bar or estoppel did not exist. Mr. Justice Woods, in his concurring opinion, took the view that, as Kirven elected not to use, as a defense, the fact of *worthlessness,* which might have been available in the action of the company against him, "he was not precluded from using the very different facts of deleteriousness and positive injury caused by appellant's alleged negligence in the manufacture of the fertilizer as the basis of an independent cause of action."

We think the facts of the case at bar, however, present a different situation. The notes given by Mitchell, upon which the bank brought its action in the Federal Court, were for money advanced, under agreement among the parties, for agricultural

purposes — the making of a potato crop — the crop, when harvested, to be sold and the proceeds applied to the payment of the debt, any balance to be paid to Mitchell. The proceeds, as alleged, amounted to about $18,000.00. The respective claims or causes of action of the parties arose out of the same transaction or state of facts; unlike Kirven, Mitchell pleaded in the Federal Court his claim as a defense *468to the bank's claim; and even if the *Kirven case,* decided by a divided Court, was correctly decided, it is not authority, we think, under the facts of this case and in the light of the later decisions of this Court for sustaining appellant's position.

In the *Greenwood Drug Company case,* the question presented was whether a judgment on contract is an estoppel to a suit in tort based on the same facts as the defense to the suit on contract *with the additional allegation of fraud,* about which the plaintiff in the last action knew when he filed his answer, as defendant, in the former suit on contract. An action was first brought by the Bromonia Company against the Drug Company to recover judgment for the value of certain medicine, expenses, etc., amounting to $197.50, which the plaintiff claimed the defendant owed it on a contract between the parties. Recovery was had by the Bromonia Company, and the judgment was affirmed by this Court on appeal. An action was then brought by the drug company against the Bromonia Company to recover damages for alleged fraudulent representations by that company which induced the drug company to enter into the contract sued upon. The complaint was dismissed by the trial Judge, and on appeal the judgment was affirmed, this Court holding that "the second action substantially involves the issues actually and impliedly involved in the first action, and it is of no consequence that the form of the second action was in tort while the first action was in contract." Mr. Justice Jones, who wrote the opinion, referred to and commented upon the *Kirven case;* and, while it was not stated to be the purpose of the Court to modify the decision in that case, we think the opinion had that effect.

The *Cannon case* was an action for the recovery of damages on account of a landlord's unreasonable and excessive distress of his tenant's goods for rent. It was preceded by an action in claim and delivery brought by the tenant for repossession of the goods distrained, in which action no de*469mand for damages was made on account of the unreasonable and excessive distress. In the second action the landlord made a motion for a new trial on the ground that the question of unreasonable and excessive distress had been adjudicated in the former case. This ground was overruled, under the *Kirven case,* and the judgment was affirmed by this Court. A casual examination shows that what we have said in differentiating the case at bar from the *Kirven case* is applicable also to the *Cannon case.*

In the *Ludlow case* the plaintiff sought to recover from the defendants $176.01, which he claimed to have paid them, through mistake, inadvertence, misapprehension, and erroneous bookkeeping on their part, over and above his indebtedness to them on an account. On trial of the action plaintiff testified in his own behalf, and his counsel offered in evidence the judgment roll in a former case of *King and Asbell v. Ludlow,* in which the Court had found that King and Asbell were indebted to Ludlow in the sum of $176.01, instead of his being indebted to them. Thereupon on motion ■of plaintiff Ludlow, the trial Judge directed a verdict in his favor against the defendants for that amount. The Supreme Court, on appeal, held that, as the question whether King and Asbell were indebted to Ludlow was not made an issue in the first case and was not necessarily involved in the trial thereof, and as the Circuit Judge did not render judgment for such indebtedness, the ruling in the second case was error, as the trial Judge, in effect, held that the finding in the former case of such indebtedness was *res ad judie ata* of that question. The pleadings in the first case are not given, and so we cannot be sure as to the facts constituting the basis of the holding that the issue tried in the second case was not involved in the first case, etc., but apparently the first case was an action

brought by King and Asbell against Ludlow for the recovery of an alleged balance due on an account, and on trial Ludlow, in proving payment as a defense, proved that he had overpaid the account by $176.01. *470His allegation in the second suit that he had overpaid the account *"through mistake, inadvertence, misapprehension, and erroneous bookkeeping on the part of defendants,"* would appear to indicate that when the first suit was brought he did not know that he had overpaid the account, and hence did not set up an affirmative claim for such overpayment, and that his lack of knowledge was without fault on his part — a situation which might well have led the Court to conclude that the circumstances were such as to constitute an exception *to* the general rule (24 R. C. L,., 882; 34 C. J., 863; *Dupre v. Gilland,* 156 S. C., 109, 152 S. E., 873), or, in other words, to justify the statement that the question of indebtedness on the part of King and Asbell .to Ludlow was not made an issue in the first case and was not necessarily involved in the trial thereof. It appears certain that Ludlow made no allegation in the first suit that he had overpaid the account.

We do not think that this case, under its peculiar facts and circumstances, supports appellant's position; and a cursory examination of what we have said as to the other cases relied upon by him shows the same to be true with reference to them. In none of these cases was it held that a plaintiff could set up as cause of action facts known to him at the time of a former action between the same parties and pleaded by him as a defense in such action.

Turning to the decisions of other Courts, we find that, while appellant's position is sustained in some few jurisdictions, the great weight of authority supports the general principles already announced. An examination of some of these cases may prove helpful and enlightening.

O'Connor v. Varney, 10 Gray (Mass.), 231, was an action on contract to recover damages for Varney's failure to build certain additions to a house according to the terms of a written agreement between the parties. The defendant set up as a defense "a judgment recovered by O'Connor in an action brought by Varney against him on that contract to *471recover the price therein agreed to be paid for the work, in defence of which O'Connor relied on the same nonperform7 anee by Varney, and in which an auditor to whom the case was referred, and upon whose report that judgment was rendered, found that Varney was not entitled to recover under the agreement," as the work had been so imperfectly done that it would require a greater sum than the amount sued for to make it correspond with the contract. At the trial of the second action, the trial Judge ruled that the judgment in the first suit was a bar, and directed a verdict for the defendant. The plaintiff O'Connor thereupon appealed.

Chief Justice Shaw, who rendered the opinion of the Court, said: "The presiding Judge rightly ruled that the former judgment was a bar to this action. A party against whom an action is brought on a contract has two modes of defending himself. He may allege specific breaches of the contract declared upon, and rely on them in defence. But if he intends to claim, by way of damages for nonperformance of the contract, more than the amount for which he is sued, he must not rely on the contract in defence, but must bring a cross action, and apply to the Court to have the cases continued so that the executions may be set off. He cannot use the same defence, first as a shield, and then as a sword. *Burnett v. Smith,* 4 Gray, 50; *Sargent v. Fitzpatrick,* 4 Gray, 511; *Sawyer v. Woodbury, 7* Gray, 499 [66 Am. Dec., 518]."

It will be noted that Varney was not entitled to recover in the first suit because his dereliction amounted to more than he sued for. This would seem to be exactly the situation in the case at bar. The bank in the first suit was not allowed to recover because the injuries which Mitchell, defendant in that suit, suffered by reason of the bank's dereliction were greater than the amount for which the bank was suing. It will be observed that Chief Justice Shaw says that, if the defendant intends to claim, by way of

damages *472for nonperformance of the contract, *more than the amount for which he is sued,* he must not rely on the contract in defense, but must bring a cross-action, etc.

Watkins v. American National Bank of Denver (C. C. A.), 134 F., 36, 41, was a case in which Watkins was sued by the bank upon a $6,000.00 note. This note represented what he had agreed to pay as the purchase price for certain land which the bank had contracted to convey to him. As defense he set up that the bank had lost the title to the land and so could not convey it, that the property was worth $25,000.00, and that therefore he was not liable to pay the note. This case was decided in his favor. Later he brought a suit for $19,000.00, which he claimed to be due him as the value of the land, after deducting the $6,000.00 of which he had had the benefit in the suit brought by the bank on the note. The Court held, however, that he could not recover, the judgment in the first case being a complete adjudication of the issues involved. In this case many authorities are cited, and the decision is clear and forceful and directly in point. The Court said: "When the bank had sued Watkins on his note, he had a single, indivisible cause of action against it for $25,000.00 for its breach of its covenant to convey. The facts which conditioned that cause of action also constituted a defense to the action on the note. Watkins had the option to interpose them as a defense or as a counterclaim in the action against him, or to reserve them and to subsequently maintain an independent action upon them against the bank. But he could not do both. He elected to take the benefit of them as a defense, and he recovered the full measure of the relief which he demanded on their account. He might have recovered in that action upon the same allegations and proofs which he there made the judgment which he now seeks, if he had prayed for it. He did not do so, and the judgment in the action upon the note renders the question of the relief to which he is entitled *res adjudicata,* and estops him from maintaining an action to *473recover any remainder of the damages for the breach of the bank's covenant, a part of which he used to defeat its action upon the note."

Brown v. First National Bank of Newton (C. C. A.), 132 F., 450, strongly supports the respondent's position in the instant case. The facts are similar in that Brown, the plaintiff, had successfully interposed as a defense in a former suit brought against him by the bank the very same facts which he attempted in the second suit to set up as a cause of action against the bank. It was held that Brown could not maintain the action.

Riddle v. McLester-Van Hoose Co., 145 Ala., 307, 40 So., 101, 102, was an action for money had and received, etc., begun by Riddle against the company. It appears that Smitherman & Co., of which firm Riddle was a member, bought goods in the sum of $634.00 from the defendant. Before this partnership was formed, Smitherman was indebted to the defendant in the sum of $640.00, and after the purchase by the firm of goods from the defendant, Smitherman gave it notes for both debts, signing the firm name and his individual name, the notes so given aggregating the amount due from Smitherman individually and from the firm of Smitherman & Co. It appears that Riddle did not know of the execution of these notes, except those for the partnership debt, and as soon as he was informed of the fact he repudiated the same. The firm of Smitherman & Co. paid the defendant $1,018.00 out of partnership property, but declined to pay the balance, whereupon the defendant company sued Smitherman & Co. and the individuals of that firm for the balance due, claiming to have credited the payments first to the individual debt of Smitherman to its extinguishment, and the balance to the firm debt. Riddle, who, at the time of the suit, owned all the partnership property of Smitherman & Co., interposed a plea of set-off to the suits on the notes and had judgment on the plea. He then began a suit against the McLester Company for the dif*474ference between the amount paid by Smitherman & Co. to the defendant and the debt due by the firm to the defendant. His position evidently was that his firm

had paid the McLester Company $1,018.00, whereas it owed the McLester Company only $634.00, thus leaving a balance due from the McLester Company to the Smitherman firm of $384.00. In other words, he appears to say to the defendant McLester Company in the second case: "Yes, the Smitherman firm owed you $634.00, but it paid you $1,018.00, an overpayment of $384.00. Now I want you to pay me that difference."

The Court said: "The execution of the notes [sued on in the first case] was not denied, nor was Smitherman's authority to execute them in the firm name questioned. The debt evidenced by them was admitted to be the debt of the firm. The proceeds of the checks and of the shingles were not payments upon the notes in any proper sense of the term-. Their application to Smitherman's individual indebtedness was wrongful only against Riddle, his partner, and not subject to be set aside, except at his instance and election. Until he disaffirmed Smitherman's agreement with the defendant to apply the proceeds to his debt and directed their application to the partnership debt, they did not, in any sense, constitute payments on such debt. 4 Mayfield's Dig., 425; 22 Am. & Eng. Ency. Law (2d Ed.), 575, 576 and notes. That Riddle had the right to set off these claims to the extent of the debt sought to be recovered of him cannot be doubted. He was not entitled, it is true, to a judgment over in his favor for the excess. *Locke v.* Locke, 57 Ala., 473, and cases there cited. Fie was, of course, not bound to plead set-off as a defense. It was entirely optional with him; but having done so, and offered evidence to support his defense, and having defeated the plaintiff's recovery against him, he must be held to a release or remittitur of the residue of his demand."

*475This case is very similar to the case at bar, in that Riddle won his plea of set-off in the first'case (in which he was a defendant), and then, in order to procure a judgment for the balance due him under all the transactions, attempted (as plaintiff) in the second case to base a cause of action upon the same facts which he had already pleaded and proved as a defense in the former case — which the Court said could not be done.

In *Miller Co. v. Harvey Mercantile Co.,* 45 N. D., 503, 178 N. W., 802, 806, issues similar to those in the case at bar were involved. The Court said:

> "The familiar principles of law apply that causes of action may not be divided, and that one who has availed himself of a part of a single claim or obligation in an action or defense is estopped thereafter from enforcing the remainder of it. 23 Cyc., 1174, 1202. This follows the famous expression by Chief Justice Shaw in *O'Connor v. Varney,* 10 Gray (Mass.), 231, that one cannot use the same defense first as a shield and then as a sword. [Citing authorities.] This is simply the application of an equitable rule that one should not be compelled to answer, or be required to pay twice for the same claim. * * *
>
> "If in the application of such principles the want of full satisfaction accrues to the plaintiff, it is only because of its own actions, deliberately taken in choosing the method of enforcing its claims and demands."

The spirit and tendency of our own decisions are to the same effect. In *Citizens' Savings Bank v. Efird,* 96 S. C., 18, 79 S. E., 637, it was said that the "Code of Procedure was adopted for the purpose of getting the Courts away from the technicalities of common-law pleading and practice." See, also, *Tunstall v. Lerner Shops,* 160 S. C., 557, 159 S. E., 386; *Sovereign Camp of Woodmen of the World v. Means,* 87 S. C., 127, 69 S. E., 85. It has been repeatedly pointed out by this Court that the "object of the framers of the Code of Procedure was to secure the trial, for all parties *476interested in the cause, of those issues which practically

had the same birth." *Cline v. Railway Co.,* 110 S. C., 534, 96 S. E., 532, 539. "The defendant is, therefore, bound to plead his defenses, legal and equitable, in the action brought, and is estopped from instituting a separate proceeding in the same cause with the same party." *Rice v. Mahaffey, 9* S. C., 281.

In *Willis v. Tozer,* 44 S. C., 1, 21 S. E., 617, 622, the Court held: "A judgment is conclusive between the parties to it not only as to those matters which were actually decided, but also all such as were necessarily involved in its rendition."

With regard to the question of *res ad judicata,* see *Hart v. Bates,* 17 S. C., 35; *Johnston-Crews Co. v. Folk,* 118 S. C., 470, 111 S. E., 15; *McConnell v. Davis,* 128 S. C., 111, 122 S. E., 399; *Brown v. Huskamp,* 141 S. C., 121, 139 S. E., 181.

In *Ruff v. Doty,* 26 S. C., 173, 1 S. E., 707, 711, 4 Am. St. Rep., 709, the Court, referring to'the *Bates case,* and to *Fraser & Dill v. Charleston,* 19 S. C., 399, said: "These two cases, considered together, decide, briefly, that a matter not necessarily involved and not raised in a previous case is not *res adjudicata;* but if necessarily involved, whether raised or not, it is concluded, and especially so, if-the party denying the adjudication knew of the matter and could have interposed it at the previous trial, either in support of a claim or as a defense."

The appellant Mitchell concedes that, if his position and theory in the present case were inconsistent with his position in the Federal case, or if the matters pleaded here as a cause of action and there as a defense- had been there decided against him, he would be out of Court; but contends that, as he won in the first action, the facts there pleaded as a defense being identical with those set up by him as constituting his cause of action in the present suit, under'the decision in the *Dudlovu case* the judgment in the former suit *477is not a bar to the present action. What we have already said with reference to the *Ludlow case* shows that that case may not be held to support this view. Nor do we think the position sound. It is true that in some decisions the Courts hold that, where a defendant loses in an action, the judgment would operate as a bar to a subsequent suit brought by him as plaintiff on the same state of facts pleaded by him as a defense in the former action, for the reason that the facts he must establish to authorize his recovery in the second action are inconsistent with, or in direct opposition to, the facts on which the plaintiff in the first action recovered. In such case, it would not be necessary to look further in order to see that he could not recover in the second action. There is no conflict between this holding and the generally accepted rule against splitting a cause of action. In fact, in some of the cases examined, the rule against splitting a cause of action is advanced as the basis of the holding that the result of the first suit, being adverse to the defendant, constitutes a bar to the subsequent action by him as plaintiff on the same claim or demand. And the fact that, in order to recover in the second suit, he would have to show a state of facts contrary to the former adjudication, is sometimes stated-as an additional ground to support the Court's decision. We here direct attention to a few cases as illustrative of the point.

Jones v. Charles Warner Co., 2 Boyce (25 Del.), 566, 83 A., 131, 134, was an action for the recovery of damages alleged to have been sustained by the plaintiff through failure of the defendant company to sell and 'deliver mortar of a quality suitable for use in the erection and construction of a certain building. It appears that the company in a prior action, as plaintiff, had brought suit against Jones for the balance of the price of the mortar, and that he had appeared in that action and defended on the ground that the mortar was not suitable for the purposes for which it was bought, judgment was rendered against him, and the Warner Com*478pany, as defendant in the second action, set up' the judgment obtained in the first action as a bar. The Court said: "The plaintiff in this action, having availed himself of his right and privilege to show before the justice that the mortar was unsuitable for the purpose for which he bought it, and being obliged in his present action to rely on the same alleged fact,

considered and adjudicated by the said justice of the peace in the former action, we think he cannot now controvert said fact, and that he is barred and estopped from showing any defects in the said mortar and from maintaining his present action."

But it also declared: "Recoupment of matters of damage growing out of the same transaction and for which a separate action could be maintained, is allowable by way of defense, after notice, at the election of the defendant, instead of compelling him to resort to a cross action for such damages. Whenever a defendant has a claim for such damages, he may, at his election, exercise his privilege to recoup. ITe is not compelled to do so, and if he does he cannot subsequently maintain an action for such damages, or any part thereof."

So in *Bierer & Downer v. Fretz,* 37 Kan., 27, 14 P., 558, 559, where it appears that Bierer & Downer had pleaded as a defense in a former action between the same parties the same facts which they set up as constituting their cause of action, as plaintiffs, in their petition in the second action. In the first action they lost, and Fretz, as defendant in the second action, pleaded the judgment rendered in the first suit as a bar. The Court said: "A judgment for Fretz in the former action disposed of not only the defenses supported by evidence, but all others that were tried or ought to have been tried, and swept them all away; and that, too, for the purposes of all subsequent actions that might have been founded upon the same transaction." But it also held: "A party cannot split up his defenses, and present them by piecemeal in successive suits arising out of the same trans*479action, nor can he relitigate matters which he might have interposed, but failed to do, in a prior action between the same parties about the same subject-matter; and this rule holds true whether the matter that might have been litigated in the former trial would have been therein a ground of action or a defense to the action then pending."

And so in the case of *South & N. A. R. Co. v. Henlein &* Barr, 56 Ala., 368, in which Henlein & Barr, as plaintiffs, pleaded as constituting a cause of action the same facts pleaded by them as a defense in a former action brought in a justice's Court by the railway company, as plaintiff, against them, and in which they lost. The Court said: "It is well settled, that a single contract, unless it be payable in installments, can not be split up, and become the foundation of a plurality of suits; and if the owner of such claim or cause of action brings suit on a part of it, *and either succeed or fail in such suit,* he can not afterwards sue on the residue of the claim or cause of action. The reason is the simple, yet well-known proposition, that the law will not permit such splitting up of a single cause of action," (Italics ours.) But added: "Another principle is, perhaps, fatal to the plaintiffs' right of recovery in the present action, if the statements of the bill of exceptions be true. The defense they offered before Justice Nettles, presented the same want of diligence, and the same damage, to the same property, as those set up in the present suit. In that case, they were adjudged insufficient to bar a recovery. The claim thereby became *res judicata,* and can not be the foundation of an independent suit." And concluded: "In every aspect in which we can view this question, we hold that Henlein & Barr, by the defense they made before Justice Nettles, have tested the validity of their demand, and have consented to abandon all claim against the railroad, except that which they asserted in that action; and that, having failed in that defense, they have barred themselves of all right to maintain a suit on that claim, or any part thereof."

*480In the matter before us, the legal wrong which Mitchell suffered was the violation by the bank of his right to receive the proceeds of his potato crop which had come into the bank's hands, amounting to about $18,000.00, and for this wrong he had a single indivisible cause of action against the bank. When the bank sued him on his two notes, amounting to about $9,000.00, he had the option to interpose his claim as a defense to that suit or to demand judgment against the bank, by way of counterclaim, for the amount owing him by it. He elected to set up his claim as a defense only, and the jury applied it to the

payment of the notes held by the bank. The transaction out of wdiich the case at bar arises is the same transaction that Mitchell pleaded as a defense in the Federal suit. He might, therefore, "have recovered in that action, upon the same allegations and proofs which he there made, the judgment which he now seeks, if he had prayed for it." He did not do this, but attempted to split his cause of action, and to use one portion of it for defense in that suit and to reserve the remainder for offense in a subsequent suit, which, under applicable principles, could not be done. As said in the *Miller Company case:* "If in the application of such principles the want of full satisfaction accrues to the plaintiff, it is only because of its [his] own actions, deliberately taken in choosing the method of enforcing its [his] claims and demands."

The judgment of the Circuit Court is affirmed.

Mr. Chief Justice BeEase and Messrs. Justices Carter and Boni-iam and Circuit Judge C. C. Featherstone, Acting Associate Justice, concur.

11.5 Issue Preclusion Generally

When can factual and legal determinations made in one case be used in another case? That is what is at stake when we address issue preclusion.

The historical standard for issue preclusion was expressed as follows:

> The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them.

Harlan, J., in *Southern Pacific Railroad Co. v. United States*

The rule stated by Justice Harlan remains correct but not complete. In the following cases we will explore the degree to which the second dispute has to be between the same parties or their privies.

11.6 Bernhard v. Bank of America

HELEN BERNHARD, as Administratrix, etc., Appellant,

v.

BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION (a National Banking Association), Respondent.

TRAYNOR, J.

In June, 1933, Mrs. Clara Sather, an elderly woman, made her home with Mr. and Mrs. Charles [809] O. Cook in San Dimas, California. Because of her failing health, she authorized Mr. Cook and Dr. Joseph Zeiler to make drafts jointly against her commercial account in the Security First National Bank of Los Angeles. On August 24, 1933, Mr. Cook opened a commercial account at the First National Bank of San Dimas in the name of "Clara Sather by Charles O. Cook." No authorization for this account was ever given to the bank by Mrs. Sather. Thereafter, a number of checks drawn by Cook and Zeiler on Mrs. Sather's commercial account in Los Angeles were deposited in the San Dimas account and checks were drawn upon that account signed "Clara Sather by Charles O. Cook" to meet various expenses of Mrs. Sather.

On October 26, 1933, a teller from the Los Angeles Bank called on Mrs. Sather at her request to assist in transferring her money from the Los Angeles Bank to the San Dimas Bank. In the presence of this teller, the cashier of the San Dimas Bank, Mr. Cook, and her physician, Mrs. Sather signed by mark an authorization directing the Security First National Bank of Los Angeles to transfer the balance of her savings account in the amount of $4,155.68 to the First National Bank of San Dimas. She also signed an order for this amount on the Security First National Bank of San Dimas "for credit to the account of Mrs. Clara Sather." The order was credited by the San Dimas Bank to the account of "Clara Sather by Charles O. Cook." Cook withdrew the entire balance from that account and opened a new account in the same bank in the name of himself and his wife. He subsequently withdrew the funds from this last mentioned account and deposited them in a Los Angeles Bank in the names of himself and his wife.

Mrs. Sather died in November, 1933. Cook qualified as executor of the estate and proceeded with its administration. After a lapse of several years he filed an account at the instance of the probate court accompanied by his resignation. The account made no mention of the money transferred by Mrs. Sather to the San Dimas Bank; and Helen Bernhard, Beaulah Bernhard, Hester Burton, and Iva LeDoux, beneficiaries under Mrs. Sather's will, filed objections to the account for this reason. After a hearing on the objections the court settled the account, and as part of its order declared that [810] the decedent during her lifetime had made a gift to Charles O. Cook of the amount of the deposit in question.

After Cook's discharge, Helen Bernhard was appointed administratrix with the will annexed. She instituted this action against defendant, the Bank of America, successor to the San Dimas Bank, seeking to recover the deposit on the ground that the bank was indebted to the estate for this amount because Mrs. Sather never authorized its withdrawal. In addition to a general denial, defendant pleaded two affirmative defenses: (1) that the money on deposit was paid out to Charles O. Cook with the consent of Mrs. Sather and (2) that this fact is res judicata by virtue of the finding of the probate court in the proceeding to settle Cook's account that Mrs. Sather made a gift of the money in question to Charles O. Cook and "owned no sums of money whatsoever" at the time of her death. Plaintiff demurred to both these defenses, and objected to the introduction in evidence of the record of the earlier proceeding to support the plea of res judicata. She also contended that the probate court had no jurisdiction to pass upon. Cook's ownership of the money because the executor resigned before the filing of the objections. This last contention was answered before judgment was entered, by the decision of this court in Waterland v. Superior Court, 15 Cal.2d 34 [98 PaCal.2d 211], holding that the probate court has jurisdiction in such a situation. The trial court overruled the demurrers and objection to the evidence, and gave judgment for defendant on the ground that Cook's ownership of the money was conclusively established by the finding of the probate court. Plaintiff has appealed, denying that the doctrine of res judicata is applicable to the instant case or that there was a valid gift of the money to Cook by Mrs. Sather.

Plaintiff contends that the doctrine of res judicata does not apply because the defendant who is asserting the plea was not a party to the previous action nor in privity with a party to that action and because there is no mutuality of estoppel.

The doctrine of res judicata precludes parties or their privies from relitigating a cause of action that has been finally determined by a court of competent jurisdiction. Any issue necessarily decided in such litigation is conclusively determined as to the parties or their privies if it is involved in a subsequent lawsuit on a different cause of action. (See cases cited in 2 Freeman, Judgments (5th ed.) sec. 627; 2 Black, [811] Judgments (2d ed.), sec. 504; 34 C.J. 742 et seq.; 15 Cal.Jur. 97.) The rule is based upon the sound public policy of limiting litigation by preventing a party who has had one fair trial on an issue from again drawing it into controversy. (See cases cited in 38 Yale L. J. 299; 2 Freeman, Judgments (5th ed.), sec. 626; 15 Cal.Jur. 98.) The doctrine also serves to protect persons from being twice vexed for the same cause. (Ibid) It must, however, conform to the mandate of due process of law that no person be deprived of personal or property rights by a judgment without notice and an opportunity to be heard. (Coca Cola Co. v. Pepsi Cola Co., 36 Del. 124 [172 Atl. 260]. See cases cited in 24 Am. and Eng. Encyc. (2d ed.), 731; 15 Cinn. L. Rev. 349, 351; 82 Pa. L. Rev. 871, 872.)

Many courts have stated the facile formula that the plea of res judicata is available only when there is privity and mutuality of estoppel. (See cases cited in 2 Black, Judgments (2d. ed.), secs. 534, 548, 549; 1 Freeman, Judgments (5th ed.), secs. 407, 428; 35 Yale L. J. 607, 608; 34 C.J. 973, 988.) Under the requirement of privity, only parties to the former judgment or their privies may take advantage of or be bound by it. (Ibid) A party in this connection is one who is "directly interested in the subject matter, and had a right to make defense, or to control the proceeding, and to appeal from the judgment." (1 Greenleaf, Evidence (15th ed.), sec. 523. See cases cited in 2 Black, Judgments (2d ed.), sec. 534; 15 R. C. L. 1009 [134]; 9 Va. L. Reg. (N.S.) 241, 242; 15 Cal.Jur. 190; 34 C.J. 992.) A privy is one who, after rendition of the judgment, has acquired an interest in the subject matter affected by the judgment through or under one of the parties, as by inheritance, succession, or purchase. (See cases cited in 2 Black, Judgments (2d ed.), sec. 549; 35 Yale L. J. 607, 608; 34 C.J. 973, 1010, 1012; 15 R. C. L. 1016. [135]) The estoppel is mutual if the one taking advantage of the earlier adjudication would have been bound by it, had it gone against him. (See cases cited in 2 Black, Judgments (2d ed.), sec. 534, 548; 1 Freeman, Judgments (5th ed.), sec. 428; 35 Yale L. J. 607, 608; 34 C.J. 988; 15 R. C. L. 956. [136])

The criteria for determining who may assert a plea of res judicata differ fundamentally from the criteria for [812] determining against whom a plea of res judicata may be asserted. The requirements of due process of law forbid the assertion of a plea of res judicata against a party unless he was bound by the earlier litigation in which the matter was decided. (Coca Cola Co. v. Pepsi Cola Co., supra. See cases cited in 24 Am. & Eng. Encyc. (2d ed) 731; 15 Cinn. L. Rev. 349, 351; 82 Pa. L. Rev. 871, 872.) He is bound by that litigation only if he has been a party thereto or in privity with a party thereto. (Ibid) There is no compelling reason, however, for requiring that the party asserting the plea of res judicata must have been a party, or in privity with a party, to the earlier litigation.

No satisfactory rationalization has been advanced for the requirement of mutuality. Just why a party who was not bound by a previous action should be precluded from asserting it as res judicata against a party who was bound by it is difficult to comprehend. (See 7 Bentham's Works (Bowring's ed.) 171.) Many courts have abandoned the requirement of mutuality and confined the requirement of privity to the party against whom the plea of res judicata is asserted. (Coca Cola Co. v. Pepsi Cola Co., supra; Liberty Mutual Insur. Co. v. George Colon & Co., 260 N.Y. 305 [183 N.E. 506]; Atkinson v. White, 60 Me. 396;

Eagle etc. Insur. Co. v. Heller, 149 Va. 82 [140 S.E. 314, 57 A.L.R. 490]; Jenkins v. Atlantic Coast Line R. Co., 89 S. C. 408 [71 S.E. 1010]; United States v. Wexler, 8 Fed.2d 880. See Good Health Dairy Food Products Corp. v. Emery, 275 N.Y. 14 [9 N.E. (2d) 758, 112 A.L.R. 401].) The commentators are almost unanimously in accord. (35 Yale L. J. 607; 9 Va. L. Reg. (N. S.) 241; 29 Ill. L. Rev. 93; 18 N.Y. U. L. Q. R. 565, 570; 12 Corn. L. Q. 92.) The courts of most jurisdictions have in effect accomplished the same result by recognizing a broad exception to the requirements of mutuality and privity, namely, that they are not necessary where the liability of the defendant asserting the plea of res judicata is dependent upon or derived from the liability of one who was exonerated in an earlier suit brought by the same plaintiff upon the same facts. (See cases cited in 35 Yale L. J. 607, 610; 9 Va. L. Reg. (N. S.) 241, 245-247; 29 Ill. L. Rev. 93, 94; 18 N.Y. U. L. Q. R. 565, 566-567; 34 C.J. 988-989.) Typical examples of such derivative liability are master and servant, principal and agent, and indemnitor and indemnitee. Thus, if a plaintiff sues a servant for injuries caused by the [813] servant's alleged negligence within the scope of his employment, a judgment against the plaintiff on the grounds that the servant was not negligent can be pleaded by the master as res judicata if he is subsequently sued by the same plaintiff for the same injuries. Conversely, if the plaintiff first sues the master, a judgment against the plaintiff on the grounds that the servant was not negligent can be pleaded by the servant as res judicata if he is subsequently sued by the plaintiff. In each of these situations the party asserting the plea of res judicata was not a party to the previous action nor in privity with such a party under the accepted definition of a privy set forth above. Likewise, the estoppel is not mutual since the party asserting the plea, not having been a party or in privity with a party to the former action, would not have been bound by it had it been decided the other way. The cases justify this exception on the ground that it would be unjust to permit one who has had his day in court to reopen identical issues by merely switching adversaries.

In determining the validity of a plea of res judicata three questions are pertinent: Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication? Estate of Smead, 219 Cal. 572 [28 PaCal.2d 348]; Silva v. Hawkins, 152 Cal. 138 [92 P. 72], and People v. Rodgers, 118 Cal. 393 [46 P. 740, 50 P. 668], to the extent that they are inconsistent with this opinion, are overruled.

In the present case, therefore, the defendant is not precluded by lack of privity or of mutuality of estoppel from asserting the plea of res judicata against the plaintiff. Since the issue as to the ownership of the money is identical with the issue raised in the probate proceeding, and since the order of the probate court settling the executor's account was a final adjudication of this issue on the merits (Prob. Code, sec. 931 [formerly Code Civ. Proc., sec. 1637]; see cases cited in 12 Cal.Jur. 62, 63; 15 Cal.Jur. 117, 120), it remains only to determine whether the plaintiff in the present action was a party or in privity with a party to the earlier proceeding. The plaintiff has brought the present action in the capacity of administratrix of the estate. In this capacity she represents the very same persons and interests that were represented in the earlier hearing on the executor's account. In [814] that proceeding plaintiff and the other legatees who objected to the executor's account represented the estate of the decedent. They were seeking not a personal recovery but, like the plaintiff in the present action, as administratrix, a recovery for the benefit of the legatees and creditors of the estate, all of whom were bound by the order settling the account. (Prob. Code, sec. 931. See cases cited in 12 Cal.Jur. 62, 63.) The plea of res judicata is therefore available against plaintiff as a party to the former proceeding, despite her formal change of capacity. "Where a party though appearing in two suits in different capacities is in fact litigating the same right, the judgment in one estops him in the other." (15 Cal.Jur. 189; Williams v.

Southern Pacific Co., 54 Cal.App. 571 [202 P. 356]; Stevens v. Superior Court, 155 Cal. 148 [99 P. 512]; Estate of Bell, 153 Cal. 331 [95 P. 372]. See Chicago, R. & I. R. R. Co. v. Schendel, 270 U.S. 611 [46 S. Ct. 420, 70 L.Ed. 757]; Sunshine A. Coal Co. v. Adkins, 310 U.S. 381, 401 et seq. [60 S. Ct. 907, 84 L.Ed. 1263]; Lee Co. v. Federal Trade Com., 113 Fed.2d 583; and cases cited in 16 N.Y. U. L. Q. R. 158, 159; 38 Yale L. J. 299, 310; 54 Harv. L. Rev. 890.)

The judgment is affirmed.

11.7 Parklane Hosiery Co. v. Shore

439 U.S. 322 (1979)
PARKLANE HOSIERY CO., INC., ET AL.
v.
SHORE.

MR. JUSTICE STEWART 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.[2] The proxy statement, according to the complaint, had violated §§ 14 (a), 10 (b), and 20 (a) of the Securities Exchange Act of 1934, 48 Stat. 895, 891, 899, as amended, 15 U. S. C. §§ 78n (a), 78j (b), and 78t (a), 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 ben alleged in the respondent's complaint. Injunctive relief was requested. After a 4-day [325] 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. *SEC* v. *Parklane Hosiery Co.,* 422 F. Supp. 477. The Court of Appeals for the Second Circuit affirmed this judgment. 558 F. 2d 1083.

The respondent in the present case then moved for partial summary judgment against the petitioners, asserting that the petitioners were collaterally estopped from relitigating the issues that had been resolved against them in the action brought by the SEC.[3] 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. 565 F. 2d 815. 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." *Id.,* at 819. Because of an intercircuit conflict,[4] we granted certiorari. 435 U. S. 1006.

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 relitigating 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.[5]

A

Collateral estoppel, like the related doctrine of res judicata,[6] 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. *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation,* 402 U. S. 313, 328-329. 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 [327] as an estoppel against the other unless both parties were bound by the judgment.[7] Based on the premise that it is somehow unfair to allow a party to use a prior judgment when he himself would not be so bound,[8] the mutuality requirement provided a party who had litigated and lost in a previous action an opportunity to relitigate identical issues with new parties.

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.[9] Recognizing the validity of this criticism, the Court in *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation, supra,* abandoned the mutuality requirement, at least in cases where a patentee seeks to relitigate the validity of a patent after a federal court in a previous lawsuit has already declared it invalid.[10] The [328] "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." 402 U. S., at 328. The Court strongly suggested a negative answer to that question:

> "In any lawsuit where a defendant, because of the mutuality principle, is forced to present a complete defense on the merits to a claim which the plaintiff has fully litigated and lost in a prior action, there is an arguable misallocation of resources. To the extent the defendant in the second suit may not win by asserting, without contradiction, that the plaintiff had fully and fairly, but unsuccessfully, litigated the same claim in the prior suit, the defendant's time and money are diverted from alternative uses—productive or otherwise—to relitigation of a decided issue. And, still assuming that the issue was resolved correctly in the first suit, there is reason to be concerned about the plaintiff's allocation of resources. Permitting repeated litigation of the same issue as long as the supply of unrelated defendants holds out reflects either the aura of the gaming table or `a lack of discipline and of disinterestedness on the part of the lower courts, hardly a worthy or wise basis for fashioning rules of procedure.' *Kerotest Mfg. Co.* v. *C-O-Two Co.,* 342 U. S. 180, 185 (1952). Although neither judges, the parties, nor the adversary system performs perfectly in all cases, the requirement of determining whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate is a most significant safeguard." *Id.,* at 329.[11]

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.[12]

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." *Bernhard* v. *Bank of America Nat. Trust & Savings Assn.,* 19 Cal. 2d, at 813, 122 P. 2d, at 895.[13] Thus defensive collateral estoppel gives a plaintiff a strong incentive to join [330] 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. *E. g., Nevarov* v. *Caldwell,* 161 Cal. App. 2d 762, 767-768, 327 P. 2d 111, 115; *Reardon* v. *Allen,* 88 N. J. Super. 560, 571-572, 213 A. 2d 26, 32. 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.[14]

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. *The Evergreens* v. *Nunan,* 141 F. 2d 927, 929 (CA2); cf. *Berner* v. *British Commonwealth Pac. Airlines,* 346 F. 2d 532 (CA2) (application of offensive collateral estoppel denied where defendant did not appeal an adverse judgment awarding damages of $35,000 and defendant was later sued for over $7 million). 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.[15] Still another situation where it might be [331] 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.[16]

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.[17] 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 [332] 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.[18] 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.[19] 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.[20]

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 [333] 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.[21]

A

"[T]he thrust of the [Seventh] Amendment was to preserve the right to jury trial as it existed in 1791." *Curtis* v. *Loether,* 415 U. S. 189, 193. At common law, a litigant was not entitled to have a jury determine issues that had been previously adjudicated by a chancellor in equity. *Hopkins* v. *Lee,* 6 Wheat. 109; *Smith* v. *Kernochen,* 7 How. 198, 217-218; *Brady* v. *Daly,* 175 U. S. 148, 158-159; Shapiro & Coquillette, The Fetish of Jury Trial in Civil Cases: A Comment on Rachal *v.* Hill, 85 Harv. L. Rev. 442, 448-458 (1971).[22]

Recognition that an equitable determination could have collateral-estoppel effect in a subsequent legal action was the major premise of this Court's decision in *Beacon Theatres, Inc.* v. *Westover,* 359 U. S. 500. In that case the plaintiff sought a declaratory judgment that certain arrangements between it [334] and the defendant were not in violation of the antitrust laws, and asked for an injunction to prevent the defendant from instituting an antitrust action to challenge the arrangements. The defendant denied the allegations and counter-claimed for treble damages under the antitrust laws, requesting a trial by jury of the issues common to both the legal and equitable claims. The Court of Appeals upheld denial of the request, but this Court reversed, stating:

> "[T]he effect of the action of the District Court could be, as the Court of Appeals believed, `to limit the petitioner's opportunity fully to try to a jury every issue which has a bearing upon its treble damage suit,' for determination of the issue of clearances by the judge might `operate either by way of res judicata or collateral estoppel so as to conclude both parties with respect thereto at the subsequent trial of the treble damage claim.' " *Id.,* at 504.

It is thus clear that the Court in the *Beacon Theatres* case thought that if an issue common to both legal and equitable claims was first determined by a judge, relitigation of the issue before a jury might be foreclosed by res judicata or collateral estoppel. To avoid this result, the Court held that when legal and equitable claims are joined in the same action, the trial judge has only limited discretion in determining the sequence of trial and "that discretion . . . must, wherever possible, be exercised to preserve jury trial." *Id.,* at 510.[23]

Both the premise of *Beacon Theatres,* and the fact that it enunciated no more than a general prudential rule were confirmed by this Court's decision in *Katchen* v. *Landy,* 382 U. S. 323. In that case the Court held that a bankruptcy court, sitting as a statutory court of equity, is empowered to adjudicate [335] equitable claims prior to legal claims, even though the factual issues decided in the equity action would have been triable by a jury under the Seventh Amendment if the legal claims had been adjudicated first. The Court stated:

> "Both *Beacon Theatres* and *Dairy Queen* recognize that there might be situations in which the Court could proceed to resolve the equitable claim first even though the results might be dispositive of the issues involved in the legal claim." *Id.,* at 339.

Thus the Court in *Katchen* v. *Landy* recognized that an equitable determination can have collateral-estoppel effect in a subsequent legal action and that this estoppel does not violate the Seventh Amendment.

B

Despite the strong support to be found both in history and in the recent decisional law of this Court for the proposition that an equitable determination can have collateral-estoppel effect in a subsequent legal action, the petitioners argue that application of collateral estoppel in this case would nevertheless violate their Seventh Amendment right to a jury trial. The petitioners contend that since the scope of the Amendment must be determined by reference to the common law as it existed in 1791, and since the common law permitted collateral estoppel only where there was mutuality of parties, collateral estoppel cannot constitutionally be applied when such mutuality is absent.

The petitioners have advanced no persuasive reason, however, why the meaning of the Seventh Amendment should depend on whether or not mutuality of parties is present. A litigant who has lost because of adverse factual findings in an equity action is equally deprived of a jury trial whether he is estopped from relitigating the factual issues against the same party or a new party. In either case, the party against whom estoppel is asserted has litigated questions of fact, and has had the facts determined against him in an earlier proceeding. [336] In either case there is no further factfinding function for the jury to perform, since the common factual issues have been resolved in the previous action. Cf. *Ex parte Peterson,* 253 U. S. 300, 310 ("No one is entitled in a civil case to trial by jury unless and except so far as there are issues of fact to be determined").

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. See *Galloway* v. *United States,* 319 U. S. 372, 388-393 (directed verdict does not violate the Seventh Amendment); *Gasoline Products Co.* v. *Champlin Refining Co.,* 283 U. S. 494, 497-498 (retrial limited to question of damages does not violate the Seventh Amendment even though there was no practice at common law for setting aside a verdict in part); *Fidelity & Deposit Co.* v. *United States,* 187 U. S. 315, 319-321 (summary judgment does not violate the Seventh Amendment).[24]

The *Galloway* case is particularly instructive. There the party against whom a directed verdict had been entered argued that the procedure was unconstitutional under the Seventh Amendment. In rejecting this claim, the Court said:

> "The Amendment did not bind the federal courts to the exact procedural incidents or details of jury trial according [337] to the common law in 1791, any more than it tied them to the common-law system of pleading or the specific rules of evidence then prevailing. Nor were `the rules of the common law' then prevalent, including those relating to the procedure by which the judge regulated the jury's role on questions of fact, crystallized in a fixed and immutable system. . . .
>
> "The more logical conclusion, we think, and the one which both history and the previous decisions here support, is that the Amendment was designed to preserve the basic institution of jury trial in only its most fundamental elements, not the great mass of procedural forms and details, varying even then so widely among common-law jurisdictions." 319 U. S., at 390, 392 (footnote omitted).

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 the *Galloway* 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 Seventh Amendment dictates a different result, even though because of lack of mutuality there would have been no collateral estoppel in 1791.[25]

The judgment of the Court of Appeals is

Affirmed.

[A dissenting opinion from Justice Rehnquist is omitted]

11.8 Preclusion Reviewed

General Issues With Regard to Preclusion:

17. One chance to litigate a 'claim'
18. One chance to litigate a factual or legal issue
19. At least one 'full and fair' chance to litigate before preclusion
20. Preclusion may be waived if not asserted early in litigation

Claim Preclusion:

21. Only Applies to actual parties to prior matter
22. Bars claims, counterclaims, between those parties.
23. Bars claims that could have been raised from the same transaction or occurrence (or alternative test for 'claim').
24. Must be valid final judgment on the merits.
25. Note: If claim could not have been brought at time of first case, it is not barred (e.g., note with installment payments not yet due).

ISSUE PRECLUSION (aka Collateral Estoppel)		
	Mutual	Non Mutual
Defensive	Mutual Defensive *Southern Pacific Railroad Co. v. United States*	Non Mutual Defensive Bernhard v. Bank of America Nat. Trust & Sav. Ass'n
Offensive	Mutual Offensive	Non Mutual Offensive

	Southern Pacific Railroad Co. v. United States	Parklane Factors Plaintiffs could not have joined in case one Defendant had every incentive to litigate fully in case one There were no inconsistent judgments There were no procedural opportunities in the second case that were unavailable to the defendants in case one.

Terminology Review

Res Judicata

Can mean claim preclusion, or both claim preclusion and issue preclusion

Claim Preclusion

Preclusion of bringing the same claim twice

Also see terms 'merger' and 'bar']

- Bar: A losing plaintiff is barred from suing on the same claim again
- Merger: A winning plaintiff cannot sue again on the same claim because other causes of action are merged into the prior claim

Issue Preclusion

AKA 'Collateral Estoppel'

Preclusion of relitigating an issue that has already been decided