CHAPTER 1

INTRODUCTION

A. THE STRUCTURE OF A LAWSUIT

NOTE ON THE STRUCTURE OF A LAWSUIT

A lawsuit is a process by which a court resolves a dispute. For example, if two drivers have a collision, there may be a dispute over who should pay for the damage caused. It is possible to imagine that the two drivers could simply walk into court, tell their story to a judge, and have her give them a decision. Such a procedure would require very few and very simple rules. Unhappily, the procedure is not that simple.

Procedural problems in lawsuits can be very complex. Because you may sometimes lose your bearings in the complexities, it may be helpful to describe in rough outline how a lawsuit is conducted, employing some of the terms frequently encountered. The following description is somewhat simplified, and we warn you that the procedures, and their names, vary from one jurisdiction to another.

Suppose that Bill Smith lives in Placerville, California, a small town in El Dorado County, in the foothills of the Sierra Nevada mountains. He buys a kerosene space heater from Sierra Appliance, a store in Placerville. Sierra Appliance is one of several stores in California and Nevada owned and operated by Sierra Appliance, Inc., a Nevada corporation with its principal place of business in Nevada. The space heater is manufactured by Heaters, Inc., a Maine corporation whose manufacturing plant and offices are located in Portland, Maine. Sierra Appliances is an authorized dealer for Heaters' space heaters.

One evening shortly after purchasing the heater, Smith leaves the heater on while he dozes in his chair. He wakes up to find his living room in flames. He escapes from the house alive, but is badly burned. The house burns to the ground. Smith subsequently learns that a neighbor had bought a Heaters, Inc., kerosene space heater that also caught fire. Smith contacts both Sierra Appliance and Heaters. He tries to obtain compensation for medical bills, lost time from work, pain and suffering, and the value of the house. He estimates that the total damages are somewhere in the neighborhood of $500,000. Neither Sierra Appliance nor Heaters is willing to offer him a satisfactory settlement. How does Smith go about bringing a lawsuit to recover for harm to himself and his property?

1. Preliminaries. Probably the first thing Smith does is to get a lawyer. The lawyer will give Smith her professional advice about whether a lawsuit is in Smith's best interest. If it is, and if Smith decides to go forward with it, she will handle all the steps in the litigation. For narrative convenience, we will frequently refer to the various steps as being made by Smith, but in fact they will be taken by his lawyer. The consequences of errors by the lawyer will ordinarily be borne by Smith rather than his lawyer, so Smith should choose his lawyer carefully. The lawyer is not obliged to take Smith's case, but here the injury to Smith and the harm to his property are sufficiently substantial to promise a significant legal fee. A person who

cannot or will not retain a lawyer, whether for a fee or through legal aid, is legally entitled to represent himself, but in litigation of any complexity this is almost always a bad idea.

The first thing Smith's lawyer will do is make as thorough an investigation of the facts as she can at this preliminary stage. The lawyer does this to fulfil her obligation to Smith to make the best possible case on his behalf and to fulfil her ethical obligation to the court to ensure that any claim she brings has an adequate factual and legal foundation. This investigation will likely involve an interview with Smith, an inspection of Smith's medical records, and interviews with the neighbor, with the Placerville Fire Department, and with people who deal professionally with space heaters. Fact investigation will continue as the case progresses.

The legal problem is whether Sierra Appliance or Heaters, or anyone else the lawyer can think of, has a legal responsibility to compensate Smith. To find this out, the lawyer will have to consult the law of contracts and torts. Smith bought the heater from Sierra Appliance, so there was a contract of sale between them. Was it breached because of a defect in the heater? If so, what are the legally recoverable damages caused by the breach of contract? The heater was made by Heaters. Did it breach a tort-based duty to Smith by manufacturing a defective heater? What are the legally recoverable damages in tort?

Suppose the lawyer concludes: (1) Sierra Appliance had a contractual duty to Smith to supply a heater that was free from defects, even if the defects were not due to any fault of Sierra Appliance. (2) Heaters had a tort-based duty to Smith to provide a heater free from defects. (3) If Sierra Appliance breached a duty to Smith, it owes Smith money to repay the cost of the heater, and to compensate Smith for the harm caused by the fire. (4) If Heaters breached a duty to Smith, it similarly owes money for the cost of the heater and to compensate for the harm caused. Based on a conclusion that the heater was defective and on the above legal analysis, Smith decides to file suit against both Sierra Appliance and Heaters, joining them as defendants in a single suit.

2. Which court? Territorial jurisdiction, subject matter jurisdiction, and venue. Smith is confronted at the outset with three interrelated questions about where to file suit. Smith would prefer to bring suit in California, in part because it is more convenient to his Placerville home, but also because his attorney has experience litigating in local courts

First, Smith must decide whether he can obtain *territorial jurisdiction* over the defendants in a court located in California. Territorial jurisdiction rules require a minimum level of contact between the defendant and the territorial sovereign (typically a state, sometimes the entire United States) within which the court is located. In general, any person who has sufficient "contacts" with a state is subject to the territorial jurisdiction of the courts in that state—that is, the person can be compelled to answer claims against her or else have a binding default judgment entered against her. Sometimes a federal court will have a broader territorial jurisdiction than a state court; in such a case, a plaintiff might choose to sue in federal court because it would thereby be able to assert jurisdiction over a particular defendant that would be unavailable in state court. In this case, however, the reach of the territorial jurisdiction of the federal and state courts is identical.

Territorial jurisdiction can be obtained in this case over both Sierra Appliance and Heaters. Although "presence" in a jurisdiction is a somewhat elusive concept when dealing with an artificial person such as a corporation, it is clear that Sierra Appliance is present in California for purposes of territorial jurisdiction because it has a store in California from which Smith bought the space heater. Heaters is incorporated in Maine, and has its principal place of business in Maine, and has no employees or agents in California. But the suit arises out of a purchase in California from an authorized Heaters dealer, as well as an injury in California that Smith claims is traceable to that space heater. These contacts between Heaters and the state of California are sufficient to justify the exercise of territorial jurisdiction over Heaters.

Second, Smith needs to find a court with *subject matter jurisdiction* over the suit. Subject matter jurisdiction is distinct from territorial jurisdiction: it concerns the kind of case that the court is empowered to hear. Smith must find a court that can assert both kinds of jurisdiction. There are both state and federal trial courts in California, called state Superior Courts and federal District Courts. In many suits, these courts have overlapping or "concurrent" subject matter jurisdiction, which means that a suit may be brought in either system.

California Superior Courts are courts of general subject matter jurisdiction with authority to hear all types of disputes, regardless of amount. Smith's suit clearly falls within the subject matter jurisdiction of the Superior Court.

Federal District Courts have subject matter jurisdiction over suits between citizens of different states if the amount in controversy exceeds $75,000. (There are other, additional bases for subject matter jurisdiction in federal District Courts that are unnecessary to consider here.) Jurisdiction exists because Smith, the plaintiff, is a citizen of California. Sierra Appliance, one of the defendants, is a citizen of Nevada, and Heaters, the other defendant, is a citizen of Maine. Let us assume that the amount in controversy is $500,000, well above the jurisdictional amount of $75,000.

Since both the state and federal trial courts have subject matter jurisdiction, Smith may choose either state or federal court depending on which better serves his interest.

Third, Smith can only file suit in a court with proper *venue.* (The word is derived from the French verb "venir," meaning "to come.") There are fifty-eight state Superior Courts in California, one for each county. Venue in a contract suit is proper in a county where the defendant resides, where the contract was entered into, or where the contract was to be performed. Venue in a tort suit for personal injury or property damages is proper where the defendant resides or where the injury took place. Venue is therefore proper in El Dorado County. The Superior Court for El Dorado County is in Placerville, the county seat, where Smith lives.

There are four federal judicial districts in California. The most common criteria for venue in federal District Court are the district where a defendant resides if both defendants reside in the same state, or the district where a substantial part of the events or omissions giving rise to the suit occurred. Because the purchase and the accident both took place in Placerville, venue is proper in the federal district that encompasses Placerville, which is the

Eastern District of California. The federal District Court for the Eastern District sits in Sacramento, about 45 miles from Placerville.

Smith is now in a position to choose whether to file suit in state or federal court. Smith's lawyer might think that a Sacramento jury, drawn from the city, is more likely to return a large verdict for plaintiff than a Placerville jury, drawn from a predominantly rural area. On the other hand, Smith may not want to travel 45 miles to Sacramento to file, and eventually try, his suit. Not only is the distance a problem, but Smith may also feel that he is likely to get a more sympathetic hearing from a local Placerville judge and jury. The choice between federal and state court can be influenced by other things, too. For example, the state court's calendar may be particularly crowded, with the result that Smith's case will come to trial more quickly in federal court. Or Smith's lawyer may have practiced primarily in state court, and feel nervous about the unfamiliar procedural rules and judges of the federal court. One thing that will not affect the decision is the substantive contract and tort law to be applied. The substantive law applicable in a lawsuit brought in the diversity subject matter jurisdiction of the district court is the substantive law of the state in which the federal court sits.

After some deliberation, Smith's lawyer decides to file in federal court. Had she chosen to file in state court, the case might have ended up in federal court anyway. Defendants often have the right to remove the suit from state to federal court, and indeed have that right in Smith's case.

3. Drafting the complaint, filing, and service of process. Smith now writes a statement of his claim against the defendants. The statement will alert the defendants to the nature of Smith's claims against them, and will help guide the court as it proceeds with the case. This statement is the *complaint*—also known in some states as the petition or declaration. In his complaint, Smith will say who he is, who the defendants are, what he alleges happened to him, and what remedy he seeks. Factual assertions in the complaint are *allegations*—also known as averments.

Everything so far has been done in the lawyer's office. Smith now takes his complaint to the federal courthouse in Sacramento and *files* it with the clerk of the District Court. By this filing, the suit is officially *commenced.* (In some states, including New York, a suit is not deemed commenced until summons is served on the defendant.) After the complaint is filed, the case will be randomly assigned to one of the district judges. In the normal course, the assigned judge will handle all further proceedings in the case, up to and including any trial. In state courts of general jurisdiction, assignment to a single judge for the entire course of proceedings is uncommon. As a case progresses in state court, different judges usually decide issues relating to jurisdiction, pleading, discovery and trial.

The District Court is advised of the suit by the filing of the complaint, but the defendants are not. The device by which the defendants are advised of the suit is the *summons.* At the same time that Smith files his complaint, he hands the clerk a form of summons, containing the names of the parties and a notice to the defendants that they must come in and defend themselves. The clerk signs and puts the court's seal on the summons, thus making it official notice. Because there are two defendants, Smith obtains a summons for each.

Smith now must *serve* the summons and complaint on the defendants to notify them of the lawsuit. In federal court, Smith may use any method of

service permitted by state law, as well as a variety of others. He will most likely hire a private agency to serve process. Since Sierra Appliance has stores in California, it probably has designated an agent for service of process within the state. The process server may give the summons and complaint to that person, thereby accomplishing personal service; or he may mail the summons and complaint by first class mail to Nevada, together with an acknowledgment of receipt of service, to any of several officers of the corporation specified in the California statute. Heaters almost certainly does not have an agent designated for service of process within the state. The process server will therefore mail the summons and complaint to a corporate officer in Maine in accordance with the California statute. We will assume that personal service was accomplished without incident on the agent of Sierra Appliance, and that an officer of Heaters signed the form acknowledging receipt of the summons and complaint.

4. Responding to the complaint. a. Preliminary objections. The defendants may think that they have some preliminary objections to the suit. For example, Heaters may think that it is a denial of due process for California to assume territorial jurisdiction over Heaters. Heaters doesn't want to litigate in California; it would prefer to compel Smith to come to Maine to make his claim. Heaters has to be careful how it presents that objection to jurisdiction. In federal court, if Heaters doesn't make that objection in its very first filing with the court, which may be a *motion to dismiss* or an *answer,* it will be held to have waived that objection and to have *consented* to the jurisdiction of the California court. In a California state court, the defendant must make that objection in a *motion to quash*, that is, to nullify, the summons, before filing any answer on the merits of the case.

Suppose that Heaters makes a *motion to dismiss* on the ground that the court lacks territorial jurisdiction over it. A *motion* is a request for the court to take action, either by entering an order or by granting specified relief. In the heat of trial, motions may be made orally and on the spur of the moment. But pretrial motions must be made in writing and are normally made on *notice*—that is, the court and the opponent are advised in writing of the party's motion and the grounds supporting it, and are given an opportunity respond to the motion in writing. To make the motion, Heaters will file the motion with the court and serve it upon Smith. The motion will typically be accompanied by a *memorandum of law* (sometimes called a *memorandum of points and authorities*) setting forth the legal arguments supporting the request. It may be accompanied as well by evidentiary materials, frequently in the form of *affidavits*—sworn written statements of facts, given by competent witnesses. In this case, Heaters will want to present affidavits from witnesses tending to show that the company has had little relevant contact with California. Plaintiff will respond with its own memorandum of law and affidavits, and may request some discovery—compelled disclosure of evidence, about which more below—from Heaters if it thinks that such discovery is likely to uncover evidence that Heaters has more extensive contacts with California than it was willing to acknowledge in its motion. If necessary, the court will postpone the hearing on the motion to permit such discovery. On the date noticed for the motion, the court will hear argument from Heaters and Smith on the jurisdictional issue. If Heaters' motion to dismiss is granted, the effect will be the same as if Heaters had never been served at all, and Smith will have to proceed against Sierra Appliance alone. If its motion is denied, however, Heaters will be subjected to the jurisdiction of the court. We will assume that the motion is denied.

b. Default and default judgment. Suppose that one of the defendants, after being served with the summons and complaint, fails to do anything. This is a common response to litigation in cases involving small amounts, but relatively uncommon in cases of this magnitude. After due notice to the defendant who failed to respond, Smith would instruct the clerk of the court to note the fact that the defendant was in *default* and would then apply to the court for a *default judgment*. The judge would conduct a brief ex parte hearing (a hearing at which only Smith is present) on the question of the amount of damages Smith has sustained and would enter a judgment against the defaulting defendant, ending the action as to that defendant. The judgment can then be enforced in any state in the nation, unless the defendant who defaulted can show that the judgment was rendered without proper notice or that the rendering court lacked jurisdiction.

If a default judgment has been entered, either Sierra Appliances or Heaters may have a basis for setting it aside. Perhaps Jones, the officer of Sierra Appliance who was served with the summons and complaint, was killed the day after she was served, and failed to pass on the complaint before her death. After the default judgment has been entered, Sierra Appliance discovers the complaint. Under these circumstances, Sierra Appliances would probably succeed in a motion *to set aside the judgment*.

c. Pleading in response to the complaint. Many problems may arise in preparing and defending against a complaint. We shall only consider a few major points.

The first problem is whether, as against each of the defendants considered separately, the complaint describes a violation of law which, if proved, would entitle Smith to recover damages. Note that at this stage, Smith is not trying to prove anything; he is merely *alleging* what he hopes and expects can be proved at trial. If his complaint does describe a violation of law, his complaint *states a claim upon which relief can be granted* (in a California state court, *states a cause of action*).

For example, as to Heaters, the law of torts recognizes that a manufacturer of goods is liable in damages to any person whom the manufacturer could foresee would be injured by a defect in the goods. Suppose that Smith's complaint alleges that Heaters manufactured the heater, that the heater was defective, and that the defect led to a kerosene leak, which in turn was the proximate cause of the fire. Is Smith's complaint sufficient as a matter of "substantive law," in this case the applicable tort law? If negligence on Heaters' part is required under the substantive law then Smith's complaint is *not* sufficient, for he has not alleged that Heaters was negligent in the way it manufactured the heater. But if a manufacturer is liable whenever its product is defective, regardless of whether the manufacturer was negligent in making it, then Smith's complaint does state a cause of action.

Apart from the requirement that the complaint be sufficient in its substance, the rules of procedure require that the complaint comply with certain rules of form. The most important such rule is that the complaint must describe the claim in sufficient detail to give defendants fair notice of the nature of the claim being asserted against them. We will assume that Smith's complaint is sufficiently specific to meet the formal requirements for a complaint.

If Heaters believes that it is liable to Smith only if it was negligent in manufacturing the space heater, and if Smith has not alleged negligence, it will move to dismiss the complaint for *failure to state a claim upon which relief can be granted.* In California and some other states, Heaters would raise this point by means of a *general demurrer.* The effect of such a motion, in either federal or state court, is to say: "Even if what you say is true, you are not entitled to recover under the substantive law."

Assume that Sierra Appliance and Heaters move to dismiss for failure to state a claim. The judge decides, however, that the complaint is sufficient in point of substantive law. She therefore *denies* the motion.

The defendants now consider their possible defenses based on disputing Smith's factual allegations. They will expressly *admit* some of the matters alleged by Smith, such as the fact that he bought the heater. They will be *deemed to admit* allegations that they don't deny, so they will be careful to deny allegations which they wish to contest. For example, they may deny that the heater was defective, that it caused the fire, and that Smith was injured. They may suspect that Smith was injured in some degree, but they are not sure how much. To be on the safe side, they will deny that he was injured at all.

The defendants' denials will be set forth in their *answer* to Smith's complaint. The answer is the pleading by which the defendant joins issue with plaintiff on the factual matters alleged in the complaint. The factual denials constitute *negative defenses.* But defendants may also have *affirmative defenses*—contentions that there are other factual circumstances which, if proven, would exonerate them even if the facts alleged by Smith are established. For example, suppose that Heaters suspects that Smith did not use the right type of fuel in the heater and that this led to the fire. In its answer, Heaters would allege that Smith used the wrong kind of fuel, that this was a proximate contributing cause of the explosion, and hence that Smith was comparatively negligent. Heaters would thus allege in its answer that even if it was liable, there are additional facts which, under the substantive law, result in Smith's being unable to recover or which reduce the amount of his recovery.

Smith might have objections to the defendants' answers very similar to those discussed in connection with the complaint. For example, Smith might think the allegations of the affirmative defense are not sufficient in point of substantive law. If so, he could make a *motion to strike* the defense as insufficient in point of law or, in code pleading states, demur to defendants' answers.

Suppose, however, that Smith does not so move or demur. One might suppose that Smith should controvert allegations of comparative negligence. In most procedural systems, however, allegations in the answer, even if unanswered, are *deemed denied.* Hence, Smith need not file any additional pleading. At this point, therefore, the dispute is framed and the *pleadings are closed.*

5. Discovery, summary judgment, and settlement. The procedure through which each side, with the aid of the court, investigates its own claims and those of its opponent is called *discovery.* In American courts, discovery reaches all information relevant to the contested issues in the case, except information protected by an evidentiary privilege.

In federal court, the parties must exchange some basic discovery at the outset of the case, without a formal request from the other side. The information includes the names and identifying information of witnesses that the party expects to call in its own case, the identity and location of relevant documents, and, for the plaintiff, a calculation of damages. Most state courts do not have this system of initial disclosures. In addition, parties in federal court must try to agree upon and present to the court a plan for conducting discovery. Depending on the degree to which the parties are able to cooperate in the planning and conduct of discovery, the court may be called upon, or may decide on its own, to intervene in the discovery process from time to time to resolve disputes.

There are three main forms of discovery: interrogatories, requests for production or inspection, and depositions. They are often used in sequence to build a party's case.

Even after receiving defendants' initial disclosures, Smith may still have little sense of the who, what, when, and how of Heaters' design and manufacture of the space heater. To get a better sense of the facts, he may use, at least in the first instance, *interrogatories to a party*. These are *written* questions addressed to Heaters. Heaters must disclose the information demanded if it has that information. For example, Smith's interrogatories to Heaters might ask for names of personnel involved in the design and manufacture of the product, the date on which the heater was made, the information provided to customers concerning proper fuel, any studies that were done concerning the product's safety, etc. Obviously such interrogatories are more important in state courts where initial disclosures are not made.

Smith, Sierra Appliance and Heaters will probably all make use of the *request for production of documents and things and entry upon land for inspection*. Smith will request documents relevant to the design and manufacture of the heater, its safety, and warnings concerning its use. The documents requested will include emails and other data in electronic form. Sierra Appliance and Heaters may request documents supporting Smith's claims of financial loss. They may also demand production of the heater itself, or what is left of it. And they may demand the right to visit the burnt out premises to see if they can identify other causes of the heater's failure or the fire itself. The defendants may also seek a physical examination of Smith by a doctor of their choosing in order to verify and assess the extent of Smith's injuries.

After this background preparation, both parties will likely make use of a *deposition on oral examination*, or, as it normally called, simply a *deposition*. This is a device by which one party may require witnesses to appear before a court reporter and/or video camera and answer questions put to him them the lawyers for the parties. A deposition may be taken not only of a *party* to the action, such as Smith or Sierra Appliance, but also of witnesses who are not parties, such as Smith's neighbor. When the lawyer asks questions of the *deponent*, he is said to be *taking* the witness's deposition. The lawyer will try to find out the other side's version of the facts, seeking to find weaknesses and to pin down the testimony. For example, Heaters will take Smith's deposition. Normally, the lawyers for Smith and Heaters will agree on a mutually satisfactory time, Heaters will arrange to have a court reporter on hand, and the deposition will be taken at the office of Heaters' lawyer. There, Smith will be asked to identify himself, placed

under oath, and questioned in detail concerning his account of buying the heater and of the fire. He will be asked about his injuries. He will be asked if there was anyone with him at the time of the fire and, if so, to give his companion's name. Probably, Heaters' lawyer will later take the deposition of the companion, if there was one. Smith will take depositions from Sierra Appliance's and Heaters' personnel, using the mandatory disclosures, answers to interrogatories, and documents to identify the key personnel and the questions to be put to them.

In a products liability case of this kind, each side is likely to have expert witnesses, retained to testify at trial. Expert witnesses do not testify about historical facts that they perceived in connection with events giving rise to the suit. Instead, they testify by way of expert opinion based upon their review of facts provided to them. For example, Smith may have retained a medical expert to testify concerning the severity of his permanent injuries and an engineer to testify to the safety of the design of the heater. Sierra Appliance and Heater are entitled to take those experts' depositions and to interrogate them intensively concerning the basis and rationale for their opinions. Smith is entitled to do the same with respect to experts retained by the defendants.

The discovery process may result in eliminating some of the issues raised by the pleadings. For example, Smith's testimony may make it quite clear that he was injured by the fire. Hence, the defendants probably will no longer wish to contest that point. On the other hand, the discovery process may open up new issues, for example, the possibility that Smith had left flammable material too close to the heater. Heaters therefore would want to amend its answer to assert this additional basis of defense.

As discovery proceeds, the parties will normally explore ways of disposing of the case without the costs and risks of trial. An important procedural device for disposing of the case without trial is *summary judgment*. It is always possible that there is some fact crucial to the lawsuit that can be established as true beyond legitimate dispute. For example, suppose that Sierra Appliance sold Smith the heater under a contract which expressly provided that Sierra Appliance would in no event be liable to the purchaser (Smith) for any amount beyond the cost of the heater itself. Assume that the contract was drafted with such care that it clearly bars Smith's claims for damages against Sierra Appliance, at least to the extent that those claims exceed the purchase price.

Smith, it will be recalled, pleaded that he was entitled to damages for personal injury and loss of property under the contract with Sierra Appliance, and Sierra Appliance denied this, so the issue is in dispute according to the pleadings. But if Sierra Appliance could produce the contract before the judge, and establish by *affidavit* that it was the contract in question, it could then urge that the contract's legal effect was to bar any liability on its part for those damages. Sierra Appliance could, therefore, move for *summary judgment*—judgment rendered on the basis of a paper record and without a trial. If Smith does not file a counter affidavit, it will be pretty clear that there is *no genuine dispute of fact* whether this was the contract under which the heater was sold. However, if Smith files an affidavit in which he denies that he signed the contract attached to Sierra Appliance's affidavit, there would be a genuine issue of fact as to whether that was the contract and summary judgment would be denied. The truth would have to be decided at the trial.

As the case approaches trial, it is likely that the parties will consider settlement. (Indeed, the parties will likely have considered settlement at earlier stages in the proceedings.) A settlement in this type of action would typically involve a payment by one or both of the defendants to the plaintiff, in exchange for plaintiff's release of his claim and agreement to dismiss his suit with prejudice. Settlement is often attractive to both parties because it saves the costs of further litigation and eliminates the risk of an extreme outcome in which either plaintiff would take nothing or defendant would pay an outsize award. Settlement is attractive to the court system as well, because it saves the high public costs of a trial. For that reason, courts often require parties to explore the potential for settlement or to participate in procedures designed to facilitate it. Settlement is by far the most common disposition in disputes that reach court. Indeed, many civil disputes settle even before a complaint is filed.

In those relatively rare cases that actually go to trial, it is helpful if, prior to trial, the parties agree on what should actually be tried. This is done at a final *pretrial conference*, a meeting, held either in the courtroom or in the judge's chambers, among the lawyers for the various parties. Sometimes, though rarely, the parties themselves will be present. At the pretrial conference, the judge will determine whether there are any required amendments to the pleadings, adding issues or eliminating them. She will also inquire about the possibilities of settlement, for the parties may now be close together in their appraisal of the case. She may take care of routine matters which would be time-consuming at the trial, such as the formal identification of documentary evidence (medical records and so on). Finally, the judge may try to ascertain whether there are any points of law that will probably come up at trial which can be decided beforehand. In short, the purpose of the pretrial conference is to put the case in final shape for trial.

6. Trial. Only a small fraction of filed civil cases are actually tried to verdict and judgment. Assume, however, that this case is not resolved by summary judgment or settlement, and a trial date is set. On the appointed day, the lawyers and parties will convene in court and the trial will commence. A threshold question will be whether the case should be tried to a jury or not. This being an action *at law*, since it is for damages, it would be triable to a jury on demand of either party. (In contrast, a suit for an injunction is in *equity* and normally is triable to the judge sitting without a jury.) Let us assume that one of the parties has made a timely demand for jury trial (usually when the complaint or answer is filed). Failure to make a timely jury demand constitutes a waiver of the right to jury trial.

At the trial the first task is the selection of the jury. In most state courts, a jury in a civil case consists of twelve persons; in many federal districts, a six person jury is used in civil cases. A court official will have herded a group of prospective jurors into the courtroom. The lawyers will proceed to interrogate them, to find out if they are qualified and fair minded and what they are like as people. This is called the *voir dire examination.* Sometimes the primary questioning is done by the judge, but the lawyers in most states are given a chance to ask questions if they wish. A juror revealing bias or some other disqualification will be *challenged for cause.* If a juror has no such disqualification, but one party nevertheless does not want him on the jury, the party may excuse the would-be juror by using one of his limited number of *peremptory challenges*. When this process is completed, the jury is sworn by the clerk of the court. It is thereby *impaneled*.

The lawyers now make their *opening statements*. Smith, the plaintiff, goes first. His lawyer tells the jury what the case is about and what he expects to prove. The defendants may make an opening statement at this time or postpone doing so until after the plaintiff has put in his evidence. The next thing that happens is that the plaintiff puts in his *case in chief*. Plaintiff has the burden of proof of most matters alleged in his complaint. Smith himself will testify and his doctor will testify about Smith's injuries. Smith might have an expert witness testify concerning the alleged defect in the heater. When Smith, and the other witnesses put on by him, are questioned by Smith's attorney, this is *direct examination*. When the direct examination of each of Smith's witnesses is concluded, defendants' attorneys may ask him questions, seeking to bring out uncertainties, weaknesses and mistakes. This is *cross-examination*.

After plaintiff has put in his case, he *rests*. By resting, plaintiff says that he has proved enough so that, if the jury believes his evidence, a verdict may be rendered in his favor. Defendants may not think so. For example, suppose that Smith offered no evidence from which it could be concluded that the heater was defective. Heaters could raise the objection by moving for a *judgment as a matter of law* (called a *non-suit* or *directed verdict* in many state courts) requesting the judge to dismiss the plaintiff's claim without submitting it to the jury, on the ground that Smith's proof as a matter of law fails to make out the elements of a valid claim.

Suppose that the judge denies the defendant's motion. She may do so either because she disagrees with Heaters' argument that the evidence is legally insufficient, or because she prefers to see what evidence Heaters develops prior to making her ruling. Defendants would then present their *case in chief*. If defendants had not previously made their opening statements, the presentation of their case would be preceded by those statements.

In their case in chief, defendants will introduce evidence tending to disprove Smith's case. For example, defendants very likely would have their own medical testimony, tending to show that Smith wasn't as badly injured as Smith's evidence seems to indicate. Defendants would also put in evidence to support any affirmative defenses they might have, such as contributory negligence. For this purpose, they may well call plaintiff himself in their own case as an *adverse witness*. They might also call other witnesses, such as Smith's neighbor. Each witness will be directly examined by defendants and may be cross-examined by plaintiff.

At the end of the case, defendants might again move for *judgment as a matter of law*. Smith himself might move for *judgment as a matter of law*, claiming that no material evidence offered by defendants disproves his claim. Usually, if a case has gotten this far, the judge will deny the motion, preferring to let the jury render a verdict. (In the unlikely event the jury renders a verdict that is not supported by the evidence, the judge can set the verdict aside, as described below.)

The plaintiff now makes his *concluding or closing argument*. He reviews the evidence, stressing the points most favorable to him and playing down the defendants' evidence. He will urge the jury to find for Smith and, within limits, encourage the jury to see the evidence in a sympathetic light. Often the plaintiff will reserve the right to rebuttal. Then the defendants will make their closing argument, stressing the evidence favorable to them and trying

to discount considerations of sympathy. When defendants are done with this argument, Smith returns with his *closing or rebuttal argument*. Finally, the judge will *instruct the jury* concerning the controlling law.

The jury then retires for *deliberation*. The jury first elects a foreperson and then proceeds to decide what they think the facts are. Usually, the jury will be asked to render a *general verdict*, which simply states the name of the prevailing party, and, if the plaintiff has prevailed, the damages he should recover. The lawyers may have requested the judge to require a *special verdict* from the jury. If the judge grants the request, the jury will be given a series of specific questions they must answer. For example, the questions might be: Did Heaters make a proper inspection of the heaters it manufactured? Did plaintiff use proper fuel?

In federal courts and in some state courts, the jury must reach unanimity in order to render a valid verdict, although the Federal Rules of Civil Procedure and some state procedural rules permit the parties to stipulate otherwise. In California and many other states, nine out of twelve must agree in favor of one party or the other. If the jury doesn't reach a decision by the necessary majority, and if the judge thinks further deliberation will be useless, she may discharge the jury and order a new trial.

If the jury does reach a verdict, it returns to the courtroom, the foreperson gives the verdict to the clerk or judge, and the judge then reads it. The parties may ask that the jury be *polled*, i.e., that each juror be individually asked whether he or she concurs in the verdict. Assuming the necessary majority does concur, the verdict will be accepted by the court and the jury will be *discharged*.

7. Post-trial or post-judgment motions. There are two principal post-verdict or post-judgment motions. First, a party may contend that the jury's verdict should be set aside because it is insufficiently supported by the evidence. In federal court, the party would raise the point by renewing his earlier motions for *judgment as a matter of law*. In most states, the point would be raised by a motion for *judgment notwithstanding the verdict*. (The Latin term for this is judgment *non obstante veredicto*, from which is derived the commonly used name for this motion, *judgment n.o.v.*) If the motion is granted, the judge will enter judgment for the moving party.

Second, a party may seek a new trial. New trials may be sought on the basis of asserted errors that occurred in the trial itself—errors in the admission of evidence, in the conduct of attorneys, litigants, jurors or judge, and, perhaps most frequently, errors in the instructions to the jury. New trials can also be sought on the ground that the jury verdict, while perhaps not wholly without factual and legal foundation, nonetheless represented a serious miscarriage of justice. The moving party may claim that the jury's verdict on liability was against the great weight of the evidence, or that the damages awarded were grossly excessive or grossly insufficient. The district court has discretion to order a new trial on those grounds as well.

8. Appeal. After a final judgment has been entered by the trial judge, the losing party may *appeal*.

First, in general an appeal may be taken only from a *final judgment*. As the trial progresses, a judge makes all kinds of rulings—on demurrers, motions, evidence, instructions and post-trial motions. At any point, the judge may make a mistake that will confuse or render erroneous all the subsequent stages of the proceeding. The litigants might hope that such a

serious error could be corrected by immediate appeal. However, except in limited situations, no appeal may be taken until the final judgment, for better or worse, has been rendered.

This "final judgment rule" creates a good deal of difficulty. Sometimes a trial judge will make an error at the threshold of litigation that is so important that the rest of the proceedings become pointless. For example, suppose that the trial judge overruled Heaters' motion to dismiss for lack of jurisdiction. Under the "final judgment rule," this means that Heaters will have to go through the whole trial before it can appeal the ruling on the motion to dismiss. Sometimes statutes and case law provide special remedies for such situations. In the federal courts and many state courts, certain kinds of orders can be appealed before final judgment; this is called *interlocutory appeal.* Another procedure is the use of the "extraordinary writs," chiefly *mandamus* (or mandate, to use the name in California) and *prohibition.* The first writ commands the trial judge to do something; the second prohibits her from doing something.

Second, an appellate court is supposed to correct errors, not to render what it thinks is a more just result in the particular case. If the trial judge made a mistake of law and the mistake affected the outcome, then the appellate court will do something about it—usually, reverse the judgment and order a new trial. This is *reversible error* on the part of the trial court. If the trial judge made a mistake but it didn't seem to have affected the result below, the appellate court will not do anything about it. This is *harmless error* on the part of the trial court. Third, appellate courts in general do not review lower court decisions on matters of *fact*; review is ordinarily limited to questions of *law*. This general rule is subject to the important qualification that a factual determination may be reversed on appeal if the appellate court thinks there is no substantial evidence to support the factual determination in question. Obviously this leaves some latitude to the appellate courts, for "substantial" is a pretty vague criterion.

Finally, the appellate court will not ordinarily consider objections that were not first presented to the trial court. A corollary of this proposition is that, except for undisputed matters subject to *judicial notice*, the appellate court will not consider any evidence not contained in the record made in the trial court.

B. THE STRUCTURE OF THE COURT SYSTEM

NOTE ON THE STRUCTURE OF THE COURT SYSTEM

Courts in the American system are of two principal types: trial courts and appellate courts. Trial courts are those tribunals in which proceedings are initiated, the disputed issues framed, the proofs taken and the initial decision handed down. Unless timely application for appellate review is made, the disposition of the trial court is final. And even when appellate review is obtained, the function of the appellate court, speaking generally, is solely that of inquiring whether the trial court properly disposed of the case as presented to it.

1. State courts. State courts, as distinguished from federal courts, are the courts in which most disputes are heard.

a. Trial courts. (1) Courts of limited jurisdiction. Most states have courts of limited jurisdiction, i.e., courts that are authorized to hear and determine cases involving a relatively small amount in controversy and (ordinarily) simple issues. The historic prototypes of the courts of limited jurisdiction are the rural justice court, presided over by a justice of the peace, and the municipal court, presided over by a magistrate. The justice court historically had authority to hear civil cases involving claims for money in a small amount, typically $20, and criminal cases involving minor offenses, typically misdemeanors. The municipal court had a similarly limited jurisdiction.

In a few states the historic pattern still prevails. In most, the court systems have been reorganized in the following directions: the justice courts have been reduced in number and professionalized (i.e., the justice is required to have legal training), and their maximum monetary jurisdiction has been increased. The municipal courts have been made uniform in their jurisdiction (so that the authority of municipal courts is the same throughout the particular state), professionalized, and have had their monetary jurisdiction increased. The names and authority of courts of limited jurisdiction vary from state to state. Most states still have courts known as justice courts, some have a court analogous to the municipal court, and many have a court of limited jurisdiction known as the "county" court. See Department of Justice, National Criminal Justice Information and Statistics Service, National Survey of Court Organization (1973). All states have what are called "small claims courts," although they are typically not a separate court. Rather, the term usually refers to a simplified form of procedure available in courts of limited jurisdiction, such as the justice or municipal court, for the trial of cases involving a relatively small amount, the precise amount varying from state to state.

(2) Courts of general jurisdiction. All states have trial courts, usually organized along county lines, for hearing cases of all types, unlimited by subject matter or amount in controversy. Such a court is referred to as a trial court of general jurisdiction. The court of general jurisdiction is known by different names in different states: in California it is the Superior Court; in New York, it is the Supreme Court; in many states it is the Circuit Court; in other states it is known as the District Court, the County Court, the Court of Common Pleas.

The hearing of cases in trial courts, whether of limited or general jurisdiction, is ordinarily conducted by a single judge. The trial bench in urban areas usually has more than one judge, and in such courts different judges may be called upon seriatim to hear various phases of a particular case. Thus, one judge may pass upon preliminary pleading questions, another on questions arising in discovery matters, and yet another preside at trial. But at any hearing only one judge ordinarily sits and decides. This is to be contrasted with the practice in continental civil procedure, where many hearings (at least in trial courts of general jurisdiction) are before a panel of three judges.

States also have specialized types of "courts," such as the "probate" court, the "domestic relations" court and others. In some states, these are separate courts staffed by separate judges. Thus, in New York there is a separate tribunal known as the Surrogate's Court which has probate jurisdiction, i.e., authority to hear matters pertaining to decedents' estates. In many states, however, the terms "probate court" or "domestic relations

court" do not refer to separate courts but to specialized procedures applied in the court of general jurisdiction to these particular types of cases.

b. Appellate courts. (1) Appeals from courts of limited jurisdiction. Most states permit appeal of the determinations made by courts of limited jurisdiction. In some states, the mode of appeal is by trial de novo in the court of general jurisdiction, so that a litigant dissatisfied with the result of the disposition by the inferior court may request that the case be retried in the court of general jurisdiction. Retrial is usually limited to the issues framed in the lower court, but additional evidence as well as additional argument may be presented. In other states, the mode of appeal is strictly review. That is, the record of the proceedings in the inferior court is presented to the court of general jurisdiction for consideration of the correctness of the disposition of the case as it was presented below. In some states, the appeal to the court of general jurisdiction is the final appeal and no further review may be obtained. In others, the disposition of the court of general jurisdiction may itself be reviewed by further appeal.

(2) Appeals from courts of general jurisdiction. All states permit appellate review of the disposition of cases in courts of general jurisdiction. In a few very small states there is a single appellate court, the state supreme court, that hears appeals from the trial courts of general jurisdiction. Most states, however, have intermediate appellate courts to which appeals are taken before they may be taken to the state supreme court.

The subject matter jurisdiction of intermediate appellate courts varies from state to state. The typical pattern is that all types of appeals from the trial courts are taken to the intermediate appellate court; further appellate review in the state supreme court is obtainable only in the discretion of the supreme court or upon special request of the intermediate appellate court. The procedural device for such further review may be simply an "appeal"; more often it is known as certiorari.

The highest appellate court of a state consists of several judges, the number varying from state to state but typically being seven, as in California, Illinois and New York. The intermediate appellate courts usually consist of a number of judges who sit in panels of three. In the New York Appellate Division five judges sit on any particular appeal.

2. Federal courts. The federal court system parallels the court systems of the states, except that there are no federal courts of general jurisdiction. The authority of federal courts is limited in the kind of cases they can hear.

a. Trial courts. The principal trial court of the federal system is the District Court. Originally, the federal system had two types of trial courts, the District Courts and the Circuit Courts. As the result of a series of statutory changes since 1789, the District Court has become the only ordinary trial court in the federal system and the Circuit Court has become exclusively an appellate court.

The District Courts are organized along territorial lines called districts. Each district comprises a state or a portion of a state. Thus, the territory of the Federal District Court for the District of Oregon consists of the state of Oregon. Florida is divided into three—Northern, Middle and Southern; California and New York are divided into four. Some of these districts are divided for administrative purposes into divisions, each of which has a

headquarters in a different place within the district. See 28 U.S.C. § 81 et seq.

The federal District Courts have jurisdiction over several types of cases. A principal type includes actions between citizens of different states where the amount in controversy exceeds $75,000. This is known as the "diversity" jurisdiction, and it extends, generally speaking, without regard to the subject matter of the controversy. The diversity jurisdiction of the federal courts is concurrent with that of the state courts. A second principal type includes suits "arising under" federal law, known as the "federal question" jurisdiction. District Courts have general federal question jurisdiction without regard to the amount in controversy. In some types of federal question jurisdiction, for example patent infringement suits, the jurisdiction of the federal district courts is exclusive of the states; in others, the state courts have concurrent jurisdiction. A third principal type of federal jurisdiction is actions by or against the federal government and its agencies. A fourth principal type of federal jurisdiction is admiralty, or maritime, suits. In all of these types of civil suits, the Federal Rules of Civil Procedure govern the conduct of the litigation. These rules will be considered in detail in this book.

In addition to the federal District Courts, there are a number of specialized federal courts. The study of these courts is beyond the scope of this book, but several deserve mention. Bankruptcy Courts operate as "adjuncts" to the federal District Courts. They decide a wide range of cases relating to the federal bankruptcy laws and are staffed by special bankruptcy judges. Appeal from the Bankruptcy Courts is to the federal District Court, or in some circuits to a Bankruptcy Appellate Panel, and thereafter to the federal Court of Appeals. Federal Magistrate Judges also operate as "adjuncts" to the federal District Court. They decide a wide range of procedural matters, and, with the consent of the parties, are authorized to try entire civil cases. The Claims Court is a specialized tribunal authorized to hear claims for money judgments against the United States. The Tax Court hears claims under the federal Internal Revenue Code. Neither the Claims nor the Tax Court is an "adjunct" court; rather, both are free-standing courts with separate routes of appeal.

b. Appellate courts. Determinations made in the federal District Courts are ordinarily appealable to the Courts of Appeals, the intermediate appellate courts of the federal system. With one exception, the Courts of Appeals are organized territorially. For example, the Court of Appeals for the Second Circuit hears appeals from federal District Courts located in the states of New York, Connecticut and Vermont. There are twelve geographically organized circuits. Eleven of them have numbers (First Circuit, Second Circuit, etc.); the twelfth is the Court of Appeals for the District of Columbia. All of these circuits hear appeals from cases in particular areas of the country. There is a thirteenth circuit whose jurisdiction is based on subject matter, the Court of Appeals for the Federal Circuit. It hears appeals in cases involving specific areas of law, including patents and international trade. Each Court of Appeals consists of several judges who ordinarily sit in panels of three judges each, but who occasionally hear cases en banc, i.e., with all or, in the Ninth Circuit, a substantial fraction of the entire membership sitting. The Courts of Appeals also have important appellate jurisdiction of cases originating in the federal administrative agencies.

The highest court in the federal system is the Supreme Court of the United States. The Supreme Court has *original* jurisdiction of a very limited class of cases, chiefly actions between states. Otherwise, the Supreme Court's jurisdiction is *appellate*. The Supreme Court has appellate jurisdiction of cases originating in the lower federal courts and of certain types of cases originating in the courts of the states. Potentially, any case originating in a federal District Court may be taken to the Supreme Court. Most such cases must be appealed initially to the Courts of Appeals and may be thereafter taken to the Supreme Court only with the latter's permission. Of cases originating in the courts of the states, only those presenting determinative questions of federal law may be considered by the Supreme Court. Its consideration of such a case is limited to the federal issues involved. The Supreme Court therefore has but limited, though vitally important, appellate supervision over decisions of state courts. The state court from which an appeal to the Supreme Court may be taken is the highest state court authorized to hear the case. Ordinarily, this means that an appeal to the Supreme Court of the United States will be from the state's supreme court. If, however, the state court system is so organized that appellate review by the state's supreme court is not available in a particular case, then an appeal to the United States Supreme Court may be taken from the lower state court.

The procedure for Court of Appeals review of District Court decisions is by appeal or, in unusual cases, by extraordinary writ. The procedure for appellate review by the Supreme Court is by writ of certiorari in almost all cases. The choice of which cases to review by writ of certiorari is entirely within the discretion of the Supreme Court. In recent years, the Supreme Court has decided fewer cases, deciding only 70 cases out of more than 10,000 cases in which review was sought in the 2014 term. In practice, the Supreme Court uses its power of appellate review to decide important or unsettled questions of federal law rather than to correct errors of the lower courts.

C. AN INTRODUCTION TO THE HISTORY OF ANGLO-AMERICAN PROCEDURE

HISTORICAL NOTE ON PROCEDURE

1. Early evolution of the writ system. William's conquest of England in 1066 and the years following witnessed the superimposition of Norman feudal institutions on Anglo-Saxon royal and communal institutions and the subsequent emergence of a royal administrative and judicial system that was stronger than either of its predecessors. For present purposes, the significant Anglo-Saxon institutions at the time of the conquest were the crown and the local tribunals. The English crown, theoretically at least, had a responsibility to see that justice was done throughout the realm, i.e., had a direct legitimate interest in all legal disputes. Of English local tribunals there were two principal kinds, the hundred courts (village courts) and the shire courts (analogous to the county courts). Communal forums, these courts by the time of the conquest had assumed a territorial jurisdiction in the sense that they were recognized as the appropriate tribunals for disposition of controversies arising in the territory in which they were located. Both acted under a nominal supervision of the crown, thus representing in theory the implementation of the royal interest in justice.

different approaches is to understate the problem, for many of the approaches are highly indeterminate in their application and yield a wide range of results in comparable cases. In 2014, the American Law Institute announced plans to draft a Restatement (Third) of Conflict of Laws.

Further elaboration of choice of law rules in the various states will take us too far afield from Civil Procedure and into the province of Conflict of Laws. But it is apparent that a creative lawyer, with a good knowledge of the various choice-of-law approaches followed in the relevant states, will sometimes have an opportunity through an astute choice of forum to obtain a substantive rule of law that will make a material difference to the outcome of her case.

B. SUBJECT MATTER JURISDICTION

PRELIMINARY NOTE ON SUBJECT MATTER JURISDICTION

A court must have both territorial jurisdiction *and* subject matter jurisdiction before it can adjudicate a case. Although they share the word "jurisdiction," territorial and subject matter jurisdiction are fundamentally distinct concepts.

Territorial jurisdiction is the geographically based authority of a court to require a person, corporation or other association, or thing to submit to binding adjudication. As seen in the previous section, the United States Constitution imposes due process limitations on the power of state and federal courts to assert territorial jurisdiction. In addition, state and federal statutes often impose further restrictions, preventing the court from asserting the full extent of territorial jurisdiction that would be available if the statute were drafted more broadly. Want of territorial jurisdiction is a waivable defect. A defendant may deliberately (or inadvertently) fail to make a timely objection to want of territorial jurisdiction, and thereby subject herself to the adjudicatory authority of the court. A defendant may also consent to territorial jurisdiction, with the same consequence as a failure to make a timely objection.

Subject matter jurisdiction is the authority of a court to adjudicate a particular type of suit. Questions of subject matter jurisdiction arise in both state and federal courts. All states have a court of general jurisdiction, often called the Superior Court, which is capable of hearing any dispute brought before it, limited only by specifically described exceptions. In addition, many states have courts of limited jurisdiction which only hear cases concerning particular subject matters, such as divorce and child custody disputes, probate matters, or disputes where the claim is below a certain amount. The nature of these courts varies significantly from state to state. Federal courts, by contrast to the state courts of general jurisdiction, are all courts of limited jurisdiction, capable of hearing only those disputes for which jurisdiction is specifically conferred by both the Constitution and federal statute. Federal courts have subject matter jurisdiction either because of the nature of the law involved, or because of the identity of the parties. An example of the first is "federal question" jurisdiction under 28 U.S.C. § 1331, in which plaintiff asserts a claim arising under federal law. An example of the second is "diversity" jurisdiction under 28 U.S.C. § 1332, in which plaintiff and defendant are citizens of diverse states, say California and New York. Unlike a want of territorial jurisdiction, a want of subject matter jurisdiction cannot

be cured by waiver or consent of the parties. Even if both plaintiff and defendant agree that they wish a state probate court to hear an ordinary contract dispute, or a federal court to hear a dispute based on state law between two citizens of the same state, the state and federal courts do not have subject matter jurisdiction and hence cannot hear the dispute.

1. State trial courts. Although there is variation from state to state, a description of the subject matter jurisdiction of the courts of California usefully conveys the nature of subject matter jurisdiction in state courts. The trial court of general jurisdiction in California is the Superior Court. Its jurisdiction is unlimited except where jurisdiction is specifically granted to other state tribunals. Unlike some state courts, the California Superior Court has jurisdiction over divorce and child custody disputes and probate matters. Calif.Civ.C. §§ 4351, 7007; Calif.C.Civ.P. § 1740 (domestic relations); Calif.Prob.C. §§ 301, 2200 (probate). There are "departments" within the Superior Court for specialized subject matters, including not only domestic relations and probate, but also delinquent and neglected minors, adoptions, and protection of incompetent persons.

State administrative agencies have subject matter jurisdiction over certain matters. Their trial jurisdiction is exclusive of the state courts, although there is generally appellate jurisdiction in the state court over decisions by an administrative agency.

2. Federal trial courts. The basic trial court in the federal system is the district court. Its jurisdiction is limited rather than general, and is dependent on both constitutional and statutory authorization.

Article III of the Constitution, the "judicial" article, sets out a series of heads of subject matter jurisdiction for the federal courts, including "federal question," admiralty, diversity of citizenship, United-States-as-a-party, and other less important heads. Article III is constructed on a principle comparable to Article I, the legislative article. Article I does not grant Congress a general legislative power. Rather, it grants Congress (and thereby the federal government) a number of specific legislative powers, such as the power to regulate interstate commerce, the power to tax, and the power to coin money. Legislation by the federal government is constitutional only if it is based on one of these enumerated heads of Article I power. Similarly, Article III does not grant general jurisdiction. Rather, it grants only the specified heads of jurisdiction, and the federal courts can only exercise the jurisdiction specified. Over the course of two centuries, the enumerated powers of the legislature under Article I have been construed fairly expansively, particularly the commerce power. See, e.g., Heart of Atlanta Motel v. United States, 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964) (Civil Rights Act of 1964, forbidding racial discrimination in public accommodations, is a valid exercise of the commerce power); but compare National Federation of Independent Business v. Sebelius, 567 U.S. ___, 132 S.Ct. 2566, 183 L.Ed.2d 450 (2012) (Patient Protection and Affordable Care Act of 2010, requiring individuals to purchase health care insurance, is not a valid exercise of the commerce power, but monetary assessment for failure to purchase such insurance is a valid exercise of the taxing power); United States v. Lopez, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) (Gun-Free School Zones Act of 1990, forbidding the knowing possession of a firearm in a school zone, is not a valid exercise of the commerce power, at least in the absence of a requirement that the firearm have previously

traveled in interstate commerce). By contrast, most of the heads of the jurisdiction under Article III have been construed fairly strictly.

In addition to constitutional authorization for the exercise of federal court jurisdiction, there must also be statutory implementation of that authorization. When the Constitution was drafted, those who were suspicious of an expanded federal government viewed with alarm the prospect of a large federal judiciary. Under a compromise suggested by James Madison, actual implementation of jurisdiction for the lower federal courts was left to Congress. In this fashion, control over the structure and jurisdiction of the federal courts was subject to the political control of the states' representatives in Congress, which made Article III much less objectionable to states' rights advocates during the constitutional ratifying debates. Congressional authority to constitute the federal courts and to define their jurisdiction was exercised by the First Congress in the Judiciary Act of 1789.

A number of statutory grants implement Article III. For example, "federal question" jurisdiction is implemented by 28 U.S.C. § 1331, "diversity" jurisdiction by 28 U.S.C. § 1332, and admiralty jurisdiction by 28 U.S.C. § 1333. In almost all instances, the statutory grant of jurisdiction does not go to the full extent of the jurisdiction authorized by the Constitution. Given that both constitutional authorization and statutory implementation are required before the district court has jurisdiction, the narrower scope of the statutory grant controls. There is an interesting historical debate about the extent of Congress' obligation to confer jurisdiction on the federal courts. Three pertinent articles are Amar, A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction, 65 B.U.L.Rev. 205 (1985); Meltzer, The History and Structure of Article III, 138 U.Pa.L.Rev. 1569 (1990); Fletcher, Congressional Power over the Jurisdiction of Federal Courts: The Meaning of the Word "All" in Article III, 59 Duke L.J. 929 (2010).

Federal magistrate courts assist and supplement the district courts in cases over which the district court already has jurisdiction. 28 U.S.C. § 636. A magistrate judge may act as a special master in certain cases, and may hear many pretrial motions (including for discovery), without the consent of the parties. If the parties consent, a magistrate judge may hear all pretrial motions and may try both jury and non-jury civil cases. The constitutionality of the exercise of authority by magistrate judges is not clear in all instances. See C. Seron, The Roles of Magistrates in Federal District Courts (1983) (describing the roles of magistrates); Note, Article III Limits on Article I Courts: The Constitutionality of the Bankruptcy Court and the 1979 Magistrate Act, 80 Colum.L.Rev. 560 (1980) (arguing that the Magistrate Act is unconstitutional); E. Chemerinsky, Federal Jurisdiction § 4.5.2 (5th ed.2007) (describing the constitutional debate).

3. Concurrent and exclusive jurisdiction. State and federal trial courts have concurrent subject matter jurisdiction in a large number of cases. In such cases, because both courts have subject matter jurisdiction, the litigants have some choice about where to adjudicate their dispute. The plaintiff gets to choose where to file the suit and often has the final say about where the suit is to be tried, but in some circumstances the defendant may remove to federal court a case originally filed in state court. 28 U.S.C. § 1441.

State trial courts have concurrent jurisdiction with the federal courts over most cases involving federal law. The general rule is that state courts

have concurrent jurisdiction over all cases based on federal law, unless Congress has explicitly provided for exclusive jurisdiction. Claflin v. Houseman, 93 U.S. (3 Otto) 130, 23 L.Ed. 833 (1876). The only exception is federal anti-trust suits, for which there is exclusive jurisdiction even though the statute is silent. See 15 U.S.C. §§ 15, 26; Freeman v. Bee Machine Co., 319 U.S. 448, 63 S.Ct. 1146, 87 L.Ed. 1509 (1943). In all other cases of exclusive jurisdiction, an explicit federal statute so provides. See, e.g., admiralty cases (28 U.S.C. § 1333); bankruptcy proceedings (28 U.S.C. § 1334); patent and copyright cases (28 U.S.C. § 1338); and some cases under the Securities Exchange Act of 1934 (15 U.S.C. § 78aa). Except for claims that are within the exclusive jurisdiction of the federal courts, a state court has a constitutional obligation to adjudicate federal claims and defenses otherwise within their jurisdiction. See Testa v. Katt, 330 U.S. 386, 67 S.Ct. 810, 91 L.Ed. 967 (1947).

Similarly, federal district courts have concurrent jurisdiction with the state courts over many cases involving state law. So long as there is a basis for federal subject matter jurisdiction, a federal court may hear the case, even if it involves state law. Usually, jurisdiction in such a case is based on diversity of citizenship, but sometimes a federal question case involves a claim or defense based on state law. Although it is normally not phrased in this way, state courts have exclusive jurisdiction in cases where there is no federal grant of subject matter jurisdiction to the federal courts. Such cases are typically those based solely on state law in which there is no diversity of citizenship between the parties.

Problems of subject matter jurisdiction in the state courts are usually easy to deal with. They rarely cause serious difficulty to judges or practitioners trying to decide which state court or courts can hear a particular dispute. By contrast, problems of subject matter jurisdiction in the federal courts can be difficult, sometimes fiendishly so. Problems of federal court subject matter jurisdiction are explored in the materials that follow.

1. FEDERAL QUESTION JURISDICTION

Louisville & Nashville RR. Co. v. Mottley

Supreme Court of the United States, 1908.
211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126.

* * *

The appellees (husband and wife), being residents and citizens of Kentucky, brought this suit in equity in the circuit court of the United States for the western district of Kentucky against the appellant, a railroad company and a citizen of the same state. The object of the suit was to compel the specific performance of [a] contract.

* * *

The bill alleged that in September, 1871, plaintiffs, while passengers upon the defendant railroad, were injured by the defendant's negligence, and released their respective claims for damages in consideration of the agreement for transportation during their lives, expressed in the contract. It is alleged that the contract was performed by the defendant up to January 1, 1907, when the defendant declined to renew the passes. The bill then alleges that the refusal to comply with the contract was

based solely upon that part of the act of Congress of June 29, 1906 (34 Stat. at L. 584, chap. 3591, U.S.Comp.Stat.Supp.1907, p. 892), which forbids the giving of free passes or free transportation. The bill further alleges: First, that the act of Congress referred to does not prohibit the giving of passes under the circumstances of this case; and, second, that, if the law is to be construed as prohibiting such passes, it is in conflict with the 5th Amendment of the Constitution, because it deprives the plaintiffs of their property without due process of law. The defendant demurred to the bill. The judge of the circuit court overruled the demurrer, entered a decree for the relief prayed for, and the defendant appealed directly to this court.

* * *

■ 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 * * * which forbids the giving of free passes or the collection of any different compensation for transportation of passengers than that specified in the tariff filed, makes it unlawful to perform a contract for transportation of persons who, in good faith, before the passage of the act, had accepted such contract in satisfaction of a valid cause of action against the railroad; and, second, whether the statute, if it should be construed to render such a contract unlawful, is in violation of the 5th 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. & L.M.R. Co. v. Swan, 111 U.S. 379, 382, 28 L.Ed. 462, 463, 4 Sup.Ct.Rep. 510.

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 or laws of the United States." 25 Stat. at L. 434, chap. 866, U.S.Comp.Stat.1901, p. 509. 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, 38 L.Ed. 511, 14 Sup.Ct.Rep. 654, the plaintiff, the state of Tennessee, brought suit in the circuit court of the United States to recover from the defendant certain taxes alleged to be due under the laws of the state. The plaintiff alleged that the defendant claimed an immunity from the taxation by virtue of its charter, and that therefore the tax was void,

because in violation of the provision of the Constitution of the United States, which forbids any state from passing a law impairing the obligation of contracts. The cause was held to be beyond the jurisdiction of the circuit court, the court saying, by Mr. Justice Gray (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." * * *

* * *

The interpretation of the act which we have stated was first announced [in 1888] in Metcalf v. Watertown, 128 U.S. 586, 32 L.Ed. 543, 9 Sup.Ct.Rep. 173, and has since been repeated and applied in Colorado Cent. Consol. Min. Co. v. Turck, 150 U.S. 138, 142, 37 L.Ed. 1030, 1031, 14 Sup.Ct.Rep. 35; Tennessee v. Union & Planters' Bank, 152 U.S. 454, 459, 38 L.Ed. 511, 513, 14 Sup.Ct.Rep. 654; Chappell v. Waterworth, 155 U.S. 102, 107, 39 L.Ed. 85, 87, 15 Sup.Ct.Rep. 34; Postal Teleg. Cable Co. v. United States (Postal Teleg. Cable Co. v. Alabama), 155 U.S. 482, 487, 39 L.Ed. 231, 232, 15 Sup.Ct.Rep. 192; Oregon Short Line & U.N.R. Co. v. Skottowe, 162 U.S. 490, 494, 40 L.Ed. 1048, 1049, 16 Sup.Ct.Rep. 869; Walker v. Collins, 167 U.S. 57, 59, 42 L.Ed. 76, 77, 17 Sup.Ct.Rep. 738; Muse v. Arlington Hotel Co., 168 U.S. 430, 436, 42 L.Ed. 531, 533, 18 Sup.Ct.Rep. 109; Galveston, H. & S.A.R. Co. v. Texas, 170 U.S. 226, 236, 42 L.Ed. 1017, 1020, 18 Sup.Ct.Rep. 603; Third Street & Suburban R. Co. v. Lewis, 173 U.S. 457, 460, 43 L.Ed. 766, 767, 19 Sup.Ct.Rep. 451; Florida C. & P.R. Co. v. Bell, 176 U.S. 321, 327, 44 L.Ed. 486, 489, 20 Sup.Ct.Rep. 399; Houston & T.C.R. Co. v. Texas, 177 U.S. 66, 78, 44 L.Ed. 673, 680, 20 Sup.Ct.Rep. 545; Arkansas v. Kansas & T. Coal Co., 183 U.S. 185, 188, 46 L.Ed. 144, 146, 22 Sup.Ct.Rep. 47; Vicksburg Waterworks Co. v. Vicksburg, 185 U.S. 65, 68, 46 L.Ed. 808, 809, 22 Sup.Ct.Rep. 585; Boston & M. Consol. Copper & S. Min. Co. v. Montana Ore Purchasing Co., 188 U.S. 632, 639, 47 L.Ed. 626, 631, 23 Sup.Ct.Rep. 434; Minnesota v. Northern Securities Co., 194 U.S. 48, 63, 48 L.Ed. 870, 877, 24 Sup.Ct.Rep. 598; Joy v. St. Louis, 201 U.S. 332, 340, 50 L.Ed. 776, 780, 26 Sup.Ct.Rep. 478; Devine v. Los Angeles, 202 U.S. 313, 334, 50 L.Ed. 1046, 1053, 26 Sup.Ct.Rep. 652. 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.

NOTE ON THE CONSTITUTIONAL SCOPE OF FEDERAL QUESTION JURISDICTION AND THE WELL-PLEADED COMPLAINT RULE

Article III of the Constitution confers jurisdiction on the federal courts in "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." U.S.Const., Art.III, Sec.2, para.1. The first Judiciary Act, adopted by the first Congress in 1789, authorized jurisdiction under several of the heads of jurisdiction of Article III, but failed to authorize general federal question jurisdiction. A general federal question jurisdiction statute was passed in 1801 by the outgoing Federalists in the waning days of the first Adams administration, but the incoming Jeffersonians repealed the statute in 1802. It was not until after the Civil War, in 1875, that a general federal

question jurisdiction statute was again enacted. The present form of the statute is 28 U.S.C. § 1331, little changed from the form in which it was enacted in 1875. The present statute provides, in words that echo the constitutional authorization, "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Although the "arising under" words of the constitutional and statutory provisions are identical, they mean quite different things.

1. Constitutional scope of federal question jurisdiction. The constitutional scope of federal question jurisdiction is exceedingly broad. In Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 6 L.Ed. 204 (1824), the Bank of the United States was authorized by statute to sue and be sued in federal court, even in cases where the cause of action did not depend on federal law, and indeed where no question of federal law was actually at issue in the dispute. Chief Justice John Marshall wrote for the Court that it was enough that the Bank was created under a federal charter and that a question of federal law *might* arise in a suit brought by or against the Bank. *Osborn* has been criticized as going to, or perhaps beyond, the outer boundaries of federal question jurisdiction. See, e.g., Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 481, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957) (Frankfurter, J., dissenting) ("*Osborn* * * * appears to have been based on premises that today * * * are subject to criticism"). But the Supreme Court reaffirmed *Osborn* in American National Red Cross v. S.G. and A.E., 505 U.S. 247, 112 S.Ct. 2465, 120 L.Ed.2d 201 (1992). The American Red Cross, like the Bank of the United States in *Osborn*, is a federally chartered corporation authorized by statute to sue and be sued in federal court, even in cases where no question of federal law is at issue. The Court in *American Red Cross* cited the "long standing and settled rule" of *Osborn*, 505 U.S. at 265, and held that the mere fact of federal incorporation was a sufficient constitutional basis for federal question jurisdiction. Note that in neither *Osborn* nor *American Red Cross* was jurisdiction based on the general federal question jurisdiction statute, 28 U.S.C. § 1331. In each case, special statutes conferred jurisdiction over suits to which the Bank and the Red Cross were parties.

Another example of a far-reaching federal question jurisdiction is bankruptcy proceedings. Under the federal bankruptcy act, a trustee in bankruptcy may sue in federal court—either bankruptcy court or district court—to marshal the assets of the bankrupt, as a prelude to eventual distribution of those assets among the bankrupt's creditors. (The division of responsibility between the bankruptcy court and the district court is a complicated subject, with significant constitutional difficulties of its own, but that question is beyond the scope of this note.) Such a claim often involves a tort or a contract between the bankrupt estate and another party, in which no question of federal law is involved. Yet it is clearly established that such cases fall within the boundaries of constitutionally permissible federal question jurisdiction. For example, in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982), the Court assumed without discussion that federal district courts can have jurisdiction over state-law contract suits between non-diverse parties brought as part of bankruptcy proceedings.

Rationales for these expansive interpretations of federal question jurisdiction are somewhat elusive. The most obvious rationale to sustain

Osborn and, to a lesser extent, *American National Red Cross* is that both the Bank and the Red Cross were federally chartered corporations that served federal purposes and that deserved the protection of adjudication in sympathetic federal courts. For many years, some academics have argued for a broader theory of "protective jurisdiction" that would go beyond federally chartered corporations. Professor Herbert Wechsler argued that federal courts should be able to exercise "protective jurisdiction" over all cases in which Congress has constitutional authority to enact a substantive rule to govern disposition of the controversy, even if Congress has not in fact enacted such a rule. This would allow Congress to pass a jurisdictional statute asserting federal jurisdiction over many litigants and areas of the law in which the federal government has a political interest, but without requiring Congress to replace the existing substantive state law with federal law. Wechsler, Federal Jurisdiction and the Revision of the Judicial Code, 13 Law & Contemp. Probs. 216 (1948). Professor Paul Mishkin suggested a limited version of Professor Wechsler's position, arguing for "protective jurisdiction" over cases based on substantive state law only when there is already "an articulated and active federal policy regulating a field." Mishkin, The Federal "Question" in the District Courts, 53 Colum.L.Rev. 157, 192 (1953). The Supreme Court, however, has steadfastly refused to decide whether "protective jurisdiction" can serve as a basis for federal question jurisdiction. See, e.g., Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 491 n. 17, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983) ("[W]e need not consider [whether] the Act is constitutional as an aspect of so-called 'protective jurisdiction.' ").

2. Original federal question jurisdiction and the "well pleaded complaint" rule. As seen in *Mottley*, the general federal question jurisdiction statute, 28 U.S.C. § 1331, is construed far more narrowly than the constitutional provision from which it derives. Plaintiff may not anticipate a federal defense by the defendant in her complaint and use that defense as a basis for federal jurisdiction. To the uninitiated, the well-pleaded complaint rule could be seen as a product of the words of 28 U.S.C. § 1331: The case must "arise under" federal law, meaning that the plaintiff's cause of action depends on—"arises under"—federal law. But this is too simple a reading of these words, for it is clear from cases like *Osborn* that the same words mean something much broader in Article III.

The general contours of the problem are obvious enough. Section 1331 sorts cases between federal and state courts for adjudication at trial, and is based on a rough principle that questions of federal law should be decided in a federal district court if one of the parties invokes the court's jurisdiction. But federal and state substantive law overlap and intertwine in many areas, and many disputes involve questions of both federal and state law. Therefore, a principle of federal right/federal forum is impossible to implement fully without drawing huge numbers of cases into district court, many of which will substantially depend for their resolution on questions of state law.

The problem thus is to devise a rule that will divide the cases of mixed state and federal law in a reasonable manner between the federal and state courts. The characteristics of an ideal rule would be: (1) It should send cases in which federal law predominates to federal court, and cases in which state law predominates to state court. (2) It should operate smoothly and predictably, so that parties do not spend time and energy litigating the jurisdictional question, and do not bring the case in the wrong forum only to

learn, after the statute of limitations has run, that they are in the wrong place. (3) It should operate early in the litigation, so that parties can prepare their cases knowing where they will litigate.

How well does the well-pleaded complaint rule satisfy these criteria? In cases in which plaintiff relies on federal law as the basis for her cause of action, it works fairly well. In such a case, criterion (1), above, is usually satisfied because federal law is likely to form an important part of the case. Criterion (2) is satisfied because of the obvious presence of federal law as the basis for the cause of action. Criterion (3) is satisfied because the parties know as soon as the complaint is filed that federal jurisdiction is present. But what about cases in which the well-pleaded complaint rule works badly? For example, what about a case in which a defendant pleads a federal defense that proves dispositive? In other words, what about *Mottley*?

After the Mottleys were dismissed by the United States Supreme Court on jurisdictional grounds, they filed suit again, this time in Kentucky state court. The Kentucky courts sustained the Mottleys' claim against the railroad's federal defense. The railroad then appealed to the United States Supreme Court, which reversed. Louisville and Nashville RR. Co. v. Mottley, 219 U.S. 467, 31 S.Ct. 265, 55 L.Ed. 297 (1911). The Mottleys thus lost twice in the Supreme Court, the first time on jurisdiction and the second time on the merits.

What or whom should the Mottleys blame? The well-pleaded complaint rule? Perhaps the rule is not ideal from the standpoint of a defendant seeking to assert a federal defense, but the Mottleys were plaintiffs. Recall that they won in the Kentucky state courts when they refiled, so it is clear, at least in retrospect, that they had nothing to fear from state-court adjudication. Their lawyer? At the time their first case was filed in federal court, the well-pleaded complaint rule was firmly established, and dismissal by the Supreme Court was easily predictable. Recall the extraordinarily long string citation at the end of the Court's opinion.

3. Counterclaims and the "well-pleaded complaint" rule. A counterclaim that states a claim under federal law does not "arise" under federal law for purposes of federal trial court jurisdiction. In Holmes Group, Inc. v. Vornado Air Circulation Systems, 535 U.S. 826, 122 S.Ct. 1889, 153 L.Ed.2d 13 (2002), the Supreme Court considered the well-pleaded complaint rule under 28 U.S.C. § 1338, the federal question jurisdictional statute for patent cases. Applying the well-pleaded complaint rule, the Court held that the patent law counterclaim by the defendant did not "arise under" federal patent law within the meaning of § 1338. The Court acknowledged that in its prior cases it had addressed only the question of whether a federal defense, rather than a federal compulsory counterclaim, could establish "arising under" jurisdiction. But it found the well-pleaded complaint rule controlled. Since a counterclaim appears as "as part of the defendant's answer, not as part of the plaintiff's complaint," it cannot serve as the basis for "arising under" jurisdiction. Id. at 831. There is no reason to think that the Court will read § 1331, the general federal question jurisdiction statute, any differently from § 1338.

4. Original and appellate jurisdiction. The well-pleaded complaint rule applies to the original jurisdiction of the district court, but not to the appellate jurisdiction of the United States Supreme Court. The Supreme Court's appellate jurisdiction over cases coming up from the state

courts is governed by 28 U.S.C. § 1257, which confers jurisdiction whenever a question of federal law may be dispositive of the case, regardless of which party asserted the right. This is why the Supreme Court took jurisdiction of the Mottleys' case the second time, after it had been decided by the Kentucky state court. Can you see why the appellate jurisdiction statute is written differently from the original jurisdiction statute?

Merrell Dow Pharmaceuticals Inc. v. Thompson

Supreme Court of the United States, 1986.
478 U.S. 804, 106 S.Ct. 3229, 92 L.Ed.2d 650.

■ JUSTICE STEVENS delivered the opinion of the Court.

The question presented is whether the incorporation of a federal standard in a state-law private action, when Congress has intended that there not be a federal private action for violations of that federal standard, makes the action one "arising under the Constitution, laws, or treaties of the United States," 28 U.S.C. § 1331.

I

The Thompson respondents are residents of Canada and the MacTavishes reside in Scotland. They filed virtually identical complaints against petitioner, a corporation, that manufactures and distributes the drug Bendectin. The complaints were filed in the Court of Common Pleas in Hamilton County, Ohio. Each complaint alleged that a child was born with multiple deformities as a result of the mother's ingestion of Bendectin during pregnancy. In five of the six counts, the recovery of substantial damages was requested on common-law theories of negligence, breach of warranty, strict liability, fraud, and gross negligence. In Count IV, respondents alleged that the drug Bendectin was "misbranded" in violation of the Federal Food, Drug, and Cosmetic Act (FDCA) because its labeling did not provide adequate warning that its use was potentially dangerous. Paragraph 26 alleged that the violation of the FDCA "in the promotion" of Bendectin "constitutes a rebuttable presumption of negligence." Paragraph 27 alleged that the "violation of said federal statutes directly and proximately caused the injuries suffered" by the two infants.

Petitioner filed a timely petition for removal from the state court to the Federal District Court alleging that the action was "founded, in part, on an alleged claim arising under the laws of the United States." After removal, the two cases were consolidated. Respondents filed a motion to remand to the state forum on the ground that the federal court lacked subject-matter jurisdiction. Relying on our decision in Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 41 S.Ct. 243, 65 L.Ed. 577 (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, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983), and noting "that the FDCA does not create or imply a private right of action for individuals injured as a result of violations of the Act," it explained:

> "Federal question jurisdiction would, thus, exist only if plaintiffs' right to relief *depended necessarily* on a substantial question of federal law. Plaintiffs' causes of action referred to the FDCA merely as one available criterion for determining whether Merrell Dow was negligent. Because the jury could find negligence on the part of Merrell Dow without finding a violation of the FDCA, the plaintiffs' causes of action did not depend necessarily upon a question of federal law. Consequently, the causes of action did not arise under federal law and, therefore, were improperly removed to federal court." 766 F.2d, at 1006.

We granted certiorari, and we now affirm.

II

Article III of the Constitution gives the federal courts power to hear cases "arising under" federal statutes. That grant of power, however, is not self-executing, and it was not until the Judiciary Act of 1875 that Congress gave the federal courts general federal-question jurisdiction. Although the constitutional meaning of "arising under" may extend to all cases in which a federal question is "an ingredient" of the action, Osborn v. Bank of the United States, 9 Wheat. 738, 823, 6 L.Ed. 204 (1824), we have long construed the statutory grant of federal-question jurisdiction as conferring a more limited power.

Under our longstanding interpretation of the current statutory scheme, the question whether a claim "arises under" federal law must be determined by reference to the "well-pleaded complaint." Franchise Tax Board, 463 U.S., at 9–10, 103 S.Ct., at 2846–2847. A defense that raises a federal question is inadequate to confer federal jurisdiction. Louisville & Nashville R. Co. v. Mottley, 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (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."

[T]he 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., 463 U.S., at 8, 103 S.Ct., at 2846.

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.' " Id., at 8–9, 103 S.Ct., at 2846, quoting American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260, 36 S.Ct. 585, 586, 60 L.Ed. 987 (1916). 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." Franchise Tax Board, 463 U.S., at

9, 103 S.Ct., at 2846.[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 (1982 ed. and Supp. III), 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. This case thus poses what Justice Frankfurter called the "litigation-provoking problem," Textile Workers v. Lincoln Mills, 353 U.S. 448, 470, 77 S.Ct. 912, 928, 1 L.Ed.2d 972 (1957) (dissenting opinion)—the presence of a federal issue in a state-created cause of action.

* * *

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 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.

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.

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[5] The case most frequently cited for that proposition is Smith v. Kansas City Title Trust Co., 255 U.S. 180, 41 S.Ct. 243, 65 L.Ed. 577 (1921). In that case the Court upheld federal jurisdiction of a shareholder's bill to enjoin the corporation from purchasing bonds issued by the federal land banks under the authority of the Federal Farm Loan Act on the ground that the federal statute that authorized the issuance of the bonds was unconstitutional. The Court stated:

> "The general rule is that where it appears from the bill or statement of the plaintiff that the right to relief depends upon the construction or application of the Constitution or laws of the United States, and that such federal claim is not merely colorable, and rests upon a reasonable foundation, the District Court has jurisdiction under this provision." Id., at 199, 41 S.Ct., at 245.

The effect of this view, expressed over Justice Holmes' vigorous dissent, on his *American Well Works* formulation has been often noted. See, e.g., Franchise Tax Board, 463 U.S., at 9, 103 S.Ct., at 2846 ("[I]t is well settled that Justice Holmes' test is more useful for describing the vast majority of cases that come within the district courts' original jurisdiction than it is for describing which cases are beyond district court jurisdiction"); T.B. Harms Co. v. Eliscu, 339 F.2d 823, 827 (C.A.2 1964) (Friendly, J.) ("It has come to be realized that Mr. Justice Holmes' formula is more useful for inclusion than for the exclusion for which it was intended").

[7] See California v. Sierra Club, 451 U.S. 287, 293, 101 S.Ct. 1775, 1778, 68 L.Ed.2d 101 (1981); Cannon v. University of Chicago, 441 U.S. 677, 689–709, 99 S.Ct. 1946, 1953–1964, 60 L.Ed.2d 560 (1979); Cort v. Ash, 422 U.S. 66, 78, 95 S.Ct. 2080, 2087, 45 L.Ed.2d 26 (1975).

* * *

III

Petitioner advances three arguments to support its position that, even in the face of this congressional preclusion of a federal cause of action for a violation of the federal statute, federal-question jurisdiction may lie for the violation of the federal statute as an element of a state cause of action.

First, petitioner contends that the case represents a straightforward application of the statement in *Franchise Tax Board* that federal-question jurisdiction is appropriate when "it appears that some substantial, disputed question of federal law is a necessary element of one of the well-pleaded state claims." 463 U.S., at 13, 103 S.Ct., at 2848. *Franchise Tax Board,* however, did not purport to disturb the long-settled understanding that the mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction. * * *

Far from creating some kind of automatic test, *Franchise Tax Board* thus candidly recognized the need for careful judgments about the exercise of federal judicial power in an area of uncertain jurisdiction. Given the significance of the assumed congressional determination to preclude federal private remedies, the presence of the federal issue as an element of the state tort is not the kind of adjudication for which jurisdiction would serve congressional purposes and the federal system. * * *

Second, petitioner contends that there is a powerful federal interest in seeing that the federal statute is given uniform interpretations, and that federal review is the best way of insuring such uniformity. In addition to the significance of the congressional decision to preclude a federal remedy, we do not agree with petitioner's characterization of the federal interest and its implications for federal-question jurisdiction. To the extent that petitioner is arguing that state use and interpretation of the FDCA pose a threat to the order and stability of the FDCA regime, petitioner should be arguing, not that federal courts should be able to review and enforce state FDCA-based causes of action as an aspect of federal-question jurisdiction, but that the FDCA pre-empts state-court jurisdiction over the issue in dispute. Petitioner's concern about the uniformity of interpretation, moreover, is considerably mitigated by the fact that, even if there is no original district court jurisdiction for these kinds of action, this Court retains power to review the decision of a federal issue in a state cause of action.

Finally, petitioner argues that, whatever the general rule, there are special circumstances that justify federal-question jurisdiction in this case. Petitioner emphasizes that it is unclear whether the FDCA applies to sales in Canada and Scotland; there is, therefore, a special reason for having a federal court answer the novel federal question relating to the extraterritorial meaning of the Act. We reject this argument. We do not believe the question whether a particular claim arises under federal law depends on the novelty of the federal issue. * * *

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.

* * *

■ JUSTICE BRENNAN, with whom JUSTICE WHITE, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, dissenting.

* * *

* * * 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, 36 S.Ct. 585, 586, 60 L.Ed. 987 (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, 41 S.Ct. 243, 65 L.Ed. 577 (1921). T.B. Harms Co. v. Eliscu, 339 F.2d 823, 827 (C.A.2 1964). * * * 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 under [the statute granting federal question jurisdiction]." 255 U.S., at 199, 41 S.Ct., at 245.

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, 463 U.S., at 9, 103 S.Ct., at 2846. * * * 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.

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 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. * * * As pleaded, then, respondents' "right to relief depend[ed] upon the construction or application of the

Constitution or laws of the United States." * * * 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 have made a similar assumption—that there is no private cause of action under the FDCA,[4] 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 to examine the reasons for Congress' decisions to grant or withhold both federal jurisdiction and private remedies, something the Court has not done.

A

In the early days of our Republic, Congress was content to leave the task of interpreting and applying federal laws in the first instance to the state courts; with one short-lived exception,[5] Congress did not grant the inferior federal courts original jurisdiction over cases arising under federal law until 1875. The reasons Congress found it necessary to add this jurisdiction to the district courts are well known. First, Congress recognized "the importance, and even necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the constitution." * * * [W]hile perfect uniformity may not have been achieved, experience indicates that the availability of a federal forum in federal-question cases has done much to advance that goal. * * *

In addition, § 1331 has provided for adjudication in a forum that specializes in federal law and that is therefore more likely to apply that law correctly. * * *

These reasons for having original federal-question jurisdiction explain why cases like this one and *Smith*—i.e., cases where the cause of

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[4] It bears emphasizing that the Court does not hold that there is no private cause of action under the FDCA. Rather, it expressly states that "[f]or purposes of our decision, we assume that this is a correct interpretation of the FDCA." * * *

[5] Congress granted original federal-question jurisdiction briefly in the Midnight Judges Act, ch. 4, § 11, 2 Stat. 92 (1801), which was repealed in 1802, Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132.

action is a creature of state law, but an essential element of the claim is federal—"arise under" federal law within the meaning of § 1331. Congress passes laws in order to shape behavior; a federal law expresses Congress' determination that there is a federal interest in having individuals or other entities conform their actions to a particular norm established by that law. * * * Congress determined that the availability of a federal forum to adjudicate cases involving federal questions would make it more likely that federal laws would shape behavior in the way that Congress intended.

By making federal law an essential element of a state-law claim, the State places the federal law into a context where it will operate to shape behavior: the threat of liability will force individuals to conform their conduct to interpretations of the federal law made by courts adjudicating the state-law claim. * * * It therefore follows that there is federal jurisdiction under § 1331.

B

The only remaining question is whether the assumption that Congress decided not to create a private cause of action alters this analysis in a way that makes it inappropriate to exercise original federal jurisdiction. According to the Court, "the very reasons for the development of the modern implied remedy doctrine" support the conclusion that, where the legislative history of a particular law shows (whether expressly or by inference) that Congress intended that there be no private federal remedy, it must also mean that Congress would not want federal courts to exercise jurisdiction over a state-law claim making violations of that federal law actionable. These reasons are " 'the increased complexity of federal legislation,' " " 'the increased volume of federal litigation,' " and " 'the desirability of a more careful scrutiny of legislative intent.' "

These reasons simply do not justify the Court's holding. Given the relative expertise of the federal courts in interpreting federal law, * * *, the increased complexity of federal legislation argues rather strongly in favor of recognizing federal jurisdiction. * * *

* * *

It may be that a decision by Congress not to create a private remedy is intended to preclude all private enforcement. If that is so, then a state cause of action that makes relief available to private individuals for violations of the FDCA is pre-empted. But if Congress' decision not to provide a private federal remedy does *not* pre-empt such a state remedy, then, in light of the FDCA's clear policy of relying on the federal courts for enforcement, it also should not foreclose federal jurisdiction over that state remedy. Both § 1331 and the enforcement provisions of the FDCA reflect Congress' strong desire to utilize the federal courts to interpret and enforce the FDCA, and it is therefore at odds with both these statutes to recognize a private state-law remedy for violating the FDCA but to hold that this remedy cannot be adjudicated in the federal courts.

The Court's contrary conclusion requires inferring from Congress' decision not to create a private federal remedy that, while some private enforcement is permissible in state courts, it is "bad" if that enforcement comes from the *federal* courts. But that is simply illogical. * * *

FURTHER NOTE ON 28 U.S.C. § 1331

The well-pleaded complaint rule works moderately well, both as a means of sorting cases that should go into federal and state courts and as a means of predicting how courts will construe 28 U.S.C. § 1331. As seen in *Merrell Dow* and *Mottley*, however, the rule does not work perfectly. No one disputed that the *Merrell Dow* plaintiffs' federal question was properly pleaded in their complaint, but the Supreme Court denied jurisdiction anyway. The Court had noted earlier, in Franchise Tax Board of California v. Construction Laborers Vacation Trust, 463 U.S. 1, 9, 11, 12, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983), that while it is a "powerful doctrine" and a "quick rule of thumb," the well-pleaded complaint rule can "produce awkward results." The Court in *Franchise Tax Board* had in mind the inability of a defendant to rely on a federal defense, but its words might also apply to *Merrell Dow*, where the well-pleaded complaint rule was satisfied but the Court nevertheless declined to find jurisdiction. Professor William Cohen argued that no single rule was ever likely to suffice for interpreting the general federal question statute. Cohen, The Broken Compass: The Requirement that a Case Arise "Directly" Under Federal Law, 115 U.Pa.L.Rev. 890 (1967). Nothing has happened in the more than half-century since the publication of Professor Cohen's article to prove him wrong.

1. Justice Holmes, the cause of action test, and the incorporation of federal law into a state cause of action. In American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260, 36 S.Ct. 585, 60 L.Ed. 987 (1916), Justice Holmes suggested that federal question jurisdiction should exist under § 1331 only when federal law creates the cause of action: "A suit arises under the law that creates the cause of action." But this test is somewhat restrictive. If a case satisfies the test, there is clearly federal question jurisdiction under § 1331. Later Supreme Court cases have made clear that some cases that do not satisfy the *American Well Works* cause-of-action test are nevertheless properly heard by the district court. In the words of the *Franchise Tax Board* Court, Justice Holmes' cause-of-action test "is more useful for describing the vast majority of cases that come within the district courts' original jurisdiction than it is for describing which cases are beyond district court jurisdiction." 463 U.S. at 9.

For example, in Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 41 S.Ct. 243, 65 L.Ed. 577 (1921), plaintiff was a shareholder in a corporation that sought to purchase bonds issued by Federal and Joint Stock Land Banks established under the Federal Farm Loan Act. Plaintiff asserted a state law cause of action under which a shareholder could bring a derivative suit to prevent the corporation from purchasing invalid bonds. Plaintiff argued that the bonds were invalid under federal law on the ground that the federal statute under which they were issued was unconstitutional. The validity of the bonds was the central, indeed the only, issue in the case. Thus, the cause of action was created under state law, but the only question actually presented was federal. The Court held that there was jurisdiction under § 1331. Justice Holmes' cause-of-action test was of course not satisfied; indeed, Justice Holmes dissented, but he was alone in so doing.

How can *Merrell Dow* and *Kansas City Title & Trust* be reconciled? By comparing the importance of the federal question in the two cases? If this is the answer (as it seems to be), is there jurisdiction under § 1331 if the federal question appears in a well-pleaded complaint (even if embedded in a state-

law cause of action) *and* it is of sufficient importance to pass a threshold established in *Merrell Dow*? What, exactly, is the threshold established in *Merrell Dow*?

2. Reading *Merrell Dow* narrowly. It is possible to read some of the language in *Merrell Dow* as overruling *Kansas City Title & Trust* and embracing Justice Holmes's opinion in *American Well Works*. The Court's concluding statement in *Merrell Dow* would certainly support such a reading. The Court wrote, "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 [federal law].' " Yet, as Justice Brennan is at pains to point out, *Merrell Dow* cited and did not overrule *Kansas City Title & Trust*. Cases decided after *Merrell Dow* make clear that *Kansas City Title & Trust* is alive and well.

3. *Grable & Sons Metal Products*. In Grable & Sons Metal Products, Inc. v. Darue Engineering and Manufacturing, 545 U.S. 308, 125 S.Ct. 2363, 162 L.Ed.2d 257 (2005), Grable brought a state-law quiet title action in state court to contest the validity of the title to real property bought at a federal tax sale by Darue. Darue removed the suit to federal district court under 28 U.S.C. § 1441, contending that Grable's suit arose under federal law within the meaning of § 1331. Grable had owned the real property but had fallen behind in paying federal taxes. The IRS seized the property and notified Grable by certified mail that it would sell the property at a tax sale if Grable failed to redeem the property by a certain date. Grable received the notice but did nothing. The property was then sold to Darue at the tax sale. Grable's quiet title action acknowledged actual receipt of the notice but alleged that the sale was invalid because the form of notice was improper under federal law. Grable's cause of action was based on state law, and the federal notice law upon which it relied did not provide a private cause of action. The Court nevertheless upheld federal question jurisdiction.

The Court formulated the general test as follows: "[D]oes 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." Id. at 314. Applying the test, the Court wrote:

> Whether Grable was given notice within the meaning of the federal statute is * * * an essential element of its quiet title claim, and the meaning of the federal statute is actually in dispute; it appears to 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 federal court. The Government has a strong interest in the "prompt and certain collection of delinquent taxes," and the ability of the IRS to satisfy its claims from the property of delinquents requires clear terms of notice to allow buyers like Darue to satisfy themselves that the Service has touched the bases necessary for good title. The Government thus has a direct interest in the availability of a federal forum to vindicate its own administrative actions, 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 disagreements over federal tax provisions will portend only a microscopic effect on the federal-state division of labor.

Id. at 315. The Court explicitly narrowed *Merrell Dow*, adding: "*Merrell Dow* should be read in its entirety as treating the absence of a federal private right of action as evidence relevant to, but not dispositive of, the 'sensitive judgments about congressional intent' that § 1331 requires. * * * The Court [in *Merrell Dow*] saw the missing cause of action not as a missing federal door key, always required, but as a missing welcome mat, required in the circumstances, when exercising federal jurisdiction over a state misbranding action that would have attracted a horde of original filings and removal cases raising other state claims with embedded federal issues." Id. at 318.

Justice Thomas concurred separately, strongly suggesting that he would be willing to abandon *Kansas City Title & Trust* and adopt Justice Holmes's position in *American Well Works*. He wrote, "Jurisdictional rules should be clear. Whatever the virtues of the [*Kansas City Title & Trust*] standard, it is anything but clear. * * * Whatever the vices of the *American Well Works* rule, it is clear. Moreover, it accounts for the 'vast majority' of cases that come within § 1331 under our current case law—further indication that trying to sort out which cases fall within the smaller [*Kansas City Title & Trust*] category may not be worth the uncertainty it entails." Id. at 321 (Thomas, J., concurring).

For a thorough analysis of *Grable* and lower court cases interpreting it, see Bradt, Grable on the Ground: Mitigating Unchecked Jurisdictional Discretion, 44 U.C. Davis L.Rev. 1153 (2011).

4. ***Empire Healthchoice.*** In Empire Healthchoice Assurance, Inc. v. McVeigh, 547 U.S. 677, 126 S.Ct. 211, 165 L.Ed.2d 131 (2006), McVeigh was a federal employee covered under a health care policy issued under the Federal Employees Health Benefits Act (FEHBA). The contract between the federal government and McVeigh's insurer pursuant to the FEHBA required the insurer to recoup damage recoveries obtained by the insured from a tortfeasor third party as reimbursement for health care expenditures made by the insurer. McVeigh was injured in an accident and eventually died from his injuries. The insurer paid $157,309 in health care expenses in caring for McVeigh after the accident. McVeigh's estate recovered a settlement of a little over $3,000,000 from the tortfeasor, and the insurer brought suit to recover the $157,309. The right of the insurer to recover this amount arose out of the contract between the federal government and the insurer, and the contract implemented the FEHBA. The Court nevertheless held that there was no jurisdiction under § 1331. The insurer's "contract-derived claim for reimbursement is not a 'creature of federal law.' " Id. at 696. Justice Breyer dissented, joined by three other Justices. He would have held that the contract was governed by federal common law, and that any claim for reimbursement under the contract therefore arose under federal law. Federal common law is judge-made law that is both jurisdiction-conferring under § 1331 and supreme under the Supremacy Clause. Federal common law is covered, infra p. 427.

5. ***Gunn v. Minton.*** In Gunn v. Minton, 568 U.S. ___, 133 S.Ct. 1059, 185 L.Ed.2d 72 (2013), Minton had been represented in federal court by attorney Gunn in a patent dispute. Minton's suit failed. Minton then sued Gunn in Texas state court for malpractice. An essential ingredient of his state-law malpractice claim was his contention that Gunn has failed to make

what would have been a winning argument under federal patent law. The Texas Supreme Court held that there was federal question jurisdiction under 28 U.S.C. § 1338. Section 1338 confers exclusive jurisdiction on the federal courts in patent cases. The Texas Supreme Court dismissed Minton's suit based on its conclusion that it arose under federal patent law and therefore came within the exclusive jurisdiction of the federal courts. The United States Supreme Court reversed. It acknowledged that the boundaries of federal question "arising under" jurisdiction when the federal issue is embedded in a state-law cause of action are not entirely clear. It wrote, "In outlining the contours of this 'slim category' [of federal question cases], we do not paint on a blank canvas. Unfortunately, the canvas looks like one that Jackson Pollock got to first." 133 S.Ct. at 1065.

The Court first noted that the "arising under" test is identical under the general federal question jurisdictional statute, § 1331, and the patent federal question jurisdiction statute, § 1338. Id. at 1064. It then derived the following test from *Grable*:

> [F]ederal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress.

Id. at 1065. "The substantiality inquiry under *Grable* looks * * * to the importance of the issue to the federal system as a whole." Id. at 1066. The Court noted that the underlying patent question in the malpractice suit was hypothetical: What would the federal court have held in the patent case if Gunn had made the argument Minton now says he should have made? The Court concluded that the answer to this hypothetical question, in the context of a state-law malpractice suit, would have extremely limited effect on patent law in general, and that the question was not "substantial" in the sense intended by *Grable*.

6. Is the cost of clarity too high? The Court itself has conceded that the picture of federal question jurisdiction in cases in which the federal question is embedded in a state-law cause of action looks like a canvas "that Jackson Pollock got to first." Eliminating the uncertainty entailed in determining whether there is federal question jurisdiction in such cases is obviously desirable. Is Justice Thomas right to prefer the clarity of Justice Holmes's *American Well Works* cause-of-action test? The cost of adopting Justice Holmes's test would be the exclusion from federal district court of cases in which "substantial" questions of federal law are embedded in state-law causes of action. Would that cost be too high?

7. Declaratory judgments and the well-pleaded complaint rule. In 1934, Congress adopted the Federal Declaratory Judgment Act, 28 U.S.C. § 2201, under which a plaintiff may request from a federal district court a declaration of rights "in a case of actual controversy within its jurisdiction." A declaratory judgment suit is used to obtain an early judicial determination of rights. It is an extremely useful device where a party would otherwise have to act based only on a guess about her rights, and would be subjected to (and would lose) a suit for damages or injunction if she guessed incorrectly. A plaintiff in a declaratory judgment suit is thus often someone who would have been a defendant had she simply gone ahead with her contemplated acts. This means that a plaintiff's well-pleaded declaratory judgment complaint will often assert rights based on federal law, whereas

that same assertion of federal rights would have appeared as federal defenses in the answer had plaintiff waited to be made a defendant in a "coercive suit" for damages or an injunction. How does the well-pleaded complaint rule apply to declaratory judgment suits?

In Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671, 70 S.Ct. 876, 94 L.Ed. 1194 (1950), the Court held, in an opinion by Justice Frankfurter, that in passing the Federal Declaratory Judgment Act, "Congress enlarged the range of remedies available in the federal courts but did not extend their jurisdiction." According to *Skelly Oil*, Congress did not intend to expand the practical reach of federal question subject matter jurisdiction by allowing declaratory judgment plaintiffs to rely on federal rights that before the passage of the Act could only have been asserted as defenses in a "coercive suit" for damages or an injunction. According to *Skelly Oil*, federal question jurisdiction cannot be determined by reading the actual complaint filed in the case. Rather, jurisdiction is determined by *hypothesizing* what a complaint would have looked like in the "coercive suit" that would have been filed if plaintiff had simply acted, and had thus been a defendant instead of a plaintiff. If a question of federal law is presented in this well-pleaded, but hypothetical, complaint, then there is federal question jurisdiction in the district court. Justice Frankfurter's explanation for the result in *Skelly Oil* was that if the plaintiff's actual complaint were consulted, "It would turn into the federal courts a vast current of litigation indubitably arising under State law. * * * [This would] disregard the effective functioning of the federal judicial system and distort the limited procedural purpose of the Declaratory Judgment Act." 339 U.S. at 673–74.

In Franchise Tax Board of California v. Construction Laborers Vacation Trust, 463 U.S. 1, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983), plaintiff brought a declaratory judgment action in state court under the state declaratory judgment act, asserting a federal right to be free of state taxation. Defendant sought to remove to federal district court, arguing that *Skelly Oil* was based on a construction of the Federal Declaratory Judgment Act and should not apply to limit removal of suits brought under a state act. The Court reaffirmed and extended *Skelly Oil*, writing, "At this point, any adjustment in the system that has evolved under the *Skelly Oil* rule must come from Congress." The Court noted that *Skelly Oil* did not directly govern a case brought in state court under a state declaratory judgment act, but noted that it would become a "dead letter" if a state law declaratory judgment case could be removed to federal court based on the federal right asserted in the state court complaint. 463 U.S. at 18 and n. 17.

The Supreme Court's application of the well-pleaded complaint rule to declaratory judgments has been criticized vigorously and repeatedly. See, e.g., American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts § 1311, at 170–71 (1969) (criticizing *Skelly Oil*); Doernberg, There's No Reason for It; It's Just Our Policy: Why the Well-Pleaded Complaint Rule Sabotages the Purposes of Federal Question Jurisdiction, 38 Hastings L.J. 597, 640–46 (1987) (criticizing both *Skelly Oil* and *Franchise Tax Board*). The Court has made it clear that it considers any change to be a matter for Congress. Congress, meanwhile, has shown no interest in the topic.

2. DIVERSITY JURISDICTION

Mas v. Perry

United States Court of Appeals for the Fifth Circuit, 1974.
489 F.2d 1396.

■ AINSWORTH, CIRCUIT JUDGE:

* * *

Appellees Jean Paul Mas, a citizen of France, and Judy Mas were married at her home in Jackson, Mississippi. Prior to their marriage, Mr. and Mrs. Mas were graduate assistants, pursuing coursework as well as performing teaching duties, for approximately nine months and one year, respectively, at Louisiana State University in Baton Rouge, Louisiana. Shortly after their marriage, they returned to Baton Rouge to resume their duties as graduate assistants at LSU. They remained in Baton Rouge for approximately two more years, after which they moved to Park Ridge, Illinois. At the time of the trial in this case, it was their intention to return to Baton Rouge while Mr. Mas finished his studies for 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. The motion was denied by the district court. Before this Court, appellant challenges the final judgment below solely on jurisdictional grounds, contending that appellees failed to prove diversity of citizenship among the parties and that the requisite jurisdictional amount is lacking with respect to Mr. Mas. Finding no merit to these contentions, we affirm. Under section 1332(a)(2), the federal judicial power extends to the claim of Mr. Mas, a citizen of France, against the appellant, a citizen of Louisiana. Since we conclude that Mrs. Mas is a citizen of Mississippi for diversity purposes, the district court also properly had jurisdiction under section 1332(a)(1) of her claim.

It has long been the general rule that complete diversity of parties is required in order that diversity jurisdiction obtain; that is, no party on one side may be a citizen of the same State as any party on the other side. Strawbridge v. Curtiss, 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. Mollan v. Torrance, 22 U.S. (9 Wheat.) 537, 539, 6 L.Ed. 154, 155 (1824). Jurisdiction is unaffected by subsequent changes in the citizenship of the parties. Morgan's Heirs v. Morgan, 15 U.S. (2 Wheat.) 290, 297, 4 L.Ed. 242, 244 (1817). The burden of pleading the diverse citizenship is upon

the party invoking federal jurisdiction, see Cameron v. Hodges, 127 U.S. 322, 8 S.Ct. 1154, 32 L.Ed. 132 (1888); and if the diversity jurisdiction is properly challenged, that party also bears the burden of proof, McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 56 S.Ct. 780, 80 L.Ed. 1135 (1936).

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, and permanent home and principal establishment, and to which he has the intention of returning whenever he is absent therefrom. . . ." A change of domicile may be effected only by a combination of two elements: (a) taking up residence in a different domicile with (b) the intention to remain there.

It is clear that at the time of her marriage, Mrs. Mas was a domiciliary of the State of Mississippi. While it is generally the case that the domicile of the wife—and, consequently, her State citizenship for purposes of diversity jurisdiction—is deemed to be that of her husband, we find no precedent for extending this concept to the situation here, in which the husband is a citizen of a foreign state but resides in the United States. Indeed, such a fiction would work absurd results on the facts before us. If Mr. Mas were considered a domiciliary of France—as he would be since he had lived in Louisiana as a student-teaching assistant prior to filing this suit, then Mrs. Mas would also be deemed a domiciliary, and thus, fictionally at least, a citizen of France. She would not be a citizen of any State and could not sue in a federal court on that basis; nor could she invoke the alienage jurisdiction to bring her claim in federal court, since she is not an alien. On the other hand, if Mrs. Mas's domicile were Louisiana, she would become a Louisiana citizen for diversity purposes and could not bring suit with her husband against appellant, also a Louisiana citizen, on the basis of diversity jurisdiction. These are curious results under a rule arising from the theoretical identity of person and interest of the married couple.

An American woman is not deemed to have lost her United States citizenship solely by reason of her marriage to an alien. 8 U.S.C. § 1489. Similarly, we conclude that for diversity purposes a woman does not have her domicile or State citizenship changed solely by reason of her marriage to an alien.

Mrs. Mas's Mississippi domicile was disturbed neither by her year in Louisiana prior to her marriage nor as a result of the time she and her husband spent at LSU after their marriage, since for both periods she was a graduate assistant at LSU. Though she testified that after her marriage she had no intention of returning to her parents' home in Mississippi, Mrs. Mas did not effect a change of domicile since she and Mr. Mas were in Louisiana only as students and lacked the requisite intention to remain there. Until she acquires a new domicile, she remains a domiciliary, and thus a citizen, of Mississippi.

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. Federal jurisdiction is not lost because a judgment of less than the jurisdictional amount is awarded. 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 plaintiff to recover an amount adequate to give the court jurisdiction does not show his bad faith or oust the jurisdiction. . . .
>
> . . . 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.

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.

Hertz Corp. v. Friend

Supreme Court of the United States, 2010.
559 U.S. 77, 130 S.Ct. 1181, 175 L.Ed.2d 1029.

■ JUSTICE BREYER delivered the opinion of the Court.

The federal diversity jurisdiction statute provides that "a corporation shall be deemed to be a citizen of any State by which it has been incorporated *and of the State where it has its principal place of*

business." 28 U.S.C. § 1332(c)(1) (emphasis added). We seek here to resolve different interpretations that the Circuits have given this phrase. In doing so, we place primary weight upon the need for judicial administration of a jurisdictional statute to remain as simple as possible. And we conclude that the phrase "principal place of business" refers to the place where the corporation's high level officers direct, control, and coordinate the corporation's activities. Lower federal courts have often metaphorically called that place the corporation's "nerve center." We believe that the "nerve center" will typically be found at a corporation's headquarters.

I

In September 2007, respondents Melinda Friend and John Nhieu, two California citizens, sued petitioner, the Hertz Corporation, in a California state court. They sought damages for what they claimed were violations of California's wage and hour laws. And they requested relief on behalf of a potential class composed of California citizens who had allegedly suffered similar harms.

Hertz filed a notice seeking removal to a federal court. Hertz claimed that the plaintiffs and the defendant were citizens of different States. Hence, the federal court possessed diversity-of-citizenship jurisdiction. Friend and Nhieu, however, claimed that the Hertz Corporation was a California citizen, like themselves, and that, hence, diversity jurisdiction was lacking.

To support its position, Hertz submitted a declaration by an employee relations manager that sought to show that Hertz's "principal place of business" was in New Jersey, not in California. The declaration stated, among other things, that Hertz operated facilities in 44 States; and that California-which had about 12% of the Nation's population, accounted for 273 of Hertz's 1,606 car rental locations; about 2,300 of its 11,230 full-time employees; about $811 million of its $4.371 billion in annual revenue; and about 3.8 million of its approximately 21 million annual transactions, *i.e.,* rentals. The declaration also stated that the "leadership of Hertz and its domestic subsidiaries" is located at Hertz's "corporate headquarters" in Park Ridge, New Jersey; that its "core executive and administrative functions * * * are carried out" there and "to a lesser extent" in Oklahoma City, Oklahoma; and that its "major administrative operations * * * are found" at those two locations.

The District Court of the Northern District of California accepted Hertz's statement of the facts as undisputed. But it concluded that, given those facts, Hertz was a citizen of California. In reaching this conclusion, the court applied Ninth Circuit precedent, which instructs courts to identify a corporation's "principal place of business" by first determining the amount of a corporation's business activity State by State. If the amount of activity is "significantly larger" or "substantially predominates" in one State, then that State is the corporation's "principal place of business." If there is no such State, then the "principal place of business" is the corporation's " 'nerve center,' " *i.e.,* the place where " 'the majority of its executive and administrative functions are performed.' "

Applying this test, the District Court found that the "plurality of each of the relevant business activities" was in California, and that "the differential between the amount of those activities" in California and the

amount in "the next closest state" was "significant." Hence, Hertz's "principal place of business" was California, and diversity jurisdiction was thus lacking. The District Court consequently remanded the case to the state courts.

Hertz appealed the District Court's remand order. The Ninth Circuit affirmed in a brief memorandum opinion. Hertz filed a petition for certiorari. And, in light of differences among the Circuits in the application of the test for corporate citizenship, we granted the writ.

* * *

III

We begin our "principal place of business" discussion with a brief review of relevant history. The Constitution provides that the "judicial Power shall extend" to "Controversies * * * between Citizens of different States." Art. III, § 2. This language, however, does not automatically confer diversity jurisdiction upon the federal courts. Rather, it authorizes Congress to do so and, in doing so, to determine the scope of the federal courts' jurisdiction within constitutional limits.

Congress first authorized federal courts to exercise diversity jurisdiction in 1789 when, in the First Judiciary Act, Congress granted federal courts authority to hear suits "between a citizen of the State where the suit is brought, and a citizen of another State." § 11, 1 Stat. 78. The statute said nothing about corporations. In 1809, Chief Justice Marshall, writing for a unanimous Court, described a corporation as an "invisible, intangible, and artificial being" which was "certainly not a citizen." *Bank of United States v. Deveaux,* 5 Cranch 61, 86, 3 L.Ed. 38 (1809). But the Court held that a corporation could invoke the federal courts' diversity jurisdiction based on a pleading that the corporation's shareholders were all citizens of a different State from the defendants, as "the term citizen ought to be understood as it is used in the constitution, and as it is used in other laws. That is, to describe the real persons who come into court, in this case, under their corporate name." *Id.,* at 91–92.

In *Louisville, C. & C.R. Co. v. Letson,* 2 How. 497, 11 L.Ed. 353 (1844), the Court modified this initial approach. It held that a corporation was to be deemed an artificial person of the State by which it had been created, and its citizenship for jurisdictional purposes determined accordingly. *Id.,* at 558–559. Ten years later, the Court in *Marshall v. Baltimore & Ohio R. Co.,* 16 How. 314, 14 L.Ed. 953 (1854), held that the reason a corporation was a citizen of its State of incorporation was that, for the limited purpose of determining corporate citizenship, courts could conclusively (and artificially) presume that a corporation's *shareholders* were citizens of the State of incorporation. *Id.,* at 327–328. And it reaffirmed *Letson.* 16 How., at 325–326, 14 L.Ed. 953. Whatever the rationale, the practical upshot was that, for diversity purposes, the federal courts considered a corporation to be a citizen of the State of its incorporation. 13F C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3623, pp. 1–7 (3d ed. 2009) (hereinafter Wright & Miller).

In 1928 this Court made clear that the "state of incorporation" rule was virtually absolute. It held that a corporation closely identified with State A could proceed in a federal court located in that State as long as

the corporation had filed its incorporation papers in State B, perhaps a State where the corporation did no business at all. Subsequently, many in Congress and those who testified before it pointed out that this interpretation was at odds with diversity jurisdiction's basic rationale, namely, opening the federal courts' doors to those who might otherwise suffer from local prejudice against out-of-state parties. Through its choice of the State of incorporation, a corporation could manipulate federal-court jurisdiction, for example, opening the federal courts' doors in a State where it conducted nearly all its business by filing incorporation papers elsewhere. Although various legislative proposals to curtail the corporate use of diversity jurisdiction were made, none of these proposals were enacted into law.

At the same time as federal dockets increased in size, many judges began to believe those dockets contained too many diversity cases. A committee of the Judicial Conference of the United States studied the matter. And on March 12, 1951, that committee, the Committee on Jurisdiction and Venue, issued a report.

Among its observations, the committee found a general need "to prevent frauds and abuses" with respect to jurisdiction. The committee recommended against eliminating diversity cases altogether. Instead it recommended, along with other proposals, a statutory amendment that would make a corporation a citizen both of the State of its incorporation and any State from which it received more than half of its gross income. If, for example, a citizen of California sued (under state law in state court) a corporation that received half or more of its gross income from California, that corporation would not be able to remove the case to federal court, even if Delaware was its State of incorporation.

During the spring and summer of 1951 committee members circulated their report and attended circuit conferences at which federal judges discussed the report's recommendations. Reflecting those criticisms, the committee filed a new report in September, in which it revised its corporate citizenship recommendation. It now proposed that " 'a corporation shall be deemed a citizen of the state of its original creation . . . [and] shall also be deemed a citizen of a state where it has its principal place of business.' " The committee wrote that this new language would provide a "simpler and more practical formula" than the "gross income" test. * * *

* * *

* * * Subsequently, in 1958, Congress both codified the courts' traditional place of incorporation test and also enacted into law a slightly modified version of the Conference Committee's proposed "principal place of business" language. A corporation was to "be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." § 2, 72 Stat. 415.

IV

* * *

[S]uppose those corporate headquarters, including executive offices, are in one State, while the corporation's plants or other centers of business activity are located in other States. In 1959 a distinguished federal district judge, Edward Weinfeld, [wrote]:

> "Where a corporation is engaged in far-flung and varied activities which are carried on in different states, its principal place of business is the nerve center from which it radiates out to its constituent parts and from which its officers direct, control and coordinate all activities without regard to locale, in the furtherance of the corporate objective. The test applied by our Court of Appeals, is that place where the corporation has an 'office from which its business was directed and controlled'-the place where 'all of its business was under the supreme direction and control of its officers.' " *Scot Typewriter Co.*, 170 F. Supp., at 865.

Numerous Circuits have since followed this rule, applying the "nerve center" test for corporations with "far-flung" business activities.

Scot's analysis, however, did not go far enough. For it did not answer what courts should do when the operations of the corporation are not "far-flung" but rather limited to only a few States. When faced with this question, various courts have focused more heavily on where a corporation's actual business activities are located.

Perhaps because corporations come in many different forms, involve many different kinds of business activities, and locate offices and plants for different reasons in different ways in different regions, a general "business activities" approach has proved unusually difficult to apply. Courts must decide which factors are more important than others: for example, plant location, sales or servicing centers; transactions, payrolls, or revenue generation.

* * *

V

A

In an effort to find a single, more uniform interpretation of the statutory phrase, we have reviewed the Courts of Appeals' divergent and increasingly complex interpretations. Having done so, we now return to, and expand, Judge Weinfeld's approach, as applied in the Seventh Circuit. We conclude that "principal place of business" is best read as referring to the place where a corporation's officers direct, control, and coordinate the corporation's activities. It is the place that Courts of Appeals have called the corporation's "nerve center." And in practice it should normally be the place where the corporation maintains its headquarters-provided that the headquarters is the actual center of direction, control, and coordination, *i.e.,* the "nerve center," and not simply an office where the corporation holds its board meetings (for example, attended by directors and officers who have traveled there for the occasion).

Three sets of considerations, taken together, convince us that this approach, while imperfect, is superior to other possibilities. First, the statute's language supports the approach. The statute's text deems a corporation a citizen of the "State where it has its principal place of business." 28 U.S.C. § 1332(c)(1). The word "place" is in the singular, not the plural. The word "principal" requires us to pick out the "main, prominent" or "leading" place. 12 Oxford English Dictionary 495 (2d ed. 1989) (def. (A)(I)(2)). Cf. *Commissioner v. Soliman,* 506 U.S. 168, 174, 113

S.Ct. 701, 121 L.Ed.2d 634 (1993) (interpreting "principal place of business" for tax purposes to require an assessment of "whether any one business location is the 'most important, consequential, or influential' one"). And the fact that the word "place" follows the words "State where" means that the "place" is a place *within* a State. It is not the State itself.

* * *

Second, administrative simplicity is a major virtue in a jurisdictional statute. Complex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims. Complex tests produce appeals and reversals, encourage gamesmanship, and, again, diminish the likelihood that results and settlements will reflect a claim's legal and factual merits. Judicial resources too are at stake. Courts have an independent obligation to determine whether subject-matter jurisdiction exists, even when no party challenges it. So courts benefit from straightforward rules under which they can readily assure themselves of their power to hear a case.

Simple jurisdictional rules also promote greater predictability. Predictability is valuable to corporations making business and investment decisions. Predictability also benefits plaintiffs deciding whether to file suit in a state or federal court.

A "nerve center" approach, which ordinarily equates that "center" with a corporation's headquarters, is simple to apply *comparatively speaking*. The metaphor of a corporate "brain," while not precise, suggests a single location. By contrast, a corporation's general business activities more often lack a single principal place where they take place. That is to say, the corporation may have several plants, many sales locations, and employees located in many different places. If so, it will not be as easy to determine which of these different business locales is the "principal" or most important "place."

Third, the statute's legislative history, for those who accept it, offers a simplicity-related interpretive benchmark. The Judicial Conference provided an initial version of its proposal that suggested a numerical test. A corporation would be deemed a citizen of the State that accounted for more than half of its gross income. The Conference changed its mind in light of criticism that such a test would prove too complex and impractical to apply. That history suggests that the words "principal place of business" should be interpreted to be no more complex than the initial "half of gross income" test. A "nerve center" test offers such a possibility. A general business activities test does not.

B

We recognize that there may be no perfect test that satisfies all administrative and purposive criteria. We recognize as well that, under the "nerve center" test we adopt today, there will be hard cases. For example, in this era of telecommuting, some corporations may divide their command and coordinating functions among officers who work at several different locations, perhaps communicating over the Internet. That said, our test nonetheless points courts in a single direction, towards the center of overall direction, control, and coordination. Courts do not have to try to weigh corporate functions, assets, or revenues different in kind, one from the other. Our approach provides a sensible

test that is relatively easier to apply, not a test that will, in all instances, automatically generate a result.

We also recognize that the use of a "nerve center" test may in some cases produce results that seem to cut against the basic rationale for 28 U.S.C. § 1332. For example, if the bulk of a company's business activities visible to the public take place in New Jersey, while its top officers direct those activities just across the river in New York, the "principal place of business" is New York. One could argue that members of the public in New Jersey would be *less* likely to be prejudiced against the corporation than persons in New York-yet the corporation will still be entitled to remove a New Jersey state case to federal court. And note too that the same corporation would be unable to remove a New York state case to federal court, despite the New York public's presumed prejudice against the corporation.

We understand that such seeming anomalies will arise. However, in view of the necessity of having a clearer rule, we must accept them. Accepting occasionally counterintuitive results is the price the legal system must pay to avoid overly complex jurisdictional administration while producing the benefits that accompany a more uniform legal system.

* * *

NOTE ON ASSORTED PROBLEMS OF DIVERSITY JURISDICTION

1. Citizenship. a. Natural persons. A natural person is a citizen of a state in which he or she is domiciled. Domicile is distinct from residence. (Venue under 28 U.S.C. § 1391 and related statutes relies on residence rather than domicile. See infra p. 300). Note the oddity of the statute as it applies to *Mas v. Perry*. An American citizen domiciled abroad may not use § 1332 as the basis for jurisdiction because the statute requires citizenship "of a state."

Under the current version of § 1332, there are two ways a diversity suit can be based on alienage or include an alien. First, under § 1332(a)(2) there is jurisdiction over suits between citizens of a state and "citizens or subjects of a foreign state." (The French are "citizens"; the British are, or at least used to be, "subjects.") Note, however, that an alien lawfully admitted for permanent residence in the United States (i.e., a holder of a "green card") is "deemed" a citizen of the state in which he or she is domiciled. Aliens lawfully in the country on work or student visas do not qualify as lawfully admitted permanent residents. Second, under § 1332(a)(3), a citizen or subject of a foreign state can join as an "additional party" a diversity suit between citizens of different states.

The odd distinction between aliens and Americans domiciled abroad was applied in Twentieth Century-Fox Film Corp. v. Taylor, 239 F. Supp. 913 (S.D.N.Y.1965). Richard Burton and Elizabeth Taylor disagreed with Twentieth Century-Fox during the filming of "Cleopatra." In the ensuing litigation, there was diversity between Burton, a British "subject," and Twentieth Century-Fox, an American corporation. But there was no diversity between Taylor and Twentieth Century-Fox because, although she was an American citizen, she was not then domiciled in the United States. For a discussion of diversity jurisdiction based on alienage, see Johnson, Why Alienage Jurisdiction? Historical Foundations and Modern Justifications for

Federal Jurisdiction over Disputes Involving Noncitizens, 21 Yale J.Int'l L. 1 (1996).

b. Artificial persons. For purposes of federal diversity jurisdiction, a corporation is treated as a citizen of both its state of incorporation and its principal place of business. The place of incorporation is easy to determine, but note that a few corporations are incorporated in more than one state. The principal place of business is sometimes more difficult to determine. Before the Court's decision in *Hertz*, there were two separate lines of authority. Under one line of cases, the principal place of business was where the corporation carries on its primary production or service activities. See, e.g., Kelly v. United States Steel Corp., 284 F.2d 850 (3d Cir. 1960). Under the other, the principal place of business was where the corporation's administrative office, or "nerve center," was located. See, e.g., Scot Typewriter Co. v. Underwood Corp., 170 F. Supp. 862 (S.D.N.Y.1959). The Court in *Hertz* resolved this split in favor of the "nerve center."

Under the general diversity jurisdiction statute, 28 U.S.C. § 1332(c), an unincorporated association is a citizen of all the states in which the members of the association are citizens. This rule has most frequent application to business partnerships and labor unions. See Carden v. Arkoma Associates, 494 U.S. 185, 110 S.Ct. 1015, 108 L.Ed.2d 157 (1990) (business partnership); United Steelworkers of America v. R.H. Bouligny, Inc., 382 U.S. 145, 86 S.Ct. 272, 15 L.Ed.2d 217 (1965) (labor union). A suit on behalf of a trust, including a business trust, may be brought solely in the name of the trustee. The citizenship of the trustee, and not that of the trust beneficiaries, will be considered for purposes of diversity. Navarro Savings Ass'n v. Lee, 446 U.S. 458, 100 S.Ct. 1779, 64 L.Ed.2d 425 (1980). Under the Class Action Fairness Act of 2005 (CAFA), however, an unincorporated association is treated like a corporation. CAFA specifies that for purposes of class actions that qualify for CAFA treatment, an unincorporated association is a citizen of the state where it has its principal place of business and of the state under whose laws it is organized. 28 U.S.C. § 1332(d)(10).

2. Complete diversity. In Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 2 L.Ed. 435 (1806), Chief Justice John Marshall held that "complete diversity" is required under the statute that later became § 1332. "Complete diversity" means that all the plaintiffs must be of a different citizenship from all the defendants. Thus, if all the plaintiffs are citizens of California and all the defendants are citizens of New York or Illinois, there is complete diversity. But if a citizen of California is joined as a defendant, in addition to the New York and Illinois citizens, complete diversity is destroyed and jurisdiction under § 1332 is defeated. Complete diversity is a statutory requirement under § 1332. It is not a constitutional requirement. One example of a statute that does not require complete diversity is the federal interpleader statute, 28 U.S.C. § 1335, which requires only minimal diversity. That is, it is enough if any defendant has a different citizenship from any plaintiff. State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523, 87 S.Ct. 1199, 18 L.Ed.2d 270 (1967). Another example is CAFA, which is applicable to class actions in which the aggregate amount in controversy exceeds $5,000,000. CAFA class actions require only minimal diversity. 28 U.S.C. § 1332(d)(2).

The Multiparty, Multiforum Trial Jurisdiction Act of 2002 gives federal district courts original jurisdiction over civil suits arising from a single accident in which at least 75 people have died, provided certain multi-state

elements are present. See 28 U.S.C. §§ 1369 and 1441(e). Only minimal diversity is required under the Act. However, the statute instructs a district court to "abstain from hearing" the suit if "the substantial majority of all plaintiffs are citizens of a single State of which the primary defendants are also citizens; and the claims asserted will be governed primarily by the laws of that state." 28 U.S.C. § 1369(b)(1) and (2). The Act contains an unusual provision allowing remand of removed actions. Once the federal district court has determined liability, it must remand to the state court for determination of the amount of damages "unless the [district] court finds that, for the convenience of parties and witnesses and in the interest of justice, the action should be retained" in the district court. 28 U.S.C. § 1441(e)(2). See Wallace v. Louisiana Citizens Property Ins. Corp., 444 F.3d 697 (5th Cir. 2006) (suit arising out of Hurricane Katrina); Passa v. Derderian, 308 F. Supp. 2d 43 (D.R.I. 2004) (suit arising out of night club fire in Rhode Island); Effron, Disaster-Specific Mechanisms for Consolidation, 82 Tul.L.Rev. 2423 (2008).

In a suit originally filed in federal court against several defendants, one of whom would defeat complete diversity, or in a suit removed from state court in which such a defendant is added after removal, the district court may dismiss the defendant under federal Rule 21 in order to preserve its jurisdiction. The dismissal is in the sound discretion of the district judge. However, the district court should not dismiss if dismissal is improper under the criteria provided in Rule 19(b). See, e.g., Filippini v. Ford Motor Co., 110 F.R.D. 131 (N.D.Ill.1986). A court of appeals also has the power to dismiss such a defendant; a remand to the district court for a dismissal under Rule 21 is unnecessary. Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 109 S.Ct. 2218, 104 L.Ed.2d 893 (1989). Compare the higher standard where plaintiff has joined a non-diverse defendant in a suit originally filed in state court, and where defendant seeks to remove. A diverse defendant seeking to dismiss a non-diverse defendant in order to permit removal must show that plaintiff joined the non-diverse defendant "fraudulently" as a means to defeat removal. Batoff v. State Farm Insurance Co., 977 F.2d 848 (3d Cir. 1992). See discussion of removal, infra p. 286.

3. Amount in controversy. The diversity jurisdiction statute has always required that the amount in controversy exceed a certain minimum. Under the Judiciary Act of 1789, the amount was $500. It is now $75,000, increased in 1997 from $50,000. (The general federal question jurisdiction statute, 28 U.S.C. § 1331, had a $10,000 amount in controversy requirement for many years, but the requirement was removed entirely in 1980.) Two functions are served, at least to some degree, by the amount in controversy requirement. First, the requirement preserves federal judicial resources by keeping small diversity cases out of the federal courts. Second, it protects plaintiffs in small diversity cases filed in rural state courts from being removed to federal courts located in urban centers.

a. Legal certainty test. The "legal certainty" test of St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 58 S.Ct. 586, 82 L.Ed. 845 (1938), requires a defendant opposing jurisdiction to prove to a "legal certainty" that plaintiff cannot recover damages in excess of $75,000. The test is obviously designed to favor plaintiffs, but it is not an "open sesame" for all claims, even when plaintiff has suffered substantial harm. For example, in Kahn v. Hotel Ramada of Nevada, 799 F.2d 199 (5th Cir. 1986), plaintiff entrusted his luggage and a briefcase containing valuable jewelry to a hotel bellman at a Las Vegas hotel. When he returned an hour later, it

had been stolen. Plaintiff sued in federal district court for the alleged value of the property, an amount substantially in excess of the jurisdictional amount. The hotel moved to dismiss on the ground that a Nevada hotelkeepers statute limited its liability to $750. The court found that the statute governed, and sustained a dismissal by the district court for lack of jurisdiction. (Question: If plaintiff Kahn now files suit in state court, what will be the effect of the federal court's dismissal for want of jurisdiction? Will the state court be required to follow the federal court's decision on the meaning of the statute? The federal court clearly found as a matter of law that the statute governed, but did it do so "on the merits"? See materials on issue preclusion, infra p. 1072.) Claims for punitive damages are part of the jurisdictional amount, but "a claim for punitive damages is to be given closer scrutiny, and the trial judge accorded greater discretion than a claim for actual damages." Zahn v. International Paper Co., 469 F.2d 1033 n. 1 (2d Cir. 1972), aff'd on other grounds 414 U.S. 291 (1973).

b. Injunctions, and plaintiff's or defendant's viewpoint. Injunctions present special problems of valuation. Not only may the dollar amount at stake be hard to calculate, but, in addition, the value to the plaintiff and the cost to the defendant may be different. For example, in Glenwood Light & Water Co. v. Mutual Light, Heat & Power Co., 239 U.S. 121, 36 S.Ct. 30, 60 L.Ed. 174 (1915), plaintiff sought an injunction that would have forced defendant to move certain electrical poles and wires. The value to the plaintiff was more than the jurisdictional amount, but the cost to the defendant was less. The Supreme Court upheld jurisdiction, viewing the jurisdictional amount from the plaintiff's perspective. Although the cases are not uniform, the general tendency is to find jurisdiction if the amount in controversy is satisfied when viewed from *either* the plaintiff's or the defendant's perspective. 14B C. Wright, A. Miller, and E. Cooper, Federal Practice and Procedure § 3703 (2009).

c. Aggregation of claims. The general rule is that a single plaintiff can aggregate all claims brought in a single complaint—even if the causes of action are unrelated to one another—to satisfy the jurisdictional amount. Multiple plaintiffs, however, cannot aggregate their claims to satisfy the jurisdictional amount. Snyder v. Harris, 394 U.S. 332, 89 S.Ct. 1053, 22 L.Ed.2d 319 (1969). However, if the claim of one plaintiff satisfies the jurisdictional amount, often plaintiffs whose claims do not satisfy the jurisdictional amount may join the suit under either Rule 20 (joinder) or Rule 23 (class action). See Exxon Mobil v. Allapattah Services, Inc., 545 U.S. 546, 125 S.Ct. 2611, 162 L.Ed.2d 502 (2005), infra p. 276. If individual or class plaintiffs have an undivided interest in the claim, the value of the entire interest may be considered. For example, in Eagle v. American Telephone and Telegraph Co., 769 F.2d 541 (9th Cir. 1985), cert. den. 475 U.S. 1084 (1986), plaintiffs were a class of minority shareholders alleging wrongful depletion of corporate assets resulting from a merger. The court held that the interests of shareholders under California law in such a case were "common and undivided," and upheld jurisdiction based on the dollar amount of injury to the entire class of shareholders. 769 F.2d at 546–47. For a useful description of the rules governing aggregation and a proposed statute see Rensberger, The Amount in Controversy: Understanding the Rules of Aggregation, 26 Ariz.St.L.J. 925 (1994).

d. Counterclaims. Amounts sought in permissive counterclaims under federal Rule 13(b) are not considered part of the amount in

controversy. The same is generally true of amounts sought in compulsory counterclaims under Rule 13(a), at least for suits filed directly in federal district court. (The only exception is a case that appears to be a "sport." Horton v. Liberty Mutual Insurance Co., 367 U.S. 348, 81 S.Ct. 1570, 6 L.Ed.2d 890 (1961).) However, when the defendant seeks an amount over $75,000 in a compulsory counterclaim in state court, and then removes the case to federal court based on that amount in controversy, the cases are split. Some allow removal; some do not. For extended discussion, see 14B C. Wright, A. Miller, and E. Cooper, Federal Practice and Procedure § 3706 (2009).

4. Improper or collusive assignment or joinder to create diversity. 28 U.S.C. § 1359 provides that assignment or joinder of parties may not be done "improperly or collusively" in order to invoke jurisdiction. In Kramer v. Caribbean Mills, Inc., 394 U.S. 823, 89 S.Ct. 1487, 23 L.Ed.2d 9 (1969), a Haitian and a Panamanian corporation became embroiled in a contract dispute. The Panamanian corporation assigned its entire claim of $165,000 under the contract to its lawyer, Kramer, a Texas citizen, for $1. In a separate agreement, signed on the same day as the assignment, Kramer agreed to pay 95% of any recovery on the assigned cause of action to the corporation, "solely as a bonus." The net effect of the assignment and the separate agreement was to give Kramer a contingency fee of 5% of any recovery in the suit. Kramer then filed suit in his own name in diversity in federal district court in Texas. The jury returned a verdict for $165,000, but the Supreme Court sustained a dismissal for want of jurisdiction. The Court reasoned:

> If federal jurisdiction could be created by assignments of this kind, which are easy to arrange and involve few disadvantages for the assignor, then a vast quantity of ordinary contract and tort litigation could be channeled into the federal courts at the will of one of the parties.

394 U.S. at 828–29.

5. Probate and domestic relations. Although no explicit exception is made in 28 U.S.C. § 1332, under long-established case law diversity jurisdiction does not include probate proceedings, or domestic relations suits seeking divorce, alimony, or child custody. The Supreme Court reaffirmed the domestic relations exception in Ankenbrandt v. Richards, 504 U.S. 689, 112 S.Ct. 2206, 119 L.Ed.2d 468 (1992). Plaintiff brought a damages suit on behalf of her two daughters against her former husband (the girls' father) and his female companion, alleging physical and sexual abuse. The Court sustained jurisdiction, noting the existence of the domestic relations exception but holding that this tort suit fell outside it.

You may wish to consider the following views on the domestic relations exception:

> [R]ecognizing the increasing federalization of family law as well as past discrimination against these issues, federal courts should treat family law cases like any other diversity cases. * * * Domestic relations issues are of paramount importance to the litigants who bring these cases; these litigants deserve as much respect as litigants in any other diversity case.

Cahn, Family Law, Federalism, and the Federal Courts, 79 Iowa L.Rev. 1073, 1126 (1994).

> Women and the families they sometimes inhabit are not only assumed to be outside the federal courts, they are also assumed not to be related to the "national issues" to which the federal judiciary is to devote its interests. Jurisdictional lines have not been drawn according to the laws of nature but by men, who today are seeking to confirm their prestige as members of the most important judiciary in the country. * * * Dealing with women—in and out of families, arguing about federal statutory rights of relatively small value—is not how they want to frame their job.

Resnik, "Naturally" without Gender: Women, Jurisdiction, and the Federal Courts, 66 N.Y.U.L.Rev. 1682, 1749 (1991). For an argument in favor of a special category of "*Akenbrandt* abstention," under which federal courts would have jurisdiction but would abstain from deciding "core" domestic relations cases and, in addition, cases raising difficult questions of unresolved state law, see Stein, The Domestic Relations Exception to Federal Jurisdiction: Rethinking an Unsettled Federal Courts Doctrine, 36 Boston Coll.L.Rev. 669 (1995).

NOTE ON THE ORIGIN AND PURPOSES OF DIVERSITY JURISDICTION

Article III of the Constitution confers jurisdiction on the federal courts over "Controversies * * * between Citizens of different States; * * * and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S.Const., Art.III, Sec.2, para.1. The Judiciary Act of 1789 implemented the constitutional grant of diversity jurisdiction, and the federal trial courts have exercised diversity jurisdiction ever since. Compare the early statutory grant of diversity jurisdiction (1789) to the late permanent grant of general federal question jurisdiction (1875). Why do you suppose the one was so early and the other so late? The 1789 statute provided that "the circuit courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and * * * an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State." 1 Stat. 73, 78, § 11 (Sept. 24, 1789). Except for the fact that district courts have now replaced circuit courts as the primary federal trial courts, the modern diversity statute, 28 U.S.C. § 1332, is remarkably similar to the 1789 version.

The most obvious purpose of diversity jurisdiction was to protect out-of-state litigants against local prejudice. As Alexander Hamilton wrote in *The Federalist* No. 80: "The reasonableness of the agency of the national courts in cases in which the State tribunals cannot be supposed to be impartial speaks for itself. * * * This principle has no inconsiderable weight in designating the federal courts as the proper tribunals for the determination of controversies between different States and their citizens." Chief Justice John Marshall wrote to the same effect in Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 87, 3 L.Ed. 38 (1809): "However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that

the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states."

Yet diversity jurisdiction was not universally accepted, and prejudice against out-of-staters not universally conceded. Consider the following exchange during the Virginia debates over the ratification of the Constitution. It anticipates modern debates over diversity both in the vigor of the attack and in the somewhat tepid defense. George Mason, a venerated Virginia lawyer, argued, "[The federal courts'] *jurisdiction* extends to controversies between citizens of different states. Can we not trust our state courts with the decision of these? If I have a controversy with a man in Maryland,—if a man in Maryland has my bond for a hundred pounds,—are not the state courts competent to try it? Is it suspected that they would enforce the payment if unjust, or refuse to enforce it if just? The very idea is ridiculous." James Madison, one of the authors of *The Federalist* and probably more responsible than any other single person for the structure of the federal judiciary, responded, "As to its cognizance of disputes between citizens of different states, I will not say it is a matter of much importance. Perhaps it might be left to the state courts. But I sincerely believe this provision will be rather salutary than otherwise." 3 J. Elliot, Debates in the Several State Conventions on the Adoption of the Federal Constitution 526, 533 (1881). For early scholarly argument on the role of prejudice against out-of-staters, compare Friendly, The Historic Basis of Diversity Jurisdiction, 41 Harv.L.Rev. 483 (1928) (prejudice against out-of-staters was speculative in 1789), and Frankfurter, Distribution of Judicial Power Between United States and State Courts, 13 Cornell L.Q. 499 (1928) (same, relying on Friendly), with Yntema and Jaffin, Preliminary Analysis of Concurrent Jurisdiction, 79 U.Pa.L.Rev. 869 (1931) (protection against prejudice was a likely purpose).

Another purpose, or at least function, of diversity jurisdiction was to provide a nationwide system of courts in which important commercial disputes could be adjudicated and a uniform system of law applied. At that time, commercial law was almost entirely judge-made common law which could vary from state to state. State courts had no obligation to adopt the commercial law of their neighboring states and had no ready mechanism to coordinate their common law decisions with those of neighboring states even when they wanted to do so. The federal courts, by contrast, were governed by a single appellate court—the Supreme Court—and applied uniform rules of general common law in commercial cases throughout the country. See Swift v. Tyson, 41 U.S. (16 Pet.) 1, 10 L.Ed. 865 (1842). By and large, particularly in the years before the Civil War, state courts appreciated the stability and uniformity of the federal courts' decisions in commercial cases and voluntarily conformed their decisions to those of the federal courts as a way of creating and maintaining a nationally uniform general common law in commercial cases. See, e.g., Fletcher, The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance, 97 Harv.L.Rev. 1513 (1984); Frank, Historical Bases of the Federal Judicial System, 13 Law & Contemp. Probs. 3, 28 (1948).

What are the purposes served by diversity jurisdiction today? The general common law of *Swift v. Tyson* was abandoned by the Supreme Court in Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188

(1938), and federal courts now follow the laws of the states in which they sit. Thus, whatever advantage diversity jurisdiction and the general common law might once have provided in achieving uniformity of law is now gone. Indeed, this advantage had disappeared or was at least outweighed by problems associated with the general common law before the end of the nineteenth century. For further exploration of *Swift v. Tyson*, *Erie Railroad v. Tompkins*, and the role of the general common law, see infra p. 348.

Therefore, of the original purposes of diversity, only protection of out-of-staters remains. Is such prejudice a problem today? Are there other purposes that modern diversity jurisdiction serves? For most of the twentieth century, many scholars and judges, and some members of the practicing bar, recommended abolishing or curtailing diversity jurisdiction. The great majority of practicing lawyers, however, have favored its retention. For discussion, see, e.g., Report of the Federal Courts Study Committee 38 (1990) (urging severe curtailment); Rowe, Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reform, 92 Harv.L.Rev. 963 (1979) (urging abolition); Kramer, Diversity Jurisdiction, 1990 B.Y.U.L.Rev. 97 (urging practical abolition or severe curtailment); American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts 99 (1969) (urging retention); Shapiro, Federal Diversity Jurisdiction: A Survey and a Proposal, 91 Harv.L.Rev. 317 (1977) (urging retention or abolition depending on local needs).

Prejudice against out-of-staters. Anecdotal evidence suggests that diversity jurisdiction is still a useful protection for out-of-staters. Consider the following two cases:

In Pappas v. Middle Earth Condominium Ass'n, 963 F.2d 534 (2d Cir. 1992), a New Jersey citizen brought a diversity suit in federal district court in Vermont against a Vermont citizen, based on a severe injury suffered when he slipped on ice outside defendant's condominium. Defendant's lawyer argued to the jury: "But isn't what they're really asking is that they can come up * * * here from New Jersey to Vermont to enjoy what we experience every year, for those of us who are here originally for most of our lives * * * and without a care in the world for their own safety when they encounter what we, ourselves do not take for granted, and then can injure themselves, and they can sit back and say, * * * 'I'd like you to retire me.' " 963 F.2d at 536–37. The court of appeals reversed a jury verdict for the defendant and remanded for a new trial, based on the regional bias in the defendant's argument.

In TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993), a state court jury in West Virginia returned a $10,000,000 punitive damages verdict against TXO, a large Texas corporation. The attorney for Allied Resources had begun his rebuttal argument, "Ladies and gentlemen of the jury, this greedy bunch from down in Texas doesn't understand this case." He called them "Texas high rollers, wildcatters," and compared TXO to a wealthy out-of-town visitor who "stays here all day" but refuses to put a quarter in the parking meter to pay for local fire and police departments. 509 U.S. at 493–94 (O'Connor, J., dissenting). The Supreme Court sustained the punitive damages award. Justice O'Connor argued in dissent that the award of punitive damages was excessive, using the regional bias to support her argument. No one, including Justice O'Connor, argued that the evident regional bias in the attorney's argument was itself sufficient to warrant setting aside the verdict. What

would the Court's response have been if the case had been tried in federal court under diversity jurisdiction rather than in state court?

A 1992 survey of cases removed from state to federal court provides further evidence. Lawyers for the defendants in 56.3% of the diversity cases removed to federal court reported that bias against out-of-staters in the state court was an important consideration in seeking removal. More experienced lawyers reported bias more frequently than less experienced lawyers. Bias against out-of-staters was reported at relatively higher levels in the South and the non-industrialized Midwest, and at relatively lower levels in the Northeast, the industrialized Midwest, and the Far West. Miller, An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction, 41 Am.U.L.Rev. 369, 409–10 (1992).

Other purposes. There may be other purposes for, or at least consequences of, diversity jurisdiction.

Protection from rural prejudice is related to but distinct from protection from prejudice against out-of-staters. State courts are located all over a state. Usually there is at least one trial court of general jurisdiction in every county. Federal courts, by contrast, are located only in the major cities. Therefore, removal from a state court in a rural county to the nearest federal court will necessarily mean that the trial will be held in an urban area, and the jury will be drawn from an urban rather than a rural population. In Gentle v. Lamb-Weston, Inc., 302 F. Supp. 161 (D.Me.1969), eleven Maine potato farmers sued an Oregon food processing corporation in state court in rural Aroostook County. Each farmer assigned 1/100th of his claim to a law school classmate of their attorney; the classmate was an Oregon citizen, who became the twelfth plaintiff by virtue of the assignments. The presence of the Oregon citizen as a plaintiff defeated removal to the federal district court in Portland because it destroyed complete diversity. The district judge wrote, "Through this cynical device, plaintiffs seek to benefit from whatever local prejudice a trial against a foreign corporation before an Aroostook County jury might afford them." 302 F. Supp. at 163. The judge allowed removal despite the assignment.

It is also argued, and sometimes stated as if beyond argument, that federal judges and procedures are better than those of the states. A representative statement is, "Without disparagement of the quality of justice in many state courts throughout the country, it may be granted that often the federal courts do have better judges, better juries, and better procedures. Life tenure gives a degree of independence to a federal judge that a state judge facing re-election may find it hard to maintain, and in some types of cases this difference might be very significant." American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts 100 (1969).

Cross-fertilization between the court systems, and broadening of federal judges through continued exposure to state law, are also asserted as advantages stemming from diversity jurisdiction. The evidence on these factors is genuine but somewhat equivocal. For a thoughtful exploration, see Shapiro, Federal Diversity Jurisdiction: A Survey and a Proposal, 91 Harv.L.Rev. 317, 321–29 (1977).

Arguments against diversity. With all of that, what are the arguments against diversity jurisdiction? Former Dean Larry Kramer gives six: First, diversity cases consume federal judicial resources, and "perhaps

no other major class of cases has a weaker claim on federal judicial resources." The federal courts' most important business is to decide cases involving questions of federal law. Second, federal courts bring no "special expertise" to questions of state law. Third, "diversity jurisdiction is frequently a source of friction between state and federal courts." This results not only from disagreements between federal and state courts about the meaning of state law, but also from the awkwardness produced when parties file (as they sometimes do) simultaneous parallel suits in federal and state court. Fourth, minimizing frictions between the two court systems is expensive and time-consuming. Fifth, "diversity jurisdiction reduces pressure to improve state judicial systems." Sixth, "while it would be an overstatement to say that there are no benefits from diversity jurisdiction, most of its original justifications no longer exist." Kramer, Diversity Jurisdiction, 1990 B.Y.U.L.Rev. 97, 102–107.

3. SUPPLEMENTAL JURISDICTION

United Mine Workers of America v. Gibbs

Supreme Court of the United States, 1966.
383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218.

■ MR. JUSTICE BRENNAN delivered the opinion of the Court.

Respondent Paul Gibbs was awarded compensatory and punitive damages in this action against petitioner United Mine Workers of America (UMW) for alleged violations of § 303 of the Labor Management Relations Act, 1947, and of the common law of Tennessee. The case grew out of the rivalry between the United Mine Workers and the Southern Labor Union over representation of workers in the southern Appalachian coal fields. Tennessee Consolidated Coal Company, not a party here, laid off 100 miners of the UMW's Local 5881 when it closed one of its mines in southern Tennessee during the spring of 1960. Late that summer, Grundy Company, a wholly owned subsidiary of Consolidated, hired respondent as mine superintendent to attempt to open a new mine on Consolidated's property at nearby Gray's Creek through use of members of the Southern Labor Union. As part of the arrangement, Grundy also gave respondent a contract to haul the mine's coal to the nearest railroad loading point.

On August 15 and 16, 1960, armed members of Local 5881 forcibly prevented the opening of the mine, threatening respondent and beating an organizer for the rival union. The members of the local believed Consolidated had promised them the jobs at the new mine; they insisted that if anyone would do the work, they would. At this time, no representative of the UMW, their international union, was present. George Gilbert, the UMW's field representative for the area including Local 5881, was away at Middlesboro, Kentucky, attending an Executive Board meeting when the members of the local discovered Grundy's plan; he did not return to the area until late in the day of August 16. There was uncontradicted testimony that he first learned of the violence while at the meeting, and returned with explicit instructions from his international union superiors to establish a limited picket line, to prevent any further violence, and to see to it that the strike did not spread to neighboring mines. There was no further violence at the mine site; a

picket line was maintained there for nine months; and no further attempts were made to open the mine during that period.

Respondent lost his job as superintendent, and never entered into performance of his haulage contract. He testified that he soon began to lose other trucking contracts and mine leases he held in nearby areas. Claiming these effects to be the result of a concerted union plan against him, he sought recovery not against Local 5881 or its members, but only against petitioner, the international union. The suit was brought in the United States District Court for the Eastern District of Tennessee, and jurisdiction was premised on allegations of secondary boycotts under § 303. The state law claim, for which jurisdiction was based upon the doctrine of pendent jurisdiction, asserted "an unlawful conspiracy and an unlawful boycott aimed at him and [Grundy] to maliciously, wantonly and willfully interfere with his contract of employment and with his contract of haulage."

* * * The jury's verdict was that the UMW had violated both § 303 and state law. Gibbs was awarded $60,000 as damages under the employment contract and $14,500 under the haulage contract; he was also awarded $100,000 punitive damages. On motion, the trial court set aside the award of damages with respect to the haulage contract on the ground that damage was unproved. It also held that union pressure on Grundy to discharge respondent as supervisor would constitute only a primary dispute with Grundy, as respondent's employer, and hence was not cognizable as a claim under § 303. Interference with the employment relationship was cognizable as a state claim, however, and a remitted award was sustained on the state law claim. We granted certiorari. We reverse.

I.

A threshold question is whether the District Court properly entertained jurisdiction of the claim based on Tennessee law. * * *

* * *

* * * The Court held in Hurn v. Oursler, 289 U.S. 238, 53 S.Ct. 586, 77 L.Ed. 1148, that state law claims are appropriate for federal court determination if they form a separate but parallel ground for relief also sought in a substantial claim based on federal law. * * *

Hurn was decided in 1933, before the unification of law and equity by the Federal Rules of Civil Procedure. At the time, the meaning of "cause of action" was a subject of serious dispute; the phrase might "mean one thing for one purpose and something different for another."

* * *

With the adoption of the Federal Rules of Civil Procedure and the unified form of action, Fed.Rule Civ.Proc. 2, much of the controversy over "cause of action" abated. The phrase remained as the keystone of the *Hurn* test, however, and, as commentators have noted, has been the source of considerable confusion. Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged. Yet because the *Hurn* question involves issues of jurisdiction as well as convenience, there has been some tendency to limit its application to cases in which the state and federal claims are, as in *Hurn,*

"little more than the equivalent of different epithets to characterize the same group of circumstances." 289 U.S., at 246, 53 S.Ct., at 590.

This limited approach is unnecessarily grudging. Pendent jurisdiction, in the sense of judicial *power,* exists whenever there is a claim "arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority * * *," U.S. Const., Art. III, § 2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case." The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. Levering & Garrigues Co. v. Morrin, 289 U.S. 103, 53 S.Ct. 549, 77 L.Ed. 1062. The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole.

That power need not be exercised in every case in which it is found to exist. It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them, Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188. Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well. Similarly, if it appears that the state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the state claims may be dismissed without prejudice and left for resolution to state tribunals. There may, on the other hand, be situations in which the state claim is so closely tied to questions of federal policy that the argument for exercise of pendent jurisdiction is particularly strong. In the present case, for example, the allowable scope of the state claim implicates the federal doctrine of pre-emption; while this interrelationship does not create statutory federal question jurisdiction, Louisville & N.R. Co. v. Mottley, 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126, its existence is relevant to the exercise of discretion. Finally, there may be reasons independent of jurisdictional considerations, such as the likelihood of jury confusion in treating divergent legal theories of relief, that would justify separating state and federal claims for trial, Fed.Rule Civ.Proc. 42(b). If so, jurisdiction should ordinarily be refused.

The question of power will ordinarily be resolved on the pleadings. But the issue whether pendent jurisdiction has been properly assumed is one which remains open throughout the litigation. Pretrial procedures or even the trial itself may reveal a substantial hegemony of state law claims, or likelihood of jury confusion, which could not have been anticipated at the pleading stage. Although it will of course be appropriate to take account in this circumstance of the already completed

course of the litigation, dismissal of the state claim might even then be merited. For example, it may appear that the plaintiff was well aware of the nature of his proofs and the relative importance of his claims; recognition of a federal court's wide latitude to decide ancillary questions of state law does not imply that it must tolerate a litigant's effort to impose upon it what is in effect only a state law case. Once it appears that a state claim constitutes the real body of a case, to which the federal claim is only an appendage, the state claim may fairly be dismissed.

We are not prepared to say that in the present case the District Court exceeded its discretion in proceeding to judgment on the state claim. We may assume for purposes of decision that the District Court was correct in its holding that the claim of pressure on Grundy to terminate the employment contract was outside the purview of § 303. Even so, the § 303 claims based on secondary pressures on Grundy relative to the haulage contract and on other coal operators generally were substantial. Although § 303 limited recovery to compensatory damages based on secondary pressures, Local 20, Teamsters, Chauffeurs and Helpers Union v. Morton, supra, and state law allowed both compensatory and punitive damages, and allowed such damages as to both secondary and primary activity, the state and federal claims arose from the same nucleus of operative fact and reflected alternative remedies. Indeed, the verdict sheet sent in to the jury authorized only one award of damages, so that recovery could not be given separately on the federal and state claims.

It is true that the § 303 claims ultimately failed and that the only recovery allowed respondent was on the state claim. We cannot confidently say, however, that the federal issues were so remote or played such a minor role at the trial that in effect the state claim only was tried. * * *

* * * Moreover, the question whether the permissible scope of the state claim was limited by the doctrine of pre-emption afforded a special reason for the exercise of pendent jurisdiction; the federal courts are particularly appropriate bodies for the application of pre-emption principles. We thus conclude that although it may be that the District Court might, in its sound discretion, have dismissed the state claim, the circumstances show no error in refusing to do so.

II.

[The Supreme Court then reversed the judgment on the merits.]

Reversed.

■ THE CHIEF JUSTICE took no part in the decision of this case.

[A concurring opinion by JUSTICE HARLAN joined by JUSTICE CLARK, is omitted.]

NOTES AND QUESTIONS

1. Why no diversity jurisdiction? Why was there no diversity between plaintiff Gibbs and defendant United Mine Workers of America? (Hint: United Mine Workers of America is not a corporation.)

2. Additional claim against the same defendant. *UMW v. Gibbs* was a fairly easy case in which to find subject matter jurisdiction. Plaintiff

was already in federal district court on a federal question claim, and sought merely to add an additional state-law claim, arising out of the same set of facts, against the same defendant. Should there have been jurisdiction if plaintiff had sought to add a claim against an additional party?

3. Additional claim against an additional party. In Aldinger v. Howard, 427 U.S. 1, 96 S.Ct. 2413, 49 L.Ed.2d 276 (1976), plaintiff brought a federal civil rights claim against several individual defendants under 28 U.S.C. § 1343 and 42 U.S.C. § 1983, and a state-law claim arising out of the same set of facts against Spokane County. The Supreme Court denied jurisdiction over the state-law claim against the additional party, Spokane County. In *Aldinger*, plaintiff could have sued all the defendants, including the county, in state court. The Court noted that a different case would be presented if one of the defendants could be sued only in federal court:

> Other statutory grants [than §§ 1343 and 1983] and other alignments of parties and claims might call for a different result. When the grant of jurisdiction to a federal court is exclusive, for example, as in the prosecution of tort claims against the United States under 28 U.S.C. § 1346, the argument of judicial economy and convenience can be coupled with the additional argument that *only* in a federal court may all of the claims be tried together.

427 U.S. at 18 (emphasis in original).

4. Further discussion. For further discussion of *UMW v. Gibbs*, see Note on Supplemental Jurisdiction following the next case.

Owen Equipment & Erection Co. v. Kroger

Supreme Court of the United States, 1978.
437 U.S. 365, 98 S.Ct. 2396, 57 L.Ed.2d 274.

■ MR. JUSTICE STEWART delivered the opinion of the Court.

In an action in which federal jurisdiction is based on diversity of citizenship, may the plaintiff assert a claim against a third-party defendant when there is no independent basis for federal jurisdiction over that claim? * * *

I

On January 18, 1972, James Kroger was electrocuted when the boom of a steel crane next to which he was walking came too close to a high-tension electric power line. The respondent (his widow, who is the administratrix of his estate) filed a wrongful-death action in the United States District Court for the District of Nebraska against the Omaha Public Power District (OPPD). Her complaint alleged that OPPD's negligent construction, maintenance, and operation of the power line had caused Kroger's death. Federal jurisdiction was based on diversity of citizenship, since the respondent was a citizen of Iowa and OPPD was a Nebraska corporation.

OPPD then filed a third-party complaint pursuant to Fed.Rule Civ.Proc. 14(a)[2] against the petitioner, Owen Equipment and Erection

[2] Rule 14(a) provides in relevant part:

"At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party

Co. (Owen), alleging that the crane was owned and operated by Owen, and that Owen's negligence had been the proximate cause of Kroger's death. OPPD later moved for summary judgment on the respondent's complaint against it. While this motion was pending, the respondent was granted leave to file an amended complaint naming Owen as an additional defendant. Thereafter, the District Court granted OPPD's motion for summary judgment in an unreported opinion. The case thus went to trial between the respondent and the petitioner alone.

The respondent's amended complaint alleged that Owen was "a Nebraska corporation with its principal place of business in Nebraska." Owen's answer admitted that it was "a corporation organized and existing under the laws of the State of Nebraska," and denied every other allegation of the complaint. On the third day of trial, however, it was disclosed that the petitioner's principal place of business was in Iowa, not Nebraska,[5] and that the petitioner and the respondent were thus both citizens of Iowa. The petitioner then moved to dismiss the complaint for lack of jurisdiction. The District Court reserved decision on the motion, and the jury thereafter returned a verdict in favor of the respondent. In an unreported opinion issued after the trial, the District Court denied the petitioner's motion to dismiss the complaint.

The judgment was affirmed on appeal. 558 F.2d 417. The Court of Appeals held that under this Court's decision in Mine Workers v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218, the District Court had jurisdictional power, in its discretion, to adjudicate the respondent's claim against the petitioner because that claim arose from the "core of 'operative facts' giving rise to both [respondent's] claim against OPPD and OPPD's claim against Owen." 558 F.2d at 424. It further held that the District Court had properly exercised its discretion in proceeding to decide the case even after summary judgment had been granted to OPPD, because the petitioner had concealed its Iowa citizenship from the respondent. Rehearing en banc was denied by an equally divided court. 558 F.2d 417.

II

It is undisputed that there was no independent basis of federal jurisdiction over the respondent's state-law tort action against the petitioner, since both are citizens of Iowa. And although Fed.Rule

to the action who is or may be liable to him for all or part of the plaintiff's claim against him. * * * The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counter-claims and cross-claims as provided in Rule 13."

[5] The problem apparently was one of geography. Although the Missouri River generally marks the boundary between Iowa and Nebraska, Carter Lake, Iowa, where the accident occurred and where Owen had its main office, lies west of the river, adjacent to Omaha, Neb. Apparently the river once avulsed at one of its bends, cutting Carter Lake off from the rest of Iowa.

Civ.Proc. 14(a) permits a plaintiff to assert a claim against a third-party defendant, it does not purport to say whether or not such a claim requires an independent basis of federal jurisdiction. Indeed, it could not determine that question, since it is axiomatic that the Federal Rules of Civil Procedure do not create or withdraw federal jurisdiction.[7]

In affirming the District Court's judgment, the Court of Appeals relied upon the doctrine of ancillary jurisdiction, whose contours it believed were defined by this Court's holding in *Mine Workers v. Gibbs, supra.* The *Gibbs* case differed from this one in that it involved pendent jurisdiction, which concerns the resolution of a plaintiff's federal-and state-law claims against a single defendant in one action. By contrast, in this case there was no claim based upon substantive federal law, but rather state-law tort claims against two different defendants. Nonetheless, the Court of Appeals was correct in perceiving that *Gibbs* and this case are two species of the same generic problem: Under what circumstances may a federal court hear and decide a state-law claim arising between citizens of the same State?[8] But we believe that the Court of Appeals failed to understand the scope of the doctrine of the *Gibbs* case.

* * *

It is apparent that *Gibbs* delineated the constitutional limits of federal judicial power. But even if it be assumed that the District Court in the present case had constitutional power to decide the respondent's lawsuit against the petitioner,[10] it does not follow that the decision of the Court of Appeals was correct. Constitutional power is merely the first hurdle that must be overcome in determining that a federal court has jurisdiction over a particular controversy. For the jurisdiction of the federal courts is limited not only by the provisions of Art. III of the Constitution, but also by Acts of Congress. * * *

III

The relevant statute in this case, 28 U.S.C. § 1332(a)(1), confers upon federal courts jurisdiction over "civil actions where the matter in controversy exceeds the sum or value of $10,000 * * * and is between * * * citizens of different States." This statute and its predecessors have consistently been held to require complete diversity of citizenship.[13] That is, diversity jurisdiction does not exist unless each defendant is a citizen of a different State from each plaintiff. Over the years Congress has

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[7] Fed.Rule Civ.Proc. 82; see Snyder v. Harris, 394 U.S. 332, 89 S.Ct. 1053, 22 L.Ed.2d 319; Sibbach v. Wilson & Co., 312 U.S. 1, 10, 61 S.Ct. 422, 424, 85 L.Ed. 479.

[8] No more than in Aldinger v. Howard, 427 U.S. 1, 96 S.Ct. 2413, 49 L.Ed.2d 276, is it necessary to determine here "whether there are any 'principled' differences between pendent and ancillary jurisdiction; or, if there are, what effect *Gibbs* had on such differences." Id., at 13, 96 S.Ct., at 2420.

[10] Federal jurisdiction in *Gibbs* was based upon the existence of a question of federal law. The Court of Appeals in the present case believed that the "common nucleus of operative fact" test also determines the outer boundaries of constitutionally permissible federal jurisdiction when that jurisdiction is based upon diversity of citizenship. We may assume without deciding that the Court of Appeals was correct in this regard. See also n. 13, infra.

[13] E.g., Strawbridge v. Curtiss, 3 Cranch 267, 2 L.Ed. 435; Coal Co. v. Blatchford, 11 Wall. 172, 20 L.Ed. 179; Indianapolis v. Chase Nat. Bank, 314 U.S. 63, 69, 62 S.Ct. 15, 16, 86 L.Ed. 47; American Fire & Cas. Co. v. Finn, 341 U.S. 6, 17, 71 S.Ct. 534, 541, 95 L.Ed. 702. It is settled that complete diversity is not a constitutional requirement. State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 530–531, 87 S.Ct. 1199, 1203–1204, 18 L.Ed.2d 270.

repeatedly re-enacted or amended the statute conferring diversity jurisdiction, leaving intact this rule of complete diversity. Whatever may have been the original purposes of diversity-of-citizenship jurisdiction, this subsequent history clearly demonstrates a congressional mandate that diversity jurisdiction is not to be available when any plaintiff is a citizen of the same State as any defendant.

Thus it is clear that the respondent could not originally have brought suit in federal court naming Owen and OPPD as codefendants, since citizens of Iowa would have been on both sides of the litigation. Yet the identical lawsuit resulted when she amended her complaint. Complete diversity was destroyed just as surely as if she had sued Owen initially. In either situation, in the plain language of the statute, the "matter in controversy" could not be "between * * * citizens of different States."

It is a fundamental precept that federal courts are courts of limited jurisdiction. The limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded. Yet under the reasoning of the Court of Appeals in this case, a plaintiff could defeat the statutory requirement of complete diversity by the simple expedient of suing only those defendants who were of diverse citizenship and waiting for them to implead nondiverse defendants.[17] If, as the Court of Appeals thought, a "common nucleus of operative fact" were the only requirement for ancillary jurisdiction in a diversity case, there would be no principled reason why the respondent in this case could not have joined her cause of action against Owen in her original complaint as ancillary to her claim against OPPD. Congress' requirement of complete diversity would thus have been evaded completely.

It is true, as the Court of Appeals noted, that the exercise of ancillary jurisdiction over nonfederal claims has often been upheld in situations involving impleader, cross-claims or counterclaims. But in determining whether jurisdiction over a nonfederal claim exists, the context in which the nonfederal claim is asserted is crucial. And the claim here arises in a setting quite different from the kinds of nonfederal claims that have been viewed in other cases as falling within the ancillary jurisdiction of the federal courts.

First, the nonfederal claim in this case was simply not ancillary to the federal one in the same sense that, for example, the impleader by a defendant of a third-party defendant always is. A third-party complaint depends at least in part upon the resolution of the primary lawsuit. Its relation to the original complaint is thus not mere factual similarity but logical dependence. The respondent's claim against the petitioner, however, was entirely separate from her original claim against OPPD, since the petitioner's liability to her depended not at all upon whether or

[17] This is not an unlikely hypothesis, since a defendant in a tort suit such as this one would surely try to limit his liability by impleading any joint tortfeasors for indemnity or contribution. Some commentators have suggested that the possible abuse of third-party practice could be dealt with under 28 U.S.C. § 1359, which forbids collusive attempts to create federal jurisdiction. See, e.g., 3 J. Moore, Federal Practice 14.27[1], p. 14–571 (2d ed. 1974); 6 C. Wright & A. Miller, Federal Practice and Procedure § 1444, pp. 231–232 (1971); Note, Rule 14 Claims and Ancillary Jurisdiction, 57 Va.L.Rev. 265, 274–275 (1971). The dissenting opinion today also expresses this view. Post, at 2407. But there is nothing necessarily collusive about a plaintiff's selectively suing only those tortfeasors of diverse citizenship, or about the named defendants' desire to implead joint tortfeasors. Nonetheless, the requirement of complete diversity would be eviscerated by such a course of events.

not OPPD was also liable. Far from being an ancillary and dependent claim, it was a new and independent one.

Second, the nonfederal claim here was asserted by the plaintiff, who voluntarily chose to bring suit upon a state-law claim in a federal court. By contrast, ancillary jurisdiction typically involves claims by a defending party haled into court against his will, or by another person whose rights might be irretrievably lost unless he could assert them in an ongoing action in a federal court. A plaintiff cannot complain if ancillary jurisdiction does not encompass all of his possible claims in a case such as this one, since it is he who has chosen the federal rather than the state forum and must thus accept its limitations. "[T]he efficiency plaintiff seeks so avidly is available without question in the state courts." Kenrose Mfg. Co. v. Fred Whitaker Co., 512 F.2d 890, 894 (CA4).[20]

It is not unreasonable to assume that, in generally requiring complete diversity, Congress did not intend to confine the jurisdiction of federal courts so inflexibly that they are unable to protect legal rights or effectively to resolve an entire, logically entwined lawsuit. Those practical needs are the basis of the doctrine of ancillary jurisdiction. But neither the convenience of litigants nor considerations of judicial economy can suffice to justify extension of the doctrine of ancillary jurisdiction to a plaintiff's cause of action against a citizen of the same State in a diversity case. Congress has established the basic rule that diversity jurisdiction exists under 28 U.S.C. § 1332 only when there is complete diversity of citizenship. "The policy of the statute calls for its strict construction." To allow the requirement of complete diversity to be circumvented as it was in this case would simply flout the congressional command.[21]

Accordingly, the judgment of the Court of Appeals is reversed.

■ MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN joins, dissenting.

The Court today states that "[i]t is not unreasonable to assume that, in generally requiring complete diversity, Congress did not intend to confine the jurisdiction of federal courts so inflexibly that they are unable * * * effectively to resolve an entire, logically entwined lawsuit." In spite of this recognition, the majority goes on to hold that in diversity suits federal courts do not have the jurisdictional power to entertain a claim asserted by a plaintiff against a third-party defendant, no matter how entwined it is with the matter already before the court, unless there is an independent basis for jurisdiction over that claim. Because I find no support for such a requirement in either Art. III of the Constitution or in

[20] Whether Iowa's statute of limitations would now bar an action by the respondent in an Iowa court is, of course, entirely a matter of state law. See Iowa Code § 614.10 (1977). Compare 558 F.2d at 420, with id., at 432 n. 42 (Bright, J., dissenting; cf. Burnett v. New York Central R. Co., 380 U.S. 424, 431–432, and n. 9, 85 S.Ct. 1050, 1056–1057, 13 L.Ed.2d 941.

[21] Our holding is that the District Court lacked power to entertain the respondent's lawsuit against the petitioner. Thus, the asserted inequity in the [petitioner's] alleged concealment of its citizenship is irrelevant. Federal judicial power does not depend upon "prior action or consent of the parties."American Fire & Cas. Co. v. Finn, 341 U.S., at 17–18, 71 S.Ct., at 542.

any statutory law, I dissent from the Court's "unnecessarily grudging"[1] approach.

* * *

In the present case, the only indication of congressional intent that the Court can find is that contained in the diversity jurisdictional statute, 28 U.S.C. § 1332(a), which states that "district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000 * * * and is between * * * citizens of different States * * * " Because this statute has been interpreted as requiring complete diversity of citizenship between each plaintiff and each defendant, Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 2 L.Ed. 435 (1806), the Court holds that the District Court did not have ancillary jurisdiction over Mrs. Kroger's claim against Owen. In so holding, the Court unnecessarily expands the scope of the complete-diversity requirement while substantially limiting the doctrine of ancillary jurisdiction.

* * *

Because in the instant case Mrs. Kroger merely sought to assert a claim against someone already a party to the suit, considerations of judicial economy, convenience, and fairness to the litigants—the factors relied upon in *Gibbs*—support the recognition of ancillary jurisdiction here. Already before the court was the whole question of the cause of Mr. Kroger's death. Mrs. Kroger initially contended that OPPD was responsible; OPPD in turn contended that Owen's negligence had been the proximate cause of Mr. Kroger's death. In spite of the fact that the question of Owen's negligence was already before the District Court, the majority requires Mrs. Kroger to bring a separate action in state court in order to assert that very claim. Even if the Iowa statute of limitations will still permit such a suit, see ante n. 20, considerations of judicial economy are certainly not served by requiring such duplicative litigation.[4]

The majority, however, brushes aside such considerations of convenience, judicial economy, and fairness because it concludes that recognizing ancillary jurisdiction over a plaintiff's claim against a third-party defendant would permit the plaintiff to circumvent the complete-diversity requirement and thereby "flout the congressional command." Since the plaintiff in such a case does not bring the third-party defendant into the suit, however, there is no occasion for deliberate circumvention of the diversity requirement, absent collusion with the defendant. In the

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[1] See Mine Workers v. Gibbs, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966).

[4] It is true that prior to trial OPPD was dismissed as a party to the suit and that, as we indicated in *Gibbs,* the dismissal prior to trial of the federal claim will generally require the dismissal of the nonfederal claim as well. See 383 U.S., at 726, 86 S.Ct., at 1139. Given the unusual facts of the present case, however—in particular, the fact that the actual location of Owen's principal place of business was not revealed until the third day of trial—fairness to the parties would lead me to conclude that the District Court did not abuse its discretion in retaining jurisdiction over Mrs. Kroger's claim against Owen. Under the Court's disposition, of course, it would not matter whether or not the federal claim is tried, for in either situation the court would have no jurisdiction over the plaintiff's nonfederal claim against the third-party defendant.

case of such collusion, of which there is absolutely no indication here,[5] the court can dismiss the action under the authority of 28 U.S.C. § 1359.[6] In the absence of such collusion, there is no reason to adopt an absolute rule prohibiting the plaintiff from asserting those claims that he may properly assert against the third-party defendant pursuant to Fed.Rule Civ.Proc. 14(a). The plaintiff in such a situation brings suit against the defendant only with absolutely no assurance that the defendant will decide or be able to implead a particular third-party defendant. Since the plaintiff has no control over the defendant's decision to implead a third party, the fact that he could not have originally sued that party in federal court should be irrelevant. Moreover, the fact that a plaintiff in some cases may be able to foresee the subsequent chain of events leading to the impleader does not seem to me to be a sufficient reason to declare that a district court does not have the *power* to exercise ancillary jurisdiction over the plaintiff's claims against the third-party defendant.

* * *

NOTE ON SUPPLEMENTAL JURISDICTION

In 1990, Congress enacted 28 U.S.C. § 1367, conferring "supplemental jurisdiction" on the federal courts. "Supplemental jurisdiction" was a new term, subsuming the old categories of "pendent jurisdiction," "ancillary jurisdiction," and "pendent party jurisdiction." As explained in this note, the supplemental jurisdiction statute preserves the results reached by the Supreme Court in both *UMW v. Gibbs* and *Owen Equipment*.

1. The problem. The limitations on subject matter jurisdiction of the federal courts can make efficient resolution of some disputes impossible in federal court. Sometimes a dispute will involve several different claims: If those claims are considered independently, there may be subject matter jurisdiction over some of the claims, but not over others. Or a dispute may involve several parties: If the claims among those parties are considered independently, there may be subject matter jurisdiction over claims among some of the parties, but not over claims among the others.

The modern notion of judicial efficiency, reflected in the Federal Rules of Civil Procedure, is that a court should resolve as much as reasonably possible in a single proceeding. The rules governing joinder of claims and parties are considered in detail later. See infra Chapter 4. For now, a summary list will convey the idea: Federal Rule 18 allows a party to join as many claims as he has against the opposing party, whether or not those claims are related to one another. Rule 20 allows all persons to join as co-parties who assert a right to relief arising out of the same transaction, so long as their claims share a common question of law or fact. Rules 13(a) and (b) require a defendant to assert "compulsory" counterclaims against a plaintiff, and permit a defendant to assert "permissive" counterclaims, depending on the relationship between the counterclaim and the plaintiff's claim. Rule 13(g) permits co-parties to cross-claim against one another. Rule

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[5] When Mrs. Kroger brought suit, it was believed that Owen was a citizen of Nebraska, not Iowa. Therefore, had she desired at that time to make Owen a party to the suit, she would have done so directly by naming Owen as a defendant.

[6] Section 1359 states: "A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court."

14(a) allows a defendant to bring in as a third-party defendant a person who is or may be liable to the defendant for the claim asserted against the defendant by the plaintiff. Rule 24(a) and (b) allow parties to intervene in existing suits either "as or right" or "permissively," depending on the strength of their interest in the litigation into which they seek to intervene.

But efficient resolution of disputes, as envisioned by the federal rules, is not always possible. Rule 82 makes explicit what would almost certainly be true even if it were not explicitly stated: The "rules do not extend or limit the jurisdiction of the district courts." That is, if the federal rules would permit a claim or party to be joined but the jurisdictional statutes do not permit it, the federal rules must give way. The controlling limitation, which must always be addressed, is federal subject matter jurisdiction.

2. Definitions. "Supplemental jurisdiction" is jurisdiction over claims brought between existing parties, or between existing and new parties, for which there is no federal subject matter jurisdiction if those claims are considered independently. To take a simple example based on *UMW v. Gibbs*, a plaintiff who is a co-citizen with the defendant may have two claims against the defendant, one based on federal law and one based on state law. There is federal question jurisdiction under 28 U.S.C. § 1331 over the federal-law claim, but there is no subject matter jurisdiction over the state-law claim if that claim is considered independently of the federal-law claim. If federal subject matter jurisdiction over the state-law claim exists, it will be by virtue of "supplemental jurisdiction."

Prior to enactment of the new supplemental jurisdiction statute, several different terms were used. Precise definitions were never provided by the courts, but practical definitions could be inferred from usage. "Pendent jurisdiction," at issue in *UMW v. Gibbs*, was jurisdiction over additional claims brought by the same plaintiff against the same defendant. "Ancillary jurisdiction," at issue in *Owen Equipment*, was jurisdiction over additional claims brought by existing parties other than the plaintiff (usually the defendant), or over claims brought by or against additional parties. "Pendent party jurisdiction," a subcategory of "ancillary jurisdiction," was jurisdiction over claims brought against additional parties, as in *Owen Equipment*.

3. Historical background of the supplemental jurisdiction statute. Intermittent calls for reform of pendent and ancillary jurisdiction doctrines went unheeded until the Supreme Court decided Finley v. United States, 490 U.S. 545, 109 S.Ct. 2003, 104 L.Ed.2d 593 (1989). In *Finley*, a private plaintiff sued the United States under the Federal Tort Claims Act, 28 U.S.C. § 1346(b), after an airplane crash in which the plane became entangled in power lines near the San Diego municipal airport. Plaintiff sought to join to its claim against the United States a state-law claim against the city of San Diego and against the power company. Neither of these additional parties was of diverse citizenship from the plaintiff. Since there was no independent basis for jurisdiction, plaintiff relied on ancillary jurisdiction.

Ordinarily, plaintiffs in pendent and ancillary jurisdiction cases have a choice of either federal or state court. If the federal court cannot, or will not, hear the pendent or ancillary state-law claims, plaintiff can choose to have the entire dispute heard in state court. Judicial efficiency is still served; it is just served in state rather than federal court. But suits brought against the United States under the Federal Torts Claim Act (FTCA) are within the

exclusive jurisdiction of the federal courts. Plaintiff's argument for ancillary jurisdiction in *Finley* was therefore particularly strong, since there was no forum capable of resolving all plaintiff's claims if the federal forum were unavailable for the state-law claims. Previously, in dictum, the Supreme Court had explicitly indicated that ancillary jurisdiction over additional defendants might be available in an FTCA suit: "When the grant of jurisdiction to a federal court is exclusive, for example, as in the prosecution of tort claims against the United States under 28 U.S.C. § 1346, the argument of judicial economy and convenience can be coupled with the additional argument that *only* in a federal court may all of the claims be tried together." Aldinger v. Howard, 427 U.S. 1, 18, 96 S.Ct. 2413, 49 L.Ed.2d 276 (1976). Nevertheless, the Court held in *Finley* that there was no ancillary jurisdiction over plaintiff's claims against the two additional parties.

Prompted by *Finley*, a Federal Courts Study Committee recommended a new "supplemental jurisdiction" statute. Report of the Federal Courts Study Committee 47–48 (1990) (recommendation); I Federal Courts Study Committee Working Papers and Subcommittee Reports 546–68 (1990) (report). A variation of the proposed statute was passed in late 1990 and was codified at 28 U.S.C. § 1367.

4. Structure of the supplemental jurisdiction statute. The structure of the statute is fairly straightforward. The old terms are replaced by the single term "supplemental jurisdiction." Section 1367(a) confers supplemental jurisdiction on the federal courts to the extent permitted by Article III of the Constitution over claims and parties for which there is no independent basis for jurisdiction, subject to the exceptions set out in subsections (b) and (c). Subsection 1367(b) excepts from supplemental jurisdiction certain claims and parties where jurisdiction is based on diversity of citizenship. The combined effect of subsections (a) and (b) is to authorize broad supplemental jurisdiction over claims combined with claims brought under federal question jurisdiction, and to authorize a somewhat narrower supplemental jurisdiction over claims combined with state-law claims brought under diversity jurisdiction. Section 1367(c) specifies circumstances under which a district court may decline to exercise supplemental jurisdiction.

a. Federal question cases. Supplemental jurisdiction under § 1367(a) is as broad as Article III will permit for the exercise of original jurisdiction. Given the limitation in subsection (b) on diversity cases, this broad grant of supplemental jurisdiction applies fully only to cases in which the original claim is based on federal law. This is a significant broadening of the case law, going beyond a mere overruling of *Finley*. Also overruled are cases in which plaintiff brought suit against one defendant under federal law and then sought to add additional defendants based on state-law claims, but in which, unlike in *Finley*, there was concurrent jurisdiction in state court over the federal claim. *Aldinger v. Howard*, supra, was such a case.

b. Diversity cases. The exceptions in § 1367(b) from the broad grant in subsection (a) make supplemental jurisdiction more narrowly available in diversity than in federal question cases. The rationale for distinguishing between federal question and diversity cases is fairly obvious. In federal question cases, broad supplemental jurisdiction facilitates the core business of the federal courts of adjudicating cases involving questions of federal law in an effective and efficient way. In diversity cases, by contrast, supplemental jurisdiction is restricted as a way of conserving the resources

of the federal courts, and of encouraging litigants to take such disputes to state courts. The drafting of § 1367(b) is awkward, but its clear purpose is largely to preserve the prior law of pendent and ancillary jurisdiction in diversity cases. For example, the denial of ancillary (now supplemental) jurisdiction in *Owen Equipment* is preserved, since jurisdiction over plaintiff Kroger's original claim was based on diversity of citizenship.

c. When jurisdiction may be declined. Even when supplemental jurisdiction exists, there are circumstances under which a district court may decline to exercise that jurisdiction. *UMW v. Gibbs* had described some of those circumstances, and § 1367(c) codifies a list derived from (but not identical to) those described in the case. When the criteria governing remand given in § 1367(c) are inconsistent with those given in *UMW v. Gibbs,* the criteria of § 1367(c) control. Executive Software North America, Inc. v. United States District Court, 24 F.3d 1545 (9th Cir. 1994). If neither party requests remand of state-law claims to state court under § 1367(c), the district court is not required to remand sua sponte. Acri v. Varian Assoc., Inc., 114 F.3d 999 (9th Cir. 1997); Myers v. County of Lake, 30 F.3d 847 (7th Cir. 1994). If a case is removed from state to federal court, and the district court decides not to exercise supplemental jurisdiction over certain claims, those claims should be remanded to state court rather than dismissed for want of jurisdiction. Carnegie-Mellon University v. Cohill, 484 U.S. 343, 108 S.Ct. 614, 98 L.Ed.2d 720 (1988).

d. Tolling of the state statute of limitations. Section 1367(d) provides that statutes of limitations for claims over which the district court has supplemental jurisdiction, including state-law claims, are tolled during the period the claims are pending in federal court. This protection is necessary for claims in cases that were filed originally in federal court, for those claims will be dismissed and must be refiled. However, the protection is unnecessary in removed cases, for the claims will not be dismissed. Rather, they will simply be remanded to state court. The Supreme Court sustained the constitutionality of the tolling provision as applied to state causes of action and state statutes of limitation in Jinks v. Richland County, 538 U.S. 456, 123 S.Ct. 1667, 155 L.Ed.2d 631 (2003) (reversing decision of the Supreme Court of South Carolina). If § 1367(d) had been in effect during the litigation in *Owen Equipment*, would Mrs. Kroger and Owen Equipment have fought about the denial of subject matter jurisdiction all the way to the United States Supreme Court?

5. The scope of a constitutional "case." The constitutional test in *UMW v. Gibbs* of what constitutes a "case" for purposes of pendent jurisdiction is that the claims "must derive from a common nucleus of operative fact," and must be such that plaintiff "would ordinarily be expected to try them all in one judicial proceeding." Note that Rule 18, which allows a plaintiff to join all claims she has against a defendant in a single complaint whether or not the claims are related, permits a plaintiff to assert claims that satisfy the second but not the first part of the test. Why did *UMW v. Gibbs* write the test more narrowly than Rule 18? The Court based its test on its own definition of a "constitutional 'case.' " Although the term "case" is used in the Constitution, it is nowhere defined in that document; nor does the Court in *UMW v. Gibbs* give any historical basis for its reading of the term. Obviously, Rule 18 has a different definition of "case" in mind from that employed in *UMW v. Gibbs* when it permits a plaintiff to join unrelated claims in the same complaint.

Several of the federal rules governing joinder have requirements of relatedness. See, e.g., Rule 13(a)(1)(A) (compulsory counterclaim) ("arises out of the transaction or occurrence that is the subject matter of the opposing party's claim"); Rule 13(g) (cross-claim) ("arises out of the transaction or occurrence that is the subject matter of the original action or of a counterclaim"); Rule 14(a) (impleader) (claim against a third-party "who is or may be liable * * * for all or part of the claim against it"); Rule 24(a) (intervention of right) ("an interest relating to the property or transaction that is the subject of the action"). Other rules have little or no requirement of relatedness. See, e.g., Rule 13(b)(1)(B) (permissive counterclaim) ("any claim that is not compulsory"); Rule 24(b) (permissive intervention) ("a claim or defense that shares with the main action a common question of law of fact"). If the relatedness requirements of the first set of rules are satisfied, the constitutional test of *UMW v. Gibbs* is likely satisfied. What about the rules in which there is little or no relatedness test?

UMW v. Gibbs states a constitutional test for a "case" under pendent jurisdiction. Did *UMW v. Gibbs* also intend to state the constitutional test for ancillary jurisdiction? Note that if claims are permitted under any of the above rules they would qualify under what used to be called ancillary jurisdiction. The Supreme Court was never willing to define pendent and ancillary jurisdiction carefully, and was hesitant to extend *UMW v. Gibbs* beyond the federal question and pendent jurisdiction context in which it arose. The Court wrote in footnotes to *Owen Equipment*, "[It is unnecessary] to determine here 'whether there are any "principled" ' differences between pendent and ancillary jurisdiction; or, if there are, what effect *Gibbs* had on such differences." It noted that *UMW v. Gibbs* was a federal question case, but only "assume[d] without deciding" that the " 'common nucleus of operative fact' " test also determines the outer boundaries of constitutionally permissible federal jurisdiction when that jurisdiction is based on diversity of citizenship. 437 U.S., at 370 n.8, 371 n.10. The supplemental jurisdiction statute extends jurisdiction to "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." *UMW v. Gibbs* and its "common nucleus of operative fact" test are nowhere mentioned.

The question is most clearly posed in cases of set-off, where a plaintiff sues for, say, $100,000, and defendant wishes to set off against any possible recovery an unrelated debt of $20,000 owed to him by plaintiff. Obviously, defendant would prefer to pay a net amount of $80,000 than to pay $100,000 and hope to recover $20,000 in a separate proceeding. The fairness and efficiency of allowing set-off in such a circumstance was recognized as early as Roman law, and set-off for unrelated claims was well-established in English courts before the adoption of the Constitution. Is it constitutionally permissible for a defendant in federal court to counterclaim for a set-off based on a debt owed by plaintiff to defendant, but arising out an unrelated transaction? Such a counterclaim for set-off is available under Rule 13(b) (permissive counterclaim). But it would pretty clearly not be permitted if *UMW v. Gibbs* provides the correct definition of a constitutional case, for the set-off claim does not "derive from a common nucleus of operative fact." But it is also pretty silly to force a defendant to pay a judgment to plaintiff without allowing her to subtract an amount that plaintiff owes her, as English courts long ago recognized in allowing such a set-off. Is that historical fact significant in defining the scope of a "case" with the meaning

of Article III? The Supreme Court has never addressed the issue. For many years, lower courts have held that a counterclaim for an unrelated set-off is permitted. See, e.g., Curtis v. J.E. Caldwell & Co., 86 F.R.D. 454 (E.D.Pa.1980); Marks v. Spitz, 4 F.R.D. 348 (D.Mass.1945). For argument that "common nucleus of operative fact" does not define the outer boundary of the term "case" in Article III, see Fletcher, "Common Nucleus of Operative Fact" and Defensive Set-off: Beyond the *Gibbs* Test, 74 Ind.L.J. 171 (1998).

Two recent cases have held that the "common nucleus of operative fact" test does not describe the outer boundary of a "case." Global Naps, Inc. v. Verizon of New England, Inc., 603 F.3d 71 (1st Cir. 2010) (supplemental jurisdiction exists over a permissive counterclaim); Jones v. Ford Motor Credit Co., 358 F.3d 205 (2d Cir. 2004) (same). Compare Channell v. Citicorp National Services, Inc., 89 F.3d 379, 385 (7th Cir. 1996) (no supplemental jurisdiction over permissive counterclaim for set-off); Ambromovage v. United Mine Workers, 726 F.2d 972, 998, 990 (3d Cir. 1984) (same).

6. American Law Institute analysis of § 1367. Under the direction of Reporter (and Professor) John Oakley, the American Law Institute conducted a comprehensive study of the federal subject matter jurisdiction, removal, and venue. Federal Judicial Code Revision Project (2004). The study makes clear what is only implicit in § 1367. Under § 1367 as it is written, subsection (a) confers supplemental jurisdiction over claims related to "any civil action of which the district courts have original jurisdiction." However, for § 1367(a) to make sense, the "*civil action* of which the district court[ ] ha[s] original jurisdiction" must be understood to refer not to the civil action as a whole but to *claims in that civil action*. That is, a court must determine whether it has subject matter jurisdiction over one or more claims in the complaint. If it does have jurisdiction over one or more claims, the court must then examine other claims in the complaint over which it would not have jurisdiction if those claims were considered on their own. If those other claims satisfy the criteria of § 1367, there is supplemental jurisdiction over them. To make this analytically clear, the Project proposes a revision of § 1367 that would divide claims into two categories: "freestanding" claims and "supplemental" claims. For additional discussion of the ALI Project see Hartnett, Would the *Kroger* Rule Survive the ALI's Proposed Revision of § 1367?, 51 Duke L.J. 647 (2001); Oakley, *Kroger* Redux, 51 Duke L.J. 663 (2001).

7. Academic assessments. For useful treatments of the supplemental jurisdiction statute, see Floyd, Three Faces of Supplemental Jurisdiction after the Demise of *United Mine Workers v. Gibbs*, 60 Fla. L.Rev. 277 (2008); Steinman, Claims, Civil Actions, Congress & the Court: Limiting the Reasoning of Cases Construing Poorly Drawn Statutes, 65 Wash. & Lee L.Rev. 1593 (2008); Pfander, Supplemental Jurisdiction and Section 1367: The Case for a Sympathetic Textualism, 148 U. Pa. L.Rev. 109 (1999); Symposium, A Reappraisal of the Supplemental Jurisdiction Statute: Title 28 U.S.C. § 1367, 74 Ind. L.J. 1 (1998); McLaughlin, The Federal Supplemental Jurisdiction Statute—A Constitutional and Statutory Analysis, 24 Ariz.St. L.J. 849 (1992).

When the statute was first passed, there was a debate about the quality of its drafting, the tone of which is suggested by the titles of the articles. Freer, Compounding Confusion and Hampering Diversity: Life After *Finley* and the Supplemental Jurisdiction Statute, 40 Emory L.J. 445 (1991); Rowe, Burbank, and Mengler, Compounding or Creating Confusion about

Supplemental Jurisdiction? A Reply to Professor Freer, id. 943; Arthur and Freer, Grasping at Burnt Straws: The Disaster of the Supplemental Jurisdiction Statute, id. 963; Rowe, Burbank, and Mengler, A Coda on Supplemental Jurisdiction, id. 993; Arthur and Freer, Close Enough for Government Work: What Happens When Congress Doesn't Do Its Job, id. 1007.

Exxon Mobil Corp. v. Allapattah Services, Inc.

Supreme Court of the United States, 2005.
545 U.S. 546, 125 S.Ct. 2611, 162 L.Ed.2d 502.

■ JUSTICE KENNEDY delivered the opinion of the Court.

These consolidated cases present the question whether a federal court in a diversity action may exercise supplemental jurisdiction over additional plaintiffs whose claims do not satisfy the minimum amount-in-controversy requirement, provided the claims are part of the same case or controversy as the claims of plaintiffs who do allege a sufficient amount in controversy. Our decision turns on the correct interpretation of 28 U.S.C. § 1367. The question has divided the Courts of Appeals, and we granted certiorari to resolve the conflict.

We hold that, where the other elements of jurisdiction are present and at least one named plaintiff in the action satisfies the amount-in-controversy requirement, § 1367 does authorize supplemental jurisdiction over the claims of other plaintiffs in the same Article III case or controversy, even if those claims are for less than the jurisdictional amount specified in the statute setting forth the requirements for diversity jurisdiction. We affirm the judgment of the Court of Appeals for the Eleventh Circuit in No. 04–70, and we reverse the judgment of the Court of Appeals for the First Circuit in No. 04–79.

I

In 1991, about 10,000 Exxon dealers filed a class-action suit against the Exxon Corporation in the United States District Court for the Northern District of Florida. The dealers alleged an intentional and systematic scheme by Exxon under which they were overcharged for fuel purchased from Exxon. The plaintiffs invoked the District Court's § 1332(a) diversity jurisdiction. After a unanimous jury verdict in favor of the plaintiffs, the District Court certified the case for interlocutory review, asking whether it had properly exercised § 1367 supplemental jurisdiction over the claims of class members who did not meet the jurisdictional minimum amount in controversy.

The Court of Appeals for the Eleventh Circuit upheld the District Court's extension of supplemental jurisdiction to these class members. Allapattah Services, Inc. v. Exxon Corp., 333 F.3d 1248 (2003). "[W]e find," the court held, "that § 1367 clearly and unambiguously provides district courts with the authority in diversity class actions to exercise supplemental jurisdiction over the claims of class members who do not meet the minimum amount in controversy as long as the district court has original jurisdiction over the claims of at least one of the class representatives." Id., at 1256. This decision accords with the views of the Courts of Appeals for the Fourth, Sixth, and Seventh Circuits. The Courts of Appeals for the Fifth and Ninth Circuits, adopting a similar

analysis of the statute, have held that in a diversity class action the unnamed class members need not meet the amount-in-controversy requirement, provided the named class members do. These decisions, however, are unclear on whether all the named plaintiffs must satisfy this requirement.

In the other case now before us the Court of Appeals for the First Circuit took a different position on the meaning of § 1367(a). 370 F.3d 124 (2004). In that case, a 9-year-old girl sued Star-Kist in a diversity action in the United States District Court for the District of Puerto Rico, seeking damages for unusually severe injuries she received when she sliced her finger on a tuna can. Her family joined in the suit, seeking damages for emotional distress and certain medical expenses. The District Court granted summary judgment to Star-Kist, finding that none of the plaintiffs met the minimum amount-in-controversy requirement. The Court of Appeals for the First Circuit, however, ruled that the injured girl, but not her family members, had made allegations of damages in the requisite amount.

The Court of Appeals then addressed whether, in light of the fact that one plaintiff met the requirements for original jurisdiction, supplemental jurisdiction over the remaining plaintiffs' claims was proper under § 1367. The court held that § 1367 authorizes supplemental jurisdiction only when the district court has original jurisdiction over the action, and that in a diversity case original jurisdiction is lacking if one plaintiff fails to satisfy the amount-in-controversy requirement. Although the Court of Appeals claimed to "express no view" on whether the result would be the same in a class action, id., at 143, n. 19, its analysis is inconsistent with that of the Court of Appeals for the Eleventh Circuit. The Court of Appeals for the First Circuit's view of § 1367 is, however, shared by the Courts of Appeal for the Third, Eighth, and Tenth Circuits, and the latter two Courts of Appeals have expressly applied this rule to class actions.

II

A

The district courts of the United States, as we have said many times, are "courts of limited jurisdiction. They possess only that power authorized by Constitution and statute," Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994). In order to provide a federal forum for plaintiffs who seek to vindicate federal rights, Congress has conferred on the district courts original jurisdiction in federal-question cases—civil actions that arise under the Constitution, laws, or treaties of the United States. 28 U.S.C. § 1331. In order to provide a neutral forum for what have come to be known as diversity cases, Congress also has granted district courts original jurisdiction in civil actions between citizens of different States, between U.S. citizens and foreign citizens, or by foreign states against U.S. citizens. § 1332. To ensure that diversity jurisdiction does not flood the federal courts with minor disputes, § 1332(a) requires that the matter in controversy in a diversity case exceed a specified amount, currently $75,000. § 1332(a).

Although the district courts may not exercise jurisdiction absent a statutory basis, it is well established—in certain classes of cases—that,

once a court has original jurisdiction over some claims in the action, it may exercise supplemental jurisdiction over additional claims that are part of the same case or controversy. The leading modern case for this principle is Mine Workers v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). * * *

* * *

We have not, however, applied Gibbs' expansive interpretive approach to other aspects of the jurisdictional statutes. For instance, we have consistently interpreted § 1332 as requiring complete diversity: In a case with multiple plaintiffs and multiple defendants, the presence in the action of a single plaintiff from the same State as a single defendant deprives the district court of original diversity jurisdiction over the entire action. Strawbridge v. Curtiss, 3 Cranch 267 (1806); Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 375 (1978). The complete diversity requirement is not mandated by the Constitution, State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523, 530–531 (1967), or by the plain text of § 1332(a). The Court, nonetheless, has adhered to the complete diversity rule in light of the purpose of the diversity requirement, which is to provide a federal forum for important disputes where state courts might favor, or be perceived as favoring, home-state litigants. The presence of parties from the same State on both sides of a case dispels this concern, eliminating a principal reason for conferring § 1332 jurisdiction over any of the claims in the action. The specific purpose of the complete diversity rule explains both why we have not adopted Gibbs' expansive interpretive approach to this aspect of the jurisdictional statute and why Gibbs does not undermine the complete diversity rule. In order for a federal court to invoke supplemental jurisdiction under Gibbs, it must first have original jurisdiction over at least one claim in the action. Incomplete diversity destroys original jurisdiction with respect to all claims, so there is nothing to which supplemental jurisdiction can adhere.

In contrast to the diversity requirement, most of the other statutory prerequisites for federal jurisdiction, including the federal-question and amount-in-controversy requirements, can be analyzed claim by claim. True, it does not follow by necessity from this that a district court has authority to exercise supplemental jurisdiction over all claims provided there is original jurisdiction over just one. Before the enactment of § 1367, the Court declined in contexts other than the pendent-claim instance to follow Gibbs' expansive approach to interpretation of the jurisdictional statutes. The Court took a more restrictive view of the proper interpretation of these statutes in so-called pendent-party cases involving supplemental jurisdiction over claims involving additional parties—plaintiffs or defendants—where the district courts would lack original jurisdiction over claims by each of the parties standing alone.

Thus, with respect to plaintiff-specific jurisdictional requirements, the Court held in Clark v. Paul Gray, Inc., 306 U.S. 583, 59 S.Ct. 744, 83 L.Ed. 1001 (1939), that every plaintiff must separately satisfy the amount-in-controversy requirement. Though Clark was a federal-question case, at that time federal-question jurisdiction had an amount-in-controversy requirement analogous to the amount-in-controversy requirement for diversity cases. "Proper practice," Clark held, "requires that where each of several plaintiffs is bound to establish the

jurisdictional amount with respect to his own claim, the suit should be dismissed as to those who fail to show that the requisite amount is involved." Id., at 590, 59 S.Ct. 744. The Court reaffirmed this rule, in the context of a class action brought invoking § 1332(a) diversity jurisdiction, in Zahn v. International Paper Co., 414 U.S. 291, 94 S.Ct. 505, 38 L.Ed.2d 511 (1973). It follows "inescapably" from Clark, the Court held in Zahn, that "any plaintiff without the jurisdictional amount must be dismissed from the case, even though others allege jurisdictionally sufficient claims." 414 U.S., at 300, 94 S.Ct. 505.

* * *

B

In Finley [v. United States, 490 U.S. 545 (1989) (holding no supplemental jurisdiction over claim against an additional party in a suit brought under the Federal Tort Claims Act),] we emphasized that "[w]hatever we say regarding the scope of jurisdiction conferred by a particular statute can of course be changed by Congress." 490 U.S., at 556, 109 S.Ct. 2003. In 1990, Congress accepted the invitation. It passed the Judicial Improvements Act, 104 Stat. 5089, which enacted § 1367, the provision which controls these cases.

Section 1367 provides, in relevant part:

> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.
>
> (b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

All parties to this litigation and all courts to consider the question agree that § 1367 overturned the result in Finley. There is no warrant, however, for assuming that § 1367 did no more than to overrule Finley and otherwise to codify the existing state of the law of supplemental jurisdiction. We must not give jurisdictional statutes a more expansive interpretation than their text warrants; but it is just as important not to adopt an artificial construction that is narrower than what the text provides. * * *

Section 1367(a) is a broad grant of supplemental jurisdiction over other claims within the same case or controversy, as long as the action is

one in which the district courts would have original jurisdiction. The last sentence of § 1367(a) makes it clear that the grant of supplemental jurisdiction extends to claims involving joinder or intervention of additional parties. The single question before us, therefore, is whether a diversity case in which the claims of some plaintiffs satisfy the amount-in-controversy requirement, but the claims of others plaintiffs do not, presents a "civil action of which the district courts have original jurisdiction." If the answer is yes, § 1367(a) confers supplemental jurisdiction over all claims, including those that do not independently satisfy the amount-in-controversy requirement, if the claims are part of the same Article III case or controversy. If the answer is no, § 1367(a) is inapplicable and, in light of our holdings in Clark and Zahn, the district court has no statutory basis for exercising supplemental jurisdiction over the additional claims.

We now conclude the answer must be yes. When the well-pleaded complaint contains at least one claim that satisfies the amount-in-controversy requirement, and there are no other relevant jurisdictional defects, the district court, beyond all question, has original jurisdiction over that claim. The presence of other claims in the complaint, over which the district court may lack original jurisdiction, is of no moment. If the court has original jurisdiction over a single claim in the complaint, it has original jurisdiction over a "civil action" within the meaning of § 1367(a), even if the civil action over which it has jurisdiction comprises fewer claims than were included in the complaint. Once the court determines it has original jurisdiction over the civil action, it can turn to the question whether it has a constitutional and statutory basis for exercising supplemental jurisdiction over the other claims in the action.

Section 1367(a) commences with the direction that §§ 1367(b) and (c), or other relevant statutes, may provide specific exceptions, but otherwise § 1367(a) is a broad jurisdictional grant, with no distinction drawn between pendent-claim and pendent-party cases. In fact, the last sentence of § 1367(a) makes clear that the provision grants supplemental jurisdiction over claims involving joinder or intervention of additional parties. The terms of § 1367 do not acknowledge any distinction between pendent jurisdiction and the doctrine of so-called ancillary jurisdiction. Though the doctrines of pendent and ancillary jurisdiction developed separately as a historical matter, the Court has recognized that the doctrines are "two species of the same generic problem," Kroger, 437 U.S., at 370, 98 S.Ct. 2396. Nothing in § 1367 indicates a congressional intent to recognize, preserve, or create some meaningful, substantive distinction between the jurisdictional categories we have historically labeled pendent and ancillary.

If § 1367(a) were the sum total of the relevant statutory language, our holding would rest on that language alone. The statute, of course, instructs us to examine § 1367(b) to determine if any of its exceptions apply, so we proceed to that section. While § 1367(b) qualifies the broad rule of § 1367(a), it does not withdraw supplemental jurisdiction over the claims of the additional parties at issue here. The specific exceptions to § 1367(a) contained in § 1367(b), moreover, provide additional support for our conclusion that § 1367(a) confers supplemental jurisdiction over these claims. Section 1367(b), which applies only to diversity cases, withholds supplemental jurisdiction over the claims of plaintiffs

proposed to be joined as indispensable parties under Federal Rule of Civil Procedure 19, or who seek to intervene pursuant to Rule 24. Nothing in the text of § 1367(b), however, withholds supplemental jurisdiction over the claims of plaintiffs permissively joined under Rule 20 (like the additional plaintiffs in No. 04–79) or certified as class-action members pursuant to Rule 23 (like the additional plaintiffs in No. 04–70). The natural, indeed the necessary, inference is that § 1367 confers supplemental jurisdiction over claims by Rule 20 and Rule 23 plaintiffs. This inference, at least with respect to Rule 20 plaintiffs, is strengthened by the fact that § 1367(b) explicitly excludes supplemental jurisdiction over claims against defendants joined under Rule 20.

We cannot accept the view, urged by some of the parties, commentators, and Courts of Appeals, that a district court lacks original jurisdiction over a civil action unless the court has original jurisdiction over every claim in the complaint. As we understand this position, it requires assuming either that all claims in the complaint must stand or fall as a single, indivisible "civil action" as a matter of definitional necessity—what we will refer to as the "indivisibility theory"—or else that the inclusion of a claim or party falling outside the district court's original jurisdiction somehow contaminates every other claim in the complaint, depriving the court of original jurisdiction over any of these claims—what we will refer to as the "contamination theory."

The indivisibility theory is easily dismissed, as it is inconsistent with the whole notion of supplemental jurisdiction. If a district court must have original jurisdiction over every claim in the complaint in order to have "original jurisdiction" over a "civil action," then in Gibbs there was no civil action of which the district court could assume original jurisdiction under § 1331, and so no basis for exercising supplemental jurisdiction over any of the claims. The indivisibility theory is further belied by our practice—in both federal-question and diversity cases—of allowing federal courts to cure jurisdictional defects by dismissing the offending parties rather than dismissing the entire action. Clark, for example, makes clear that claims that are jurisdictionally defective as to amount in controversy do not destroy original jurisdiction over other claims. 306 U.S., at 590, 59 S.Ct. 744 (dismissing parties who failed to meet the amount-in-controversy requirement but retaining jurisdiction over the remaining party). If the presence of jurisdictionally problematic claims in the complaint meant the district court was without original jurisdiction over the single, indivisible civil action before it, then the district court would have to dismiss the whole action rather than particular parties.

We also find it unconvincing to say that the definitional indivisibility theory applies in the context of diversity cases but not in the context of federal-question cases. The broad and general language of the statute does not permit this result. The contention is premised on the notion that the phrase "original jurisdiction of all civil actions" means different things in § 1331 and § 1332. It is implausible, however, to say that the identical phrase means one thing (original jurisdiction in all actions where at least one claim in the complaint meets the following requirements) in § 1331 and something else (original jurisdiction in all actions where every claim in the complaint meets the following requirements) in § 1332.

The contamination theory, as we have noted, can make some sense in the special context of the complete diversity requirement because the presence of nondiverse parties on both sides of a lawsuit eliminates the justification for providing a federal forum. The theory, however, makes little sense with respect to the amount-in-controversy requirement, which is meant to ensure that a dispute is sufficiently important to warrant federal-court attention. The presence of a single nondiverse party may eliminate the fear of bias with respect to all claims, but the presence of a claim that falls short of the minimum amount in controversy does nothing to reduce the importance of the claims that do meet this requirement.

It is fallacious to suppose, simply from the proposition that § 1332 imposes both the diversity requirement and the amount-in-controversy requirement, that the contamination theory germane to the former is also relevant to the latter. There is no inherent logical connection between the amount-in-controversy requirement and § 1332 diversity jurisdiction. After all, federal-question jurisdiction once had an amount-in-controversy requirement as well. If such a requirement were revived under § 1331, it is clear beyond peradventure that § 1367(a) provides supplemental jurisdiction over federal-question cases where some, but not all, of the federal-law claims involve a sufficient amount in controversy. In other words, § 1367(a) unambiguously overrules the holding and the result in Clark. If that is so, however, it would be quite extraordinary to say that § 1367 did not also overrule Zahn, a case that was premised in substantial part on the holding in Clark.

* * *

* * * When the well-pleaded complaint in district court includes multiple claims, all part of the same case or controversy, and some, but not all, of the claims are within the court's original jurisdiction, does the court have before it "any civil action of which the district courts have original jurisdiction"? It does. Under § 1367, the court has original jurisdiction over the civil action comprising the claims for which there is no jurisdictional defect. No other reading of § 1367 is plausible in light of the text and structure of the jurisdictional statute. Though the special nature and purpose of the diversity requirement mean that a single nondiverse party can contaminate every other claim in the lawsuit, the contamination does not occur with respect to jurisdictional defects that go only to the substantive importance of individual claims.

It follows from this conclusion that the threshold requirement of § 1367(a) is satisfied in cases, like those now before us, where some, but not all, of the plaintiffs in a diversity action allege a sufficient amount in controversy. We hold that § 1367 by its plain text overruled Clark and Zahn and authorized supplemental jurisdiction over all claims by diverse parties arising out of the same Article III case or controversy, subject only to enumerated exceptions not applicable in the cases now before us.

C

The proponents of the alternative view of § 1367 insist that the statute is at least ambiguous and that we should look to other interpretive tools, including the legislative history of § 1367, which supposedly demonstrate Congress did not intend § 1367 to overrule Zahn. We can reject this argument at the very outset simply because § 1367 is

not ambiguous. For the reasons elaborated above, interpreting § 1367 to foreclose supplemental jurisdiction over plaintiffs in diversity cases who do not meet the minimum amount in controversy is inconsistent with the text, read in light of other statutory provisions and our established jurisprudence. Even if we were to stipulate, however, that the reading these proponents urge upon us is textually plausible, the legislative history cited to support it would not alter our view as to the best interpretation of § 1367.

[Discussion of legislative history omitted.]

D

Finally, we note that the Class Action Fairness Act (CAFA), Pub.L. 109–2, 119 Stat. 4, enacted this year, has no bearing on our analysis of these cases. Subject to certain limitations, the CAFA confers federal diversity jurisdiction over class actions where the aggregate amount in controversy exceeds $5 million. It abrogates the rule against aggregating claims, a rule this Court recognized in Ben-Hur and reaffirmed in Zahn. The CAFA, however, is not retroactive, and the views of the 2005 Congress are not relevant to our interpretation of a text enacted by Congress in 1990. The CAFA, moreover, does not moot the significance of our interpretation of § 1367, as many proposed exercises of supplemental jurisdiction, even in the class-action context, might not fall within the CAFA's ambit. The CAFA, then, has no impact, one way or the other, on our interpretation of § 1367.

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

■ JUSTICE STEVENS' dissenting opinion, joined by JUSTICE BREYER, is omitted. JUSTICE GINSBURG'S dissenting opinion, joined by JUSTICES STEVENS, O'CONNOR, and BREYER, is omitted.

NOTES AND QUESTIONS

1. Two questions. The Supreme Court answered two questions in *Exxon Mobil*. The first, in the Eleventh Circuit case, was whether, in a diversity class action brought under Federal Rule of Civil Procedure 23, more than one plaintiff must satisfy the amount in controversy requirement of 28 U.S.C. § 1332(a) (amount in controversy must exceed $75,000). The second, in the First Circuit case, was whether, in a diversity action with multiple plaintiffs permissively joined under Federal Rule of Civil Procedure 20, more than one plaintiff must satisfy the amount in controversy requirement. The Court answered both questions the same way: in both class actions brought under Rule 23 and multiple plaintiff suits brought under Rule 20, only one plaintiff needs to satisfy the amount in controversy requirement. Other plaintiffs' claims that do not satisfy the amount in controversy requirement may be heard under the supplemental jurisdiction granted by § 1367(a).

2. A long-awaited decision. The two questions answered by the Court were apparent almost from the moment § 1367 was passed in 1990. Although the Court concluded in *Exxon Mobil* that the statutory text was clear, this result was not a foregone conclusion. At least as to Rule 23, the wording might have been due to an oversight in drafting. The three law

professors primarily responsible for drafting § 1367 published an article almost immediately after its enactment suggesting that the statute should be read to preserve the rule of Zahn v. International Paper Co., 414 U.S. 291, 94 S.Ct. 505, 38 L.Ed.2d 511 (1973), in class action cases, even though its text did not appear to say so. See T. Mengler, S. Burbank, and T. Rowe, Congress Accepts Supreme Court's Invitation to Codify Supplemental Jurisdiction, 74 Judicature 213 (1991). The Court granted certiorari in a case presenting the Rule 23 (but not the Rule 20) question, but the Court divided four to four, affirming without opinion by an equally divided Court. Free v. Abbott Laboratories, Inc., 529 U.S. 333, 120 S.Ct. 1578, 146 L.Ed.2d 306 (2000). As indicated at the beginning of the Court's opinion in *Exxon Mobil*, the courts of appeals were divided on both questions. Fifteen years after the adoption of § 1367, we finally got the answers.

The Court presents its decision as an exercise in applying the language of the statute to the exclusion of its legislative history. Are you persuaded that the Court's "claim by claim" theory is consistent with the statutory language? (Recall that the ALI Project, described in the supplemental jurisdiction note following *Kroger*, suggested a revision of the text to make clear that 1367 intended a claim by claim analysis.) In particular, are you persuaded by the distinction that the Court draws between failures by some plaintiffs to meet the jurisdictional minimum amount (which the Court holds are cured by the statute when at least one plaintiff is diverse from all defendants and has a claim satisfying the minimum) and failures to satisfy complete diversity (which the Court states in dictum are not cured, even when at least one plaintiff is diverse from all defendants and satisfies the minimum)? Where is that distinction reflected in the language of the statute? If the distinction drawn is not supported by the language of the statute, is it nonetheless wise as a matter of policy?

3. What was at stake in the Rule 23 case? Prior to the adoption of § 1367, the established rule under *Zahn v. International Paper* was that all plaintiffs in a diversity class action under Rule 23 had to satisfy the amount in controversy requirement of § 1332(a). The conventional view was that the rule in *Zahn* was harmful to plaintiffs' interests, and that overruling *Zahn* would help plaintiffs by increasing their options, allowing them to choose between a state and a federal forum. That view is now dated. It has become increasingly clear that there are sharp differences between the federal courts and some state courts on issues bearing on class action practice, including standards for certification, awards of punitive damages, and review of settlements, and that these differences present strategic opportunities for both plaintiffs and defendants. For example, plaintiffs may (and often do) choose a plaintiff-favorable state court, creating tremendous litigation exposure for the defendant. In cases leading up to *Exxon Mobil*, it was usually corporate defendants who argued that § 1367 overrules *Zahn* because they wished to remove the class action to what they thought would be the more defendant-favorable federal forum. For a vivid example see McCauley v. Ford Motor Co., 264 F.3d 952 (9th Cir. 2001), cert. dismissed, 537 U.S. 1, 123 S.Ct. 584, 154 L.Ed.2d 1 (2002).

4. Overtaken by events? Responding to pressure from corporate class action defendants (and corporations who feared that they would become such defendants in the future), Congress enacted the Class Action Fairness Act of 2005 (CAFA), greatly expanding diversity jurisdiction over class actions. See 28 U.S.C. §§ 1332(d) (original jurisdiction) and 1453 (removal).

CAFA authorizes subject matter jurisdiction in federal district court in class actions in which there is more than $5,000,000 in controversy for the entire class. Only minimal diversity is required. § 1332(d)(2). Removal to federal court is much easier than removal in general diversity cases. See discussion of removal, infra p. 286. Federal district court jurisdiction is not authorized in class actions with a particularly strong connection to a single state, but the overall effect of the Act is to allow defendants to remove most diversity class actions to federal court.

CAFA greatly diminishes the practical importance of supplemental jurisdiction in diversity class actions. The only diversity class actions in which supplemental jurisdiction now makes a difference are those in which the aggregate amount in controversy for the entire class is $5,000,000 or less, or in which the connection to a single state is particularly strong. The Court in *Exxon Mobil* writes that "the Class Action Fairness Act * * * has no bearing on our analysis of these cases." The Court is correct in saying that the Act has no bearing on its analysis of the text of § 1367. But CAFA does have a substantial impact on the practical importance of that analysis.

5. What was at stake in the Rule 20 case? The stakes in a Rule 20 case replicate, to a lesser degree and on a much smaller scale, the stakes in a Rule 23 class action case. Generally speaking, corporate defendants in diversity cases prefer litigating in federal rather than state court. The Court's answer in the Rule 20 case makes it somewhat easier for defendants to remove multiple-plaintiff diversity cases to federal court, for so long as all of the plaintiffs are of diverse citizenship from all of the defendants, only one of the plaintiffs need satisfy the amount in controversy requirement of § 1332(a). But it is fair to say that there had been no organized effort, comparable to the effort in class action cases, to allow broader removal in Rule 20 permissive joinder diversity cases.

6. Supplemental jurisdiction based on something other than § 1367. Is § 1367 the only basis on which federal courts can assert supplemental (or ancillary or pendent) jurisdiction? The answer is almost certainly no. In Kokkonen v. Guardian Life Insurance Co. of America, 511 U.S. 375, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994), the district court had entered an unconditional order dismissing plaintiff's claim pursuant to a settlement agreement. When defendant failed to live up to the agreement, plaintiff returned to the federal court seeking an enforcement order. The Supreme Court held that there had to be an independent basis for subject matter jurisdiction to support plaintiff's suit to enforce the agreement, and that no such basis existed here. But the Court noted explicitly that if the parties had incorporated into the order of dismissal a condition that the defendant comply with the settlement, the district court would have had ancillary jurisdiction: "In that event, a breach of the agreement would be a violation of the order, and ancillary jurisdiction to enforce the agreement would therefore exist." Id. at 381. The Court nowhere mentioned § 1367 in its opinion. For an analysis of Kokkonen, see Green, Justice Scalia and Ancillary Jurisdiction: Teaching a Lame Duck New Tricks in *Kokkonen v. Guardian Life Insurance Company of America*, 81 Va.L.Rev. 1631 (1995).

4. REMOVAL

Caterpillar Inc. v. Williams

Supreme Court of the United States, 1987.
482 U.S. 386, 107 S.Ct. 2425, 96 L.Ed.2d 318.

■ JUSTICE BRENNAN delivered the opinion of the Court.

The question for decision is whether respondents' state-law complaint for breach of individual employment contracts is completely pre-empted by § 301 of the Labor Management Relations Act, 1947 (LMRA), and therefore removable to Federal District Court.

I

At various times between 1956 and 1968, Caterpillar Tractor Company (Caterpillar) hired respondents to work at its San Leandro, California, facility. Initially, each respondent filled a position covered by the collective-bargaining agreement between Caterpillar and Local Lodge No. 284, International Association of Machinists (Union). Each eventually became either a managerial or a weekly salaried employee, positions outside the coverage of the collective-bargaining agreement. Respondents held the latter positions for periods ranging from 3 to 15 years; all but two respondents served 8 years or more.

Respondents allege that, "[d]uring the course of [their] employment, as management or weekly salaried employees," Caterpillar made oral and written representations that "they could look forward to indefinite and lasting employment with the corporation and that they could count on the corporation to take care of them." More specifically, respondents claim that, "while serving Caterpillar as managers or weekly salaried employees, [they] were assured that if the San Leandro facility of Caterpillar ever closed, Caterpillar would provide employment opportunities for [them] at other facilities of Caterpillar, its subsidiaries, divisions, or related companies." Respondents maintain that these "promises were continually and repeatedly made," and that they created "a total employment agreement wholly independent of the collective-bargaining agreement pertaining to hourly employees." In reliance on these promises, respondents assert, they "continued to remain in Caterpillar's employ rather than seeking other employment."

Between May 1980 and January 1984, Caterpillar downgraded respondents from managerial and weekly salaried positions to hourly positions covered by the collective-bargaining agreement. Respondents allege that, at the time they were downgraded to unionized positions, Caterpillar supervisors orally assured them that the downgrades were temporary. On December 15, 1983, Caterpillar notified respondents that its San Leandro plant would close and that they would be laid off.

On December 17, 1984, respondents filed an action based solely on state law in California state court, contending that Caterpillar "breached [its] employment agreement by notifying [respondents] that the San Leandro plant would be closed and subsequently advising [respondents] that they would be terminated" without regard to the individual employment contracts. Caterpillar then removed the action to federal court, arguing that removal was proper because any individual

employment contracts made with respondents "were, as a matter of federal substantive labor law, merged into and superseded by the . . . collective bargaining agreements." Respondents denied that they alleged any federal claim and immediately sought remand of the action to the state court. In an oral opinion, the District Court held that removal to federal court was proper, and dismissed the case when respondents refused to amend their complaint to attempt to state a claim under § 301 of the LMRA.

The Court of Appeals for the Ninth Circuit reversed, holding that the case was improperly removed. * * *

We granted certiorari, and now affirm.

II

A

* * *

Only state-court actions that originally could have been filed in federal court may be removed to federal court by the defendant. Absent diversity of citizenship, federal-question jurisdiction is required. The presence or absence of federal-question jurisdiction is governed by the "well-pleaded complaint rule," which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint. See Gully v. First National Bank, 299 U.S. 109, 112–113, 57 S.Ct. 96, 97–98, 81 L.Ed. 70 (1936). The rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law.

Ordinarily federal pre-emption is raised as a defense to the allegations in a plaintiff's complaint. Before 1887, a federal defense such as pre-emption could provide a basis for removal, but, in that year, Congress amended the removal statute. We interpret that amendment to authorize removal only where original federal jurisdiction exists. See Act of Mar. 3, 1887. Thus, it is now settled law that a case may *not* be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue.

There does exist, however, an "independent corollary" to the well-pleaded complaint rule, known as the "complete pre-emption" doctrine. On occasion, the Court has concluded that the pre-emptive force of a statute is so "extraordinary" that it "converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." * * *

The complete pre-emption corollary to the well-pleaded complaint rule is applied primarily in cases raising claims pre-empted by § 301 of the LMRA. Section 301 provides:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect of the amount in controversy or without regard to the citizenship of the parties." 29 U.S.C. § 185(a).

In Avco Corp. v. Machinists, the Court of Appeals decided that "[s]tate law does not exist as an independent source of private rights to enforce collective bargaining contracts." 376 F.2d 337, 340 (C.A.6 1967), aff'd, 390 U.S. 557, 88 S.Ct. 1235, 20 L.Ed.2d 126 (1968). In affirming, we held that, when "[t]he heart of the [state-law] complaint [is] a . . . clause in the collective bargaining agreement," id., at 558, 88 S.Ct., at 1236, that complaint arises under federal law:

> "[T]he pre-emptive force of § 301 is so powerful as to displace entirely any state cause of action 'for violation of contracts between an employer and a labor organization.' Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of § 301." Franchise Tax Board, supra, 463 U.S., at 23, 103 S.Ct., at 2853–2854.

B

Caterpillar asserts that respondents' state-law contract claims are in reality completely pre-empted § 301 claims, which therefore arise under federal law. We disagree. Section 301 governs claims founded directly on rights created by collective-bargaining agreements, and also claims "substantially dependent on analysis of a collective-bargaining agreement." Respondents allege that Caterpillar had entered into and breached individual employment contracts with them. Section 301 says nothing about the content or validity of individual employment contracts. It is true that respondents, bargaining unit members at the time of the plant closing, possessed substantial rights under the collective agreement, and could have brought suit under § 301. As masters of the complaint, however, they chose not to do so.

* * *

Caterpillar next relies on this Court's decision in *J.I. Case Co. v. NLRB,* 321 U.S. 332, 64 S.Ct. 576, 88 L.Ed. 762 (1944), arguing that when respondents returned to the collective-bargaining unit, their individual employment agreements were subsumed into, or eliminated by, the collective-bargaining agreement. Thus, Caterpillar contends, respondents' claims under their individual contracts actually are claims under the collective agreement and pre-empted by § 301.

Caterpillar is mistaken. * * *

* * *

* * * Caterpillar's basic error is its failure to recognize that a plaintiff covered by a collective-bargaining agreement is permitted to assert legal rights independent of that agreement, including state-law contract rights, so long as the contract relied upon is not a collective-bargaining agreement. Caterpillar impermissibly attempts to create the prerequisites to removal by ignoring the set of facts (i.e., the individual employment contracts) presented by respondents, along with their legal characterization of those facts, and arguing that there are different facts respondents might have alleged that would have constituted a federal claim. In sum, Caterpillar does not seek to point out that the contract relied upon by respondents is in fact a collective agreement; rather it attempts to justify removal on the basis of facts not alleged in the

complaint. The "artful pleading" doctrine cannot be invoked in such circumstances.

[I]f an employer wishes to dispute the continued legality or viability of a pre-existing individual employment contract because an employee has taken a position covered by a collective agreement, it may raise this question in state court. The employer may argue that the individual employment contract has been pre-empted due to the principle of exclusive representation in § 9(a) of the National Labor Relations Act (NLRA), 29 U.S.C. § 159(a). Or the employer may contend that enforcement of the individual employment contract arguably would constitute an unfair labor practice under the NLRA, and is therefore pre-empted. The fact that a defendant might ultimately prove that a plaintiff's claims are pre-empted under the NLRA does not establish that they are removable to federal court.

Finally, Caterpillar argues that § 301 pre-empts a state-law claim even when the employer raises only a defense that requires a court to interpret or apply a collective-bargaining agreement. Caterpillar asserts such a defense claiming that, in its collective-bargaining agreement, its unionized employees waived any pre-existing individual employment contract rights.[13]

It is true that when a defense to a state claim is based on the terms of a collective-bargaining agreement, the state court will have to interpret that agreement to decide whether the state claim survives. But the presence of a federal question, even a § 301 question, in a defensive argument does not overcome the paramount policies embodied in the well-pleaded complaint rule—that the plaintiff is the master of the complaint, that a federal question must appear on the face of the complaint, and that the plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court. When a plaintiff invokes a right created by a collective-bargaining agreement, the plaintiff has *chosen* to plead what we have held must be regarded as a federal claim, and removal is at the defendant's option. But a *defendant* cannot, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law, thereby selecting the forum in which the claim shall be litigated. If a defendant could do so, the plaintiff would be master of nothing. Congress has long since decided that federal defenses do not provide a basis for removal.

III

Respondents' claims do not arise under federal law and therefore may not be removed to federal court. The judgment of the Court of Appeals is

Affirmed.

NOTE ON REMOVAL

1. Federal question removal. *Caterpillar* illustrates two important general principles applicable to federal question removal cases under 28

[13] We intimate no view on the merits of this or any of the pre-emption arguments discussed above. These are questions that must be addressed in the first instance by the state court in which respondents filed their claims.

U.S.C. § 1441: (a) plaintiff is "master" of his or her complaint, and (b) federal defenses may not be used as a basis for removal.

a. Plaintiff as master of the complaint. It sometimes happens that plaintiff has available both federal- and state-law causes of action. If plaintiff is willing to forgo her federal-law cause of action, she may prevent removal from state to federal court by confining her complaint to her state-law cause of action. See The Fair v. Kohler Die and Specialty Co., 228 U.S. 22, 25, 33 S.Ct. 410, 57 L.Ed. 716 (1913) ("Of course the party who brings a suit is master to decide what law he will rely upon."); Garibaldi v. Lucky Food Stores, Inc., 726 F.2d 1367, 1370 (9th Cir. 1984) ("[P]laintiff is the master of his or her own complaint and is free to ignore the federal cause of action and rest the claim solely on a state cause of action."). In *Caterpillar*, plaintiffs chose to rely only on state-law claims under individual contracts between themselves and the company, forgoing possible federal-law claims under the collective bargaining contract between their union and the company.

b. Federal defenses not available as a basis for removal. 28 U.S.C. § 1441(a) permits a defendant to remove from state to federal court "any civil action * * * of which the district courts of the United States have original jurisdiction." The statute has been construed to mean that removal is proper only if the plaintiff could have filed the suit in federal court in the first place. In other words, the well-pleaded complaint rule applies to removal by the defendant as well as to initial filing by the plaintiff.

Is this sensible? An important justification for the well-pleaded complaint rule is that it can be applied at an early stage in litigation, on the basis of pleadings actually in front of the court. Plaintiff cannot rely on an anticipated federal defense as a basis for subject matter jurisdiction when she files the case, in part because defendant might not in fact assert that defense. Removal is generally sought early in the case. And if a federal defense is pleaded as a basis for removal, it is no longer a hypothetical matter whether the federal defense will be pleaded. Further, if we think that parties relying on federal law should have a federal forum to determine their federal rights, the well-pleaded complaint is proper as applied to plaintiffs, but perverse as applied to defendants. As the rule now stands, defendants can remove only when plaintiffs assert federal rights.

Reformulation of § 1441(a) to allow removal based on the assertion of a federal defense is not a new idea. Professor Herbert Wechsler suggested it in 1948. Wechsler, Federal Jurisdiction and the Revision of the Judicial Code, 13 Law & Contemp. Probs. 216, 233–34 (1948). The American Law Institute recommended it again in 1969. ALI, Study of the Division of Jurisdiction Between State and Federal Courts 188–194 (1969). But Congress has refused to act, and the Court has refused to reread the statute as it stands. Franchise Tax Board of California v. Construction Laborers Vacation Trust, 463 U.S. 1, 10 n. 9, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983) ("Commentators have repeatedly proposed that some mechanism be established to permit removal of cases in which a federal defense may be dispositive. * * * But those proposals have not been adopted."). The general rule is that only defendants have the right to remove. Under this rule, a plaintiff may not remove based on a defendant's counterclaim asserting a right under federal law. Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 61 S.Ct. 868, 85 L.Ed. 1214 (1941). However, under a narrow 2011 amendment to the removal statute, a plaintiff may remove based on a counterclaim or third-party claim arising under federal patent, plant variety protection, or copyright laws. 28 U.S.C. § 1454.

2. Complete preemption removal. The result in *Caterpillar* was not as obvious as it might appear from the preceding principles. The Supreme Court has developed an odd and somewhat unruly exception that permits removal where the plaintiff has tried to plead a state-law cause of action that is completely preempted by federal law. Thus, in Avco Corp. v. Aero Lodge No. 735, International Association of Machinists and Aerospace Workers, 390 U.S. 557, 88 S.Ct. 1235, 20 L.Ed.2d 126 (1968), plaintiff-employer sued under state law in state court to enjoin a strike, relying on a no-strike clause in its collective bargaining agreement with the union. The Supreme Court upheld removal to federal district court on the ground that a claim under a collective bargaining agreement was entirely preempted by federal labor law. In Metropolitan Life Insurance Co. v. Taylor, 481 U.S. 58, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987), an employee sued his employer in state court, seeking recovery under state law from the employer's plan for ill and disabled workers. The Court upheld removal to federal district court on the ground that any state-law claim against the plan was entirely preempted by the federal Employee Retirement Income Security Act (ERISA).

It is somewhat unclear why defenses based on assertions of complete federal preemption are entitled to special treatment in removal, for preemption defenses are not necessarily more difficult for a state court to address than other federal defenses. The Court's decisions in *Avco* and *Taylor* may have been motivated by a particular distrust of the state courts' ability to deal with federal labor law and with ERISA. There is a history of conflict between the federal government and the states over their respective spheres of authority in labor law, and both federal labor law and ERISA are notoriously complicated. Even if the complete preemption doctrine is confined to these two areas, removal on this basis is not simple, for there is complication and ambiguity as to the meaning and preemptive scope of the substantive law, as is evident from the Court's opinion in *Caterpillar*.

The Supreme Court has repeated the mantra that only "complete" (not merely partial) preemption is required, noting that "artful pleading" of a preempted state claim will not be permitted to disguise the preempted claim's inescapably federal nature. See Rivet v. Regions Bank of Louisiana, 522 U.S. 470, 118 S.Ct. 921, 139 L.Ed.2d 912, 925 (1998) (citations omitted):

> The artful pleading doctrine allows removal where federal law completely preempts a plaintiff's state-law claim. Although federal preemption is ordinarily a defense, "[o]nce an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state-law claim is considered, from its inception, a federal claim, and therefore arises under federal law."

However, neither the justification for the doctrine, nor the scope of its application, is readily apparent. The Court's latest foray is Beneficial National Bank v. Anderson, 539 U.S. 1, 123 S.Ct. 2058, 156 L.Ed.2d 1 (2003). The Court held that federal regulation of interest rates chargeable by nationally chartered banks completely preempt state usury laws, allowing removal of a state-law usury suit brought against a national bank. Justice Scalia dissented vigorously. He criticized the Court's earlier decisions in *Avco* and *Taylor* as without sufficient theoretical foundation, and objected to the expansion of those decisions in *Anderson*: "[A]s between an inexplicable narrow holding [in *Avco* and *Taylor*] and an inexplicable broad one [in this case], the former is the lesser evil[.]" Id. at 21.

For analysis and criticism, see Tarkington, Rejecting the Touchstone: Complete Preemption and Congressional Intent after *Beneficial National Bank v. Anderson*, 59 S. Car. L.Rev.225 (2008); Pursley, Rationalizing Complete Preemption after *Beneficial National Bank v. Anderson*: A New Rule, a New Justification, 54 Drake L.Rev. 371 (2006); Ragazzo, Reconsidering the Artful Pleading Doctrine, 44 Hast. L.J. 273 (1993). See also Miller, Artful Pleading: A Doctrine in Search of a Definition, 76 Tex.L.Rev. 1781 (1998); Twitchell, Characterizing Federal Claims: Preemption, Removal, and the Arising-Under Jurisdiction of the Federal Courts, 54 Geo.Wash.L.Rev. 812 (1986).

3. Diversity removal. a. Narrower scope of removal. Removal in a diversity case, unlike that in a federal question case, is narrower than original jurisdiction in federal district court. Original jurisdiction in diversity under 28 U.S.C § 1332 requires only that plaintiff and defendant be citizens of different states. It does not matter if plaintiff—the party seeking the presumptively unbiased federal forum—is a citizen of the state in which the district court sits. By contrast, removal is unavailable in diversity if any defendant named and served is a citizen of the state in which the suit is brought, on the ground that a defendant need not fear bias in his or her own state court. 28 U.S.C. § 1441(b). The American Law Institute has recommended that treatment between in-state plaintiffs and in-state defendants be equalized by eliminating the right of an in-state plaintiff to invoke original diversity jurisdiction. ALI, Study of the Division of Jurisdiction between State and Federal Courts 124 (1969) ("The right of an in-state plaintiff to institute a diversity action against an out-of-state defendant * * * is not responsive to any acceptable justification for diversity jurisdiction. The in-stater can hardly be heard to ask the federal government to spare him from litigation in the courts of his own state.").

b. Devices to defeat diversity removal. A plaintiff may defeat removal in a diversity suit by choosing to forego a damage recovery in excess of $75,000. Plaintiff must make it plain before removal that she seeks $75,000 or less; she may not obtain a remand to state court by reducing her damage claim after removal. St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 292, 58 S.Ct. 586, 82 L.Ed. 845 (1938). See also Rogers v. Wal-Mart Stores, Inc., 230 F.3d 868 (6th Cir. 2000); In re Shell Oil Co., 970 F.2d 355 (7th Cir. 1992). Some states do not require a plaintiff to state in the complaint how much she is claiming; other states forbid a plaintiff from doing so. To deal with complaints filed in these states (as well as cases in which non-monetary relief is sought), Congress amended the removal statute in 2011. The defendant needs only to allege plausibly in the notice of removal an amount in controversy that satisfies the jurisdictional amount. 28 U.S.C. § 1446. If plaintiff contests defendant's allegation, defendant must show, by a preponderance of the evidence, that the alleged amount is true. See Dart Cherokee Basin Operating Co., LLC v. Owens, 574 U.S. ___, 135 S.Ct. 547, 190 L.Ed.2d 495 (2014).

The Class Action Fairness Act of 2005 (CAFA) takes a different approach to stipulated amounts in controversy. In Standard Fire Ins. v. Knowles, 568 U.S. ___, 133 S.Ct. 1345, 185 L.Ed.2d 439 (2013), the Supreme Court held that a stipulation attached to the complaint that damages in excess of $5,000,000 (i.e., damages satisfying the CAFA jurisdictional amount) will not be sought cannot defeat removal. Removal in a CAFA case typically takes place before a class is certified, The Court reasoned that a

binding stipulation is not possible because a named plaintiff in an uncertified class action has no authority to bind members of the would-be class.

Recall that 28 U.S.C. § 1359 does not permit improper or collusive assignments or joinder to invoke diversity. See, supra p. 255. The conventional view is that § 1359 speaks only to attempts to invoke jurisdiction, leaving the parties to their own ingenious devices to defeat jurisdiction. In Mecom v. Fitzsimmons Drilling Co., 284 U.S. 183, 52 S.Ct. 84, 76 L.Ed. 233 (1931), an Oklahoma citizen three times filed separate wrongful death suits in state court as administratrix of the estate of her deceased husband. Each time defendant, a Louisiana citizen, removed to federal court based on diversity of citizenship. After each removal, plaintiff took voluntary dismissals and refiled the suit. After the first two dismissals, she refiled in state court as administratrix. After the third dismissal, she resigned as administratrix, and had a Louisiana citizen appointed in her place. The Louisiana citizen then filed suit in state court and successfully resisted removal on the ground that diversity of citizenship no longer existed.

The specific problem posed in *Mecom* is now handled by statute. In 1988, 28 U.S.C. § 1332(c)(2) was added, providing that the legal representative of an estate is deemed to be a citizen of the same state as the decedent. But the general problem remains: Can a litigant assign her interest to a non-diverse party in order to defeat diversity? In Provident Savings Life Assurance Society v. Ford, 114 U.S. 635, 5 S.Ct. 1104, 29 L.Ed. 261 (1885), the Supreme Court upheld an assignment to defeat diversity, and the case has not been overruled in the more than one hundred years since the decision. But the lower federal courts have begun to move away from *Provident*. For example, in Grassi v. Ciba-Geigy, Ltd., 894 F.2d 181 (5th Cir. 1990), the court disregarded an assignment made for the purpose of remaining in state court. See also Gentle v. Lamb-Weston, Inc., 302 F. Supp. 161 (D. Me. 1969), supra p. 259.

Plaintiff may also prevent removal by joining defendants who would destroy complete diversity. If joinder of a defendant is "fraudulent" in the sense that there is no colorable ground supporting the claim, or if plaintiff has no real intention of prosecuting the claim against the defendant, the case may be removed and the defendant dismissed. But fraudulent joinder is not always easy to show. See, e.g., Batoff v. State Farm Insurance Co., 977 F.2d 848, 851–54 (3d Cir. 1992) (denying removal because defendant did not meet "heavy burden of persuasion" to show that joinder was fraudulent). Further, a diversity case must be removed within one year of its filing in state court. 28 U.S.C. § 1446(b). For many years, the one-year limitation would not be extended even if the defendant seeking to remove could not discover within that time that the joinder was fraudulent. Congress changed the rule in 2011. Under 28 U.S.C. § 1441(c)(1), a district court now has discretion to extend the period for removal if it finds that the plaintiff "acted in bad faith in order to prevent the defendant from removing the action."

4. Removal under the Class Action Fairness Act of 2005. Corporate defendants in class actions have long preferred federal courts. The Class Action Fairness Act of 2005 was enacted to benefit corporations by expanding federal court subject matter jurisdiction in diversity class actions. Subject to exceptions for actions with a particularly strong connection to a single state, federal courts now have concurrent subject matter jurisdiction over all diversity class actions in which the aggregate amount in controversy exceeds $5,000,000, and in which there is minimal diversity of citizenship.

28 U.S.C. § 1332(d). If the action is filed in state court, removal is governed by the newly enacted 28 U.S.C. § 1453. By comparison to removal under §§ 1441 and 1446, removal under § 1453 is very easy. First, a defendant may remove even if it is a citizen of the state in which the action is brought. § 1453(b). Compare § 1441(b) (no removal in diversity cases if any of the defendants is a citizen of the state in which the suit is brought). Second, one defendant may remove the entire action to federal court, even if other defendants do not want to remove. § 1453(b). Compare § 1446(a) (all defendants must agree to remove). Third, there is no time limit on removal. § 1435(b). Compare § 1446(b) (one-year time limit on removal). Fourth, a district court's order remanding to state court is reviewable on appeal. § 1453(c)(1). Compare § 1447(d) (remand order not reviewable on appeal or otherwise; but see discussion of the *Hermansdorfer* case, infra note 6). For a history of the passage of CAFA, see Burbank, The Class Action Fairness Act of 2005 in Historical Context, 156 U. Pa. L. Rev. 1439 (2008); Marcus, Erie, the Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction, 48 Wm. & Mary L. Rev. 1247 (2007).

5. Non-removable claims. Some claims are specifically made non-removable. For example, claims under the Federal Employers Liability Act (FELA) are made non-removable by 28 U.S.C. § 1445(a). FELA is a statute under which workers on interstate railroads can recover for injuries negligently caused during the course of their employment. When FELA was enacted in 1908, it was an innovative, pro-worker statute that, among other things, introduced the concept of comparative negligence to land-based tort law. (Previously, comparative negligence had been used only in maritime torts.) In 1910, Congress made FELA cases filed in state court non-removable to federal court. 36 Stat. 291 (April 5, 1910). Senator Dixon of Montana supported the amendment because, in his words, "It has been my experience that in suits of this kind in the West * * * whenever a personal-injury suit was brought against a railroad the invariable custom was to transfer the case to the federal courts; in my own State taking the plaintiff a distance in many cases of 400 miles to the federal court, involving a tremendous expense of witnesses and in many cases amounting actually to a denial of justice." 46 Congressional Record 4092 (61st Cong., 2d Sess., Sen., April 1, 1910).

Later in the book, you will encounter a choice-of-law question—a so-called "reverse *Erie*" question—in a FELA case, Dice v. Akron, Canton & Youngstown RR. Co., 342 U.S. 359, 72 S.Ct. 312, 96 L.Ed. 398 (1952). See infra p. 410. As you study *Dice*, you may wish to consider this rationale for non-removability of FELA cases.

6. Non-appealability of remand orders. Section 1447(d) provides that remands to state court of cases removed under § 1441 are "not reviewable on appeal or otherwise." But see Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336, 96 S.Ct. 584, 46 L.Ed.2d 542 (1976). District Judge Hermansdorfer relied on the non-reviewability of remand orders and acted out the hostility felt by many district judges toward diversity cases. During 1973, fourteen diversity cases were removed from Kentucky state courts to Judge Hermansdorfer's court. In each case Judge Hermansdorfer issued an order to show cause why it should not be remanded, and entered orders of remand in twelve of the fourteen cases. *Thermtron Products*, one of these twelve cases, was an ordinary diversity case arising out of an automobile accident. On the record, Judge Hermansdorfer noted his crowded

docket, complained that the case interfered with cases of higher priority, stated that defendant had failed to show how he would be prejudiced in state court, and remanded. The Supreme Court granted mandamus, reversing his order. It held that only remands based on lack of subject matter jurisdiction are non-reviewable, and Judge Hermansdorfer had made it painfully clear that he was remanding for other reasons. After *Thermtron Products*, a remand is still non-reviewable when based on a finding that subject matter jurisdiction is lacking, even if that finding is clearly mistaken. See, e.g., Tillman v. CSX Transportation, Inc., 929 F.2d 1023 (5th Cir.), cert. den. 502 U.S. 859 (1991). To get a sense of the strength of the non-reviewability principle, see Liberty Mutual Insurance Co. v. Ward Trucking Corp., 48 F.3d 742 (3d Cir. 1995), in which defendant removed a diversity case to federal court. The district court remanded on the ground of insufficient amount in controversy. During discovery, defendant learned that plaintiff had incurred damages of over $150,000, and again removed. The district court remanded to state court without allowing defendant an opportunity to respond to plaintiff's motion to remand. The court of appeals held the remand order non-reviewable.

The Supreme Court has since reaffirmed the narrow scope of the *Thermtron Products* exception to the non-reviewability of remand orders. In Kircher v. Putnam Funds Trust, 547 U.S. 633, 126 S.Ct. 2145, 165 L.Ed.2d 92 (2006), the district court remanded to state court based upon its conclusion that the suit did not satisfy the requirements of the special removal provision of the Securities Litigation Uniform Standards Act of 1998. The district court's reading of the removal provision was logically dependent on its reading of a substantive provision of the same Act. The Supreme Court, in another case, had just held that the district court's reading of the substantive provision of the Act was wrong, which meant that its decision to remand was necessarily wrong. Nonetheless, the Court held that the district court's order remanding the case to state court was not reviewable on appeal. The Court wrote:

> The District Court said that it was remanding for lack of jurisdiction, an unreviewable ground[.] * * * [O]n the District Court's understanding [of the substantive provision], the court had no subject matter jurisdiction. * * * And "[w]here the order is based on one of the [grounds enumerated in 28 U.S.C. § 1447(c)], review is unavailable no matter how plain the legal error in ordering the remand."

547 U.S. at 641–42 (citation omitted).

In contrast to remand orders based on lack of subject matter jurisdiction under 28 U.S.C. § 1331 and comparable statutes, remand orders under the supplemental jurisdiction statute, § 1367(c), are not based on a lack of subject matter jurisdiction. The district court has the authority under § 1367(c) to retain the claim over which there is supplemental jurisdiction after the federal question or diversity-based claim has been dismissed, but it need not do so. A district court's decision to remand a claim under § 1367(c) is based on discretionary or judgment-based criteria such as whether the remanded claim "raises a novel or complex issue of State law." § 1367(c)(1). Remands under § 1367(c) are reviewable by appeal rather than mandamus.

7. Procedure. To seek removal, defendant or defendants file a notice of removal in the state court. Ordinarily, all defendants must join in the

notice. A defendant has thirty days from service of the complaint to file a timely notice of removal, if the facts alleged in the complaint show the case is removable; if not, the defendant has 30 days from receipt of some other document showing the case is removable. 28 U.S.C. § 1446(b). If the defendant has independent knowledge of facts making a case removable, it may remove based on those facts. Roth v. CHA Hollywood Medical Ctr., 720 F.3d 1121 (9th Cir. 2013). Before 2011, the operation of the 30-day rule was confusing in a case with multiple defendants served at different times. The statute now provides that each defendant has 30 days to file a notice of removal after service on that defendant. 28 U.S.C. § 1446(b)(1). Earlier-served defendants may then satisfy the requirement of unanimity by consenting to the later-served defendant's removal notice. § 1446(b)(2)(C). A motion to remand must be made within 30 days of removal for anything other than a defect in subject matter jurisdiction. § 1447(c).

8. Post-removal cure of improper removal. The general rule is that if the removal is improper because of lack of subject matter jurisdiction, a motion to remand may (indeed, must) be entertained at any time. However, in Caterpillar Inc. v. Lewis, 519 U.S. 61, 117 S.Ct. 467, 136 L.Ed.2d 437 (1996), a diversity suit was improperly removed to federal court, and the federal district court wrongly denied a timely motion to remand. (At the time of removal, there was incomplete diversity because one of the defendants had the same citizenship as the plaintiff.) The non-diverse defendant then settled out of the suit. Because the non-diverse defendant was now gone, the federal district court now had subject matter jurisdiction, even though it had not had jurisdiction at the time of removal. The wrongly removed plaintiff went to trial and lost on the merits. He then renewed his objection to removal. The Supreme Court conceded that removal had been improper and that the district court had wrongly denied the motion to remand. But "no jurisdictional defect lingered through judgment in the district court. To wipe out the adjudication post-judgment, and return to the state court a case now satisfying all federal jurisdictional requirements, would impose an exorbitant cost on our dual court system, a cost incompatible with the fair and unprotracted administration of justice." 519 U.S. at 477. But compare Grupo Dataflux v. Atlas Global Group, L.P., 541 U.S. 567, 124 S.Ct. 1920, 158 L.Ed.2d 866 (2004), in which plaintiff Atlas was a limited partnership and defendant a Mexican corporation. Plaintiff filed a state-law claim in federal court. At the time of filing, two of the partners in Atlas were Mexican citizens. Hence, under the rule that a partnership is a citizen of each state or foreign country of which any of its partners is a citizen, there was a lack of complete diversity. Before trial, however, the two Mexican partners were bought out, so that at the time of trial there were no non-diverse partners in Atlas and diversity was complete. After losing at trial, defendant moved to dismiss for lack of subject matter jurisdiction because of the lack of diversity at the time of filing. The Court held that the suit should have been dismissed. It distinguished *Caterpillar* on the ground that the correction of the defect in that case had been accomplished by dismissing a non-diverse party, while the correction in *Grupo Dataflux* had been accomplished by changing the citizenship of a continuing party. Has the Supreme Court lost its way?

9. Other removal statutes. In addition to the general removal statute and the newly enacted CAFA removal statute, several other statutes permit removal in specific types of cases. For example, removal is permitted in civil or criminal suits brought against individual federal officers so long as a federal defense is asserted. 28 U.S.C. § 1442; Mesa v. California, 489

U.S. 121, 109 S.Ct. 959, 103 L.Ed.2d 99 (1989). Further, removal is permitted in suits brought against private individuals where the defendant is denied or cannot enforce "equal civil rights." 28 U.S.C. § 1443(1). This statute has been narrowly construed, however, and is rarely employed. Georgia v. Rachel, 384 U.S. 780, 86 S.Ct. 1783, 16 L.Ed.2d 925 (1966) ("equal civil rights" refers only to racial equality); City of Greenwood v. Peacock, 384 U.S. 808, 86 S.Ct. 1800, 16 L.Ed.2d 944 (1966) ("pervasive and explicit" state law denying equality is required; mere allegation of unequal treatment is not sufficient)

10. Additional reading. For recent thoughtful articles on removal, see Field, Removal Reform: A Solution for Federal Question Jurisdiction, Forum Shopping, and Duplicative Federal Litigation, 88 Ind. L.J. 611 (2013); Bassett and Perschbacher, The Roots of Removal, 77 Brook. L.Rev. 1 (2011).

5. CHALLENGING FEDERAL SUBJECT MATTER JURISDICTION

NOTE ON DIRECT CHALLENGE TO FEDERAL SUBJECT MATTER JURISDICTION

A defect of federal subject matter jurisdiction is not waivable in district court or on appeal. It may be challenged directly until a judgment has become final and appeals are no longer possible. It may be raised in the district court at any time before judgment. Rule 12(b)(1), (h)(3). It may also be raised on appeal, even if not previously raised in the trial court. It may be raised by any party. It may even be—indeed, must be—raised by the federal court *sua sponte* if it comes to the court's attention. See Mansfield, Coldwater & Lake Michigan Ry. v. Swan, 111 U.S. 379, 4 S.Ct. 510, 28 L.Ed. 462 (1884). A federal court must find that it has subject matter jurisdiction before it can decide any question on the merits. The Supreme Court has disapproved a "doctrine of hypothetical jurisdiction" under which a court could assume that it had subject matter jurisdiction in order to dismiss a case on the merits when the merits question was easier than the jurisdiction question, and when the result would be the same as if jurisdiction were denied. Steel Company v. Citizens for a Better Environment, 523 U.S. 83, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). However, a collateral attack on subject matter jurisdiction (i.e., an attack in a separate proceeding) is treated differently from a direct challenge and is usually unavailing.

The consequences of a successful, late-raised objection to subject matter jurisdiction are apparent in both *Louisville & Nashville Rr. v. Mottley* and *Owen Equipment & Erection Co. v. Kroger*, supra pp. 225, 264. At best, the consequence is a significant expenditure of time and money, as in *Mottley*. At worst, the consequence is the potential loss of a cause of action because of the running of the statute of limitations, as in *Owen Equipment*. (This is probably why the parties fought the jurisdictional question all the way to the Supreme Court in *Owen Equipment*. By the time the district court dismissed Mrs. Kroger's suit, it may have been too late to refile in state court because the statute of limitations had run.)

The most extreme case may be American Fire & Casualty Co. v. Finn, 341 U.S. 6, 71 S.Ct. 534, 95 L.Ed. 702 (1951). Plaintiff Finn suffered a loss due to fire and brought suit in state court against three defendants, including

CHAPTER 4

PLEADINGS

A. INTRODUCTION

A modern lawsuit is commenced by the parties' filing statements of their claims and defenses, in writing, with a trial court. These written statements are called "pleadings." Federal Rule 7(a) lists the types of pleadings in federal litigation. The plaintiff's statement of claim is called a "complaint," and the defendant's response to the plaintiff's claim is called an "answer." If the defendant wishes to assert a claim against the plaintiff, she files a "counterclaim." If the defendant wishes to assert a claim against a co-defendant, she files a "cross-claim." In certain defined circumstances, the defendant may also file a complaint against a person who is not already a party to the action. In federal practice, this is called a "third-party complaint." A plaintiff, a co-defendant, or a third-party defendant responding to the defendant files a "reply" to a counterclaim and an answer to a cross-claim or third-party complaint. The court may order that a reply be filed to an answer but does not usually do so. Fed. R. Civ. P. 7(a)(7). Broadly speaking, the pleadings set the "agenda" for the case by describing the nature of the dispute between the parties. Although there is significant debate over how specific the pleadings must be, in essence there is a consensus that the pleadings serve to notify the parties of their claims and defenses against one another and to clarify the issues that are joined and which must eventually be resolved by a judge or jury, if the parties do not settle.

There are two systems of pleading in modern American civil litigation: "notice" and "code" pleading. They are principally distinguished by the extent to which they require the pleader to provide specific details. Notice pleading is used in federal district court and in most state trial courts. Code pleading is used in a minority of state courts, but a minority that includes large and influential jurisdictions like California, Illinois, and New York. Notice pleading has historically been thought to require very little of the pleader. To assert a substantive claim in federal district court in an ordinary case, a complaint need only provide "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Code pleading, sometimes called "fact pleading," requires somewhat (but not a great deal) more. For example, a complaint in California state court must provide "[a] statement of the facts constituting the cause of action, in ordinary and concise language." Calif.C.Civ.P. § 425.10(a)(1).

Both the notice and code pleading systems are relatively recent innovations and are considerable improvements upon the highly technical system that they replaced. Until the mid-nineteenth century, both the English and American court systems had the ambitious aims of using an extended series of pleadings to identify the precise legal and factual issues in dispute and, when the disputes proved to be solely legal, to permit early disposition by the court without convening a jury. In theory, this lengthy back-and-forth of competing pleadings would narrow

the factual issues in dispute, and a jury would be convened for the sole purpose of resolving those disputes.

In the view of contemporary critics, the resulting system often failed to achieve its stated goals and was technical, expensive, and prone to unfair manipulation. In the United States, code pleading was the reformist response, first introduced in the Field Code in New York in 1848. ("Code" pleading is so named because its requirements were laid out in a legislated code.) The Field Code provided the model for the adoption of code pleading a year later in Missouri, and two years later in California. Hepburn, The Development of Code Pleading 92–94 (1897). By 1875, twenty-four states had adopted some form of code pleading, and by the 1930s most American states had followed suit. Clark, Code Pleading 24 (2d ed. 1947).

Notice pleading was first adopted in 1938 in the federal courts as part of the new Federal Rules of Civil Procedure. Most states have now adopted the federal rules and notice pleading for use in their own courts, although a minority of states have retained modernized versions of code pleading. See Oakley, A Fresh Look at the Federal Rules in State Courts, 3 Nev. L.J. 354 (2003).

In both notice and code pleading systems, relatively little time and energy are spent on pleading compared to the old common law system. Instead, the center of gravity in contested civil litigation is discovery. In the old common law system, there was very little discovery at all. In both notice and code pleading, it is often said that the function of the pleadings is simply to provide notice to the other party of the pendency of the action and the nature of the pleader's contentions, so as to facilitate informed preparation for discovery or settlement. In fact, however, we expect written pleadings to do more than that, even in a pure notice pleading system. In some cases, the pleadings provide the basis for a prompt and inexpensive resolution of the case at the outset on the ground of legal insufficiency of a claim or defense. Often, the exchange of pleadings discloses that some matters of fact are not in dispute, so that the parties and the court can focus their time and financial resources on the disputed contentions. After the close of the case, the pleadings provide a record of what was disputed and decided.

Although there is consensus that notice pleading is a considerable improvement over the old common law pleading system, it has become increasingly controversial as cases involving substantial discovery have become more frequent and discovery has become more expensive and time consuming. Many believe that notice pleading makes it too easy for plaintiffs to advance non-meritorious claims at the outset of the case, forcing the defendant to an unfair choice between coerced settlement and paying the costs of defending itself. For several decades, efforts have been made to change the rules and pass statutes that require more detailed pleadings for claims judged to be less socially desirable or likely to be without merit, and to sanction attorneys whose pleadings prove to have been frivolous. Recently, as we shall see, the Supreme Court has acknowledged these concerns and has raised the burdens on parties filing pleadings in all cases in federal court. See Miller, From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure, 60 Duke L.J. 1 (2010).

This fight over pleading doctrine has long been hard fought, especially over the last forty years. As you consider the developments in the modern law of pleading over that span of time, ask yourself why the fight has been so loud and intense. Why are judges, lawyers, and law professors so worked up over pleading? What should the burden on parties be in pleading their claims and defenses? And who should set that burden—legislatures, judges, or rulemakers?

B. DETERMINING THE SUBSTANTIVE SUFFICIENCY OF THE COMPLAINT

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 02–21734

CIV-SEITZ

ACCESS NOW, INC., a Florida non-profit corporation, and ROBERT GUMSON,
Plaintiffs,

v.

SOUTHWEST AIRLINES CO.,
a Texas corporation,
Defendant.

COMPLAINT

Plaintiffs, ACCESS NOW, INC. ("ACCESS NOW"), and ROBERT GUMSON ("GUMSON"), by their undersigned counsel, sue the Defendant, SOUTHWEST AIRLINES, CO., a Texas corporation, ("SOUTHWEST") and states:

SUMMARY OF THE CASE

1. ACCESS NOW, a non-profit, access advocacy organization for disabled individuals, and GUMSON, who is a blind individual, bring this action for injunctive and declaratory relief to require SOUTHWEST to bring the internet website SOUTHWEST.COM (the "SOUTHWEST.COM website") into compliance with the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101, GUMSON, as well as certain other members of ACCESS NOW are blind and therefore, can only navigate the internet by employing a screen access software program ("screen reader") that converts website content into synthesized speech. The SOUTHWEST.COM website is incompatible with screen readers, denying plaintiffs of their access to services offered through SOUTHWEST.COM.[1] Despite being the first airline to establish a home page on the internet, SOUTHWEST has failed to remove

[1] Southwest, Through its Website, represents that it is a publicly traded company on the New York Stock exchange under symbol "LUV" with a total operating revenue in the year 2001 of 5.6 billion dollars. Southwest employs more than 34,000 employees, flies to 58 cities in approximately 30 states. Moreover, Southwest represents that it was the most admired airline in the world for the years 1997 through 2000; one of the most admired companies in the world; and has been named one of the top 100 E-businesses in the United States.

communications barriers inherent in the SOUTHWEST.COM website, thus denying the blind, independent access to purchase products,[2] in violation of Title III of the ADA, 42 U.S.C. §§ 12181, *et seq*.

JURISDICTION AND PARTIES

2. This is an action for declaratory and injunctive relief pursuant to Title III of the Americans With Disabilities Act, 42 U.S.C. §§ 12181, *et seq*. (hereinafter the "ADA") and 28 U.S.C. §§ 2201–02. This Court has jurisdiction pursuant to 28 U.S.C. § 1331. Venue is proper in this district (Miami division), pursuant to 28 U.S.C. §§ 1391(b) and (c) in that a substantial part of the events giving rise to the action occurred and continue to occur in this district and/or the Defendant conducts substantial and regular business within this district. Defendant operates for profit, 24 hours a day, 7 days a week, an inter-active website(s) to solicit and sell their services to the public living within the district.

3. Plaintiff, ACCESS NOW, is a Florida not-for-profit corporation, with over 600 nationwide members, many of whom are disabled. One of the purposes of Access Now is to assure that public spaces, public accommodations and commercial premises are accessible to and useable by its members; to assure its members are not excluded from the enjoyment and use of the benefits and services, programs and activities of public accommodations; and to assure that its members are not discriminated against because of their disabilities. ACCESS NOW and its blind members, including GUMSON, have suffered as a result of SOUTHWEST'S actions and/or inactions as stated herein.

4. Plaintiff, GUMSON is an individual, *sui juris* with a disability defined by the ADA, 42 U.S.C. § 12102(2). GUMSON has a computer on which he installed a screen reader and on which he uses the internet and has e-mail capabilities. He has attempted, prior to the filing of this lawsuit, to use the SOUTHWEST.COM website to purchase airline tickets [and] other products, however, he was/is unable to gain access to the goods and services offered by SOUTHWEST.COM as they are inaccessible to a blind person using a screen reader. SOUTHWEST.COM offers the sighted customer the promise of independence of on-line airline/hotel booking in the comfort and safety of their home. Yet, even if a blind person like GUMSON has a screen reader with a voice synthesizer on their computer, they are prevented from using the SOUTHWEST.COM website because of its failure to allow access.

5. To help its sighted customers tailor their searches, SOUTHWEST.COM provides tabs marked "Reservations, Schedules and Fares" and a "click and save program", "travel center" and "rapid rewards" program, thereby offering its sighted customers a customized and money saving booking experience.

6. In fact, SOUTHWEST.COM states on its website that more [than] 3.5 million people subscribe to SOUTHWEST'S weekly click and save e-mails. Moreover, SOUTHWEST touts itself as exemplary of the highest level of design effectiveness and innovative technology achievable on the web today. Unfortunately, this "innovative technology"

[2] Southwest represents on its Website that internet users search for Southwest more than any other airline on the web.

excludes plaintiffs as SOUTHWEST. COM fails to accommodate the disability, despite the relative ease to accommodate.

FACTUAL BACKGROUND

7. In 1990, Congress enacted the ADA (42 U.S.C. § 12101) wherein commercial enterprises were provided one and a half years from the enactment of the statute to implement its requirements. The effective date of Title III of the ADA was January 26, 1993. 42 U.S.C. § 12181; 28 C.F.R. § 36.508(a).

8. The stated purpose of the ADA can best be surmised by Justice Kennedy's concurring opinion in the recent United States Supreme Court's opinion, Board of Trustees of Univ. of Alabama v. Patricia Garrett, 531 U.S. 356, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001) (Kennedy, J., O'Connor, J., concurring).

> Prejudice we are beginning to understand, rises not from malice or hostile animus alone. It may result as well from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves. . . . [K]nowledge of our own human instincts teaches that persons who find it difficult to perform routine functions by reason of some mental or physical impairment might at first seem unsettling to us, unless we are guided by the better angels of our nature. There can be little doubt, then, that persons with mental or physical impairments are confronted with prejudice which can stem from indifference or insecurity as well as from malicious ill will.
>
> One of the undoubted achievements of statutes designed to assist those with impairments is that citizens have an incentive, flowing from a legal duty, to develop a better understanding, a more decent perspective, for accepting persons with impairments or disabilities into the larger society. The law works this way because the law can be a teacher. . . . [T]he Americans with Disabilities Act of 1990 will be a milestone on the path to a more decent, tolerant, progressive society.

Id.

9. The SOUTHWEST. COM website is a public accommodation as defined by Title III of the ADA, 42 U.S.C. § 12181(7), in that it is a place of exhibition, display and a sales establishment. SOUTHWEST has discriminated and continues to discriminate against Plaintiffs, and others who are similarly situated, by denying access to, and full and equal enjoyment of the goods, services, facilities, privileges, advantages and/or accommodations of their website (SOUTHWEST.COM) in derogation of the ADA.

10. Specifically, blind members of ACCESS NOW, including GUMSON do not have use of a monitor, nor a computer mouse due to their disability. Instead of reading web pages or viewing the images, they listen to the web through a software program known as a screen reader. A screen reader converts text into speech using an integrated voice synthesizer, and the computer's sound card to output the content of a website to the computer's speakers.

11. Blind members of ACCESS NOW and GUMSON, in employing their screen readers, have been denied access to the SOUTHWEST.COM website based solely on their disability, prior to the filing of this lawsuit. Specifically, the SOUTHWEST.COM website fails to provide "alternative text" which would provide a "screen reader" program the ability to communicate via synthesized speech what is visually displayed on the website.

12. Additionally, the SOUTHWEST.COM web site also fails to provide online forms which can be readily filled out by ACCESS NOW and GUMSON and fails to provide a "skip navigation link" which facilitates access for these blind consumers by permitting them to bypass the navigation bars on a website and proceed to the main content.

13. SOUTHWEST.COM accessibility barriers include, without limitation, the following:

(a) Approximately 45 instances of failure to provide alternative text for all images on the home page alone ("unlabeled graphics");

(b) Data tables are not adequately labeled with headers for the table rows and columns;

(c) Online forms which cannot be completed by a blind consumer; and

(d) Absence of "skip navigation link".

14. Accordingly, the SOUTHWEST. COM website does not allow screen readers to effectively monitor the computer screen and to fully convert the information into synthesized speech. SOUTHWEST. COM's use of (a) unlabeled graphics, (b) inadequately labeled data tables, (c) online forms not accessible to the blind and its lack of a (d)"skip navigation link" deny plaintiffs access to on-line bookings and other items offered through SOUTHWEST.COM. In fact, what often appears to be text—such as the tabs for reservations and schedules—are in fact unlabeled graphics. For example:

(a) **Navigating**: Although SOUTHWEST.COM'S home screen contains some text (i.e., "Reservations, Schedules and Fares"), in actuality, the "text" is a graphic that while capable of being read by a screen reader does not allow proper navigation. Due to the lack of any alternative, plaintiffs were/are forced to listen to a never ending recitation of text that cannot even be reduced to recognizable terms when they should hear a simple term such as "Reservations."

Specifically, while a sighted consumer sees a link labeled as "Fares", plaintiffs hear "CGI-bin/request Fares." Moreover, while a sighted customer sees "GO", plaintiffs hear "images/sidego.gif." Also, a sighted customer sees "contact SWA", while plaintiffs hear "travel-center/luvbook.html." Lastly, while a sighted user can focus in immediately to the main content of a page, the plaintiffs must listen to hundreds of items before arriving at the main content. Compounding the many navigational challenges facing plaintiffs when they visit SOUTHWEST.COM is the lack of a "skip navigation link." Once plaintiffs select a link to follow, the navigation bars from the

home page are repeated. Accordingly, plaintiffs are forced to listen to the recitation of non-alternative text before hearing the main content of that particular webpage, i.e. the home page and/or ordering page.

(b) **Purchasing**: Although technically possible, plaintiffs found purchasing a ticket to be extremely difficult and thereby they have been denied equal access. For example, a sighted customer goes to the visual prompt indicating "Reservations," however, plaintiffs hear "CGI-bin/billeditenarary." This sighted customer would then proceed to the visual prompt "Hotel," however, plaintiffs hear "CGI-bin/hoteltab."

Then the sighted customer would see the visual prompt "stay near downtown," however, a screen reader would prompt plaintiff, another blind customer, to press the tab key which automatically checks the "other city" radio button. While a sighted customer could proceed to the "negotiated corporate rate code," plaintiffs hear "edit box." Further, a sighted customer could proceed to a visual prompt "air," while plaintiffs hear "ss=0 & disc=3:1020187129.580657:49368@22de40b7c17e5db 60052564bf9c7071c65e291eb." Therefore, blind users are denied the independent ability to purchase airline tickets or any other item from SOUTHWEST.COM.

15. Without injunctive relief, GUMSON and other blind members of ACCESS NOW will continue to be discriminated against and unable to independently access and use Defendant's, SOUTHWEST.COM, website in violation of their rights under the ADA. Providing accessibility would neither fundamentally, alter the nature of Defendant's website nor unduly burden Defendant. It is readily achievable.

16. Plaintiffs have no adequate remedy at law.

CLAIMS FOR RELIEF

COUNT I–VIOLATION OF THE ADA'S COMMUNICATION BARRIERS REMOVAL MANDATE

17. Plaintiffs reallege paragraphs 1 through 16 as if fully set forth herein.

18. Defendant, SOUTHWEST'S website denies access to Plaintiffs through the use of a screen reader and therefore violates the communication barriers removal provision of the ADA, 42 U.S.C. § 12182(b)(2)(A)(iv), because it constitutes a failure to remove existing communication barriers from the website.

19. Redesigning the SOUTHWEST.COM website to permit the blind to use it through a screen reader is readily achievable and the requested modification is reasonable.

20. These remedial measures (SOUTHWEST redesigning the portions of the website to enable access through a screen reader) are effective, practical and financially manageable.

COUNT II–VIOLATION OF THE ADA'S AUXILIARY AIDS SERVICES MANDATE

21. Plaintiffs reallege paragraphs 1 through 16, as if fully set forth herein.

22. Defendant's website violates the auxiliary aids and services provision of the ADA, 42 U.S.C. § 12182(b)(2)(A)(iii), because it constitutes a failure to take steps to ensure that individuals who are blind are not denied access to the website, and does not provide an effective method of making this "visually delivered material available to individuals with visual impairments." 42 U.S.C. § 12102(1)(b).

23. Providing auxiliary aids and services that would make Defendant's SOUTHWEST.COM website accessible to and independently usable by persons who are blind.

COUNT III–VIOLATION OF ADA'S
REASONABLE MODIFICATION MANDATE

24. Plaintiffs reallege paragraphs 1 through 16, as if fully set forth herein.

25. Defendant's website denying access to the Plaintiffs to use it through a screen reader violates the reasonable modifications provisions of the ADA, 42 U.S.C. § 12182(b)(2)(A)(ii), in that it constitutes a failure to make reasonable modifications to policies, practices and procedures necessary to afford access to the website to persons who are blind. Modifying its policies, practices and procedures to afford access to SOUTHWEST.COM by redesigning the web site, would not fundamentally alter the nature of SOUTHWEST.COM'S website.

COUNT IV–VIOLATION OF THE ADA'S
FULL AND EQUAL ENJOYMENT MANDATE

26. Plaintiffs reallege paragraphs 1 through 16, as if fully set forth herein.

27. Defendant's internet website violates the full and equal enjoyment and participation provisions of the ADA pertaining to access to goods and services and advantages offered by SOUTHWEST.COM (42 U.S.C. §§ 12182(a), 12182(b)(1)(A)(i), and 12182(b)(1)(A)(ii)), in that it constitutes a failure to make the website fully accessible and independently usable by individuals who are blind.

RELIEF

WHEREFORE, Plaintiffs, ACCESS NOW, INC. and ROBERT GUMSON, request this court grant the following relief:

(a) Declare that Defendant's, SOUTHWEST AIRLINES CO., actions and inactions with respect to its SOUTHWEST.COM internet website violate Title III of the ADA, 42 U.S.C. § 12182 as alleged in Counts 1–4;

(b) Enjoin Defendant, SOUTHWEST AIRLINES CO. from continuing to violate the ADA and order Defendant to make its SOUTHWEST.COM website accessible and to take such other and further steps as are necessary to allow independent access through screen access programs by persons who are blind; and

(c) Grant Plaintiffs, ACCESS NOW, INC. and ROBERT GUMSON. such other relief as the Court deems just, equitable, and appropriate, including without limitation, an award of reasonable attorneys' fees, litigation expenses and costs under 42 U.S.C. § 12205.

TRIAL BY JURY IS DEMANDED ON ALL CLAIMS SO TRIABLE.

DATED this 10th day of June, 2002.

RASCO REININGER PEREZ & ESQUENAZI, PL

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NOTE ON THE ELEMENTS OF A COMPLAINT

1. Caption and form. The complaint is the formal opening salvo of the litigation. Although the parties may have corresponded before the complaint is filed, the complaint represents the formal commencement of the case. See Fed. R. Civ. P. 3. The required format of pleadings and other papers is prescribed in part by statute, in part by rule, and in part by custom. See, e.g., Fed. R. Civ. P. 10. In general, pleadings and other papers have a caption containing the name of the court, the title of the action, the name, address, and telephone number of the attorney presenting the pleading, and a brief designation of the nature of the paper (e.g., "complaint"). Papers ordinarily must be typed and double spaced, with proper margins.

2. Body. In the body of pleadings, it is mandatory (or sometimes merely customary) to set forth allegations in separately numbered paragraphs. See, e.g., Fed. R. Civ. P. 10(b). The organization of the paragraphs is largely up to the drafter, subject to three principal considerations. First, separate claims or causes of action must be stated separately. Second, each paragraph should deal with a limited subject. Third, allegations unlikely to be contested (e.g., ownership of a car) should be stated in separate paragraphs from allegations likely to be contested (e.g., negligence of the driver). This organization permits a person responding to the pleading to admit or deny allegations efficiently and precisely.

3. The required content of the complaint. In federal court, a complaint or other claim for relief must contain three required elements: (1) "a short and plain statement of the grounds of the court's jurisdiction"; (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." See Fed. R. Civ. P. 8(a). Can you identify the portions of the complaint where the plaintiffs attempt to supply each of those elements? Where do you suppose that Paragraph 8 of the Complaint fits in the scheme of required elements?

4. Pleading subject matter jurisdiction in federal court. The requirement that the complaint in a federal court plead the basis of the court's jurisdiction reflects the fact that federal courts' subject matter jurisdiction is limited by the Constitution and by statute. For example, the outer boundaries of federal question jurisdiction are set by Article III: "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." U.S. Const. art. III, § 2, cl. 1.

But Article III is not enough by itself to confer jurisdiction. A statute conferring all or part of the constitutionally authorized jurisdiction is also required. The most important statute conferring federal question jurisdiction is 28 U.S.C. § 1331: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Comparable provisions for diversity jurisdiction are U.S. Const. art. III, § 2, cl. 1 and 28 U.S.C. § 1332(a). What is the claimed basis for the court's jurisdiction in *Access Now?*

State trial courts are typically courts of general rather than limited jurisdiction and usually do not require allegations of jurisdiction in the complaint.

5. The "claims for relief." By convention, most complaints include "claims for relief," or "counts" describing the plaintiff's legal theories. *Access Now* is typical in this regard. But this section of the complaint is not formally required. All federal Rule 8 requires, for instance, is a "short and plain statement of the claim showing that the pleader is entitled to relief." The Supreme Court has on several occasions explained that "a complaint need not pin plaintiff's claim to a precise legal theory." Skinner v. Switzer, 562 U.S. 521, 131 S.Ct. 1289, 179 L.Ed.2d 233 (2011); see also Johnson v. City of Shelby, Miss., 574 U.S. ___, 135 S.Ct. 346, 190 L.Ed.2d 309 (2014) (per curiam) (holding that the rules "do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted"). Why do you suppose the drafters of Rule 8 did not require plaintiffs to plead their legal theories? And why do you suppose most plaintiffs do so anyway?

6. Prayer for relief. At the conclusion of the complaint, plaintiff "prays" or makes a "demand" for the relief, or remedies, she seeks. See, e.g., Fed. R. Civ. P. 8(a)(3). A foundation for the prayer must be laid by appropriate allegations in the body of the complaint describing the nature and extent of the harm suffered. If the suit is contested by the defendant, the relief awarded is not limited by the amount or kind of relief sought in the prayer. But if the defendant fails to answer and a default judgment is entered, the relief will be limited to that sought in the prayer. See Fed. R. Civ. P. 54(c). What is the relief that the plaintiffs are seeking in *Access Now* and how does the complaint lay the foundation for the requested relief? For background see Chapter 1.E., An Introduction to Judicial Remedies.

7. Designation of parties. When a party is a person other than a natural person suing in his own right, the party's capacity is specifically designated. When a corporation is named, its state of incorporation is given. (In suits in federal district court in which jurisdiction is based on diversity, both the state of incorporation and the state in which the corporation has its principal place of business are given, for the corporation is a citizen of both states for purposes of the diversity statute, 28 U.S.C. § 1332.) A natural person suing or being sued in a special capacity, such as an executor, trustee, receiver, or public officer, is named in that capacity. Under older doctrine, a failure to specify the capacity of a person suing or being sued in a special capacity was a fatal error, but such a mistake is today regarded as harmless or correctable by amendment.

8. Signing and verification. Statutes or rules require that all pleadings be signed by the party or her attorney. See, e.g., Fed. R. Civ. P. 11(a). By statute or rule in some states, and by custom in others, all papers other than pleadings are signed by the attorney (or by the party if she is

unrepresented). Some jurisdictions require that all complaints be verified; that is, accompanied by an affidavit stating that the person knows, or states on information and belief, that the matters contained in the pleading are true. In other states, verification is required only for certain kinds of claims or is optional.

Access Now, Inc. v. Southwest Airlines Co.

United States District Court, Southern District of Florida, 2002.
227 F. Supp. 2d 1312.

■ SEITZ, DISTRICT JUDGE.

This matter is before the Court on Defendant Southwest Airlines, Co.'s ("Southwest") Motion to Dismiss Plaintiffs' Complaint. Plaintiffs, Access Now, Inc. ("Access Now"), a non-profit, access advocacy organization for disabled individuals, and Robert Gumson ("Gumson"), a blind individual, filed this four-count Complaint for injunctive and declaratory relief under the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101 et seq. Plaintiffs contend that Southwest's Internet website, southwest.com, excludes Plaintiffs in violation of the ADA, as the goods and services Southwest offers at its "virtual ticket counters" are inaccessible to blind persons. Southwest has moved to dismiss Plaintiffs' Complaint on the grounds that southwest.com is not a "place of public accommodation" and, therefore, does not fall within the scope of Title III of the ADA. The Court has considered the parties' thorough papers, the extremely informative argument of counsel, and the exhibits presented during oral argument. For the reasons stated below, The Court will grant Southwest's motion to dismiss.

Background

Having found that nearly forty-three million Americans have one or more mental or physical disabilities, that such individuals continually encounter various forms of discrimination, and that "the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous," Congress enacted the ADA in 1990. Congress' stated purposes in enacting the ADA were, among other things, to provide "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities," and "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." Among the statutorily created rights embodied within the ADA, is Title III's prohibition against discrimination in places of public accommodation. 42 U.S.C. § 12182(a).

Since President George Bush signed the ADA into law on July 26, 1990, this Nation, as well the rest of the world, has experienced an era of rapidly changing technology and explosive growth in the use of the Internet. Today, millions of people across the globe utilize the Internet on a regular basis for communication, news gathering, and commerce. Although this increasingly widespread and swiftly developing technology provides great benefits for the vast majority of Internet users, individuals who suffer from various physical disabilities may be unable to access the goods and services offered on many Internet websites. According to

Plaintiffs, of the nearly ten million visually impaired persons in the United States, approximately 1.5 million of these individuals use the Internet.

In an effort to accommodate the needs of the visually impaired, a number of companies within the computer software industry have developed assistive technologies, such as voice-dictation software, voice-navigation software, and magnification software to assist visually impaired persons in navigating through varying degrees of text and graphics found on different websites. However, not only do each of the different assistive software programs vary in their abilities to successfully interpret text and graphics, but various websites also differ in their abilities to allow different assistive technologies to effectively convert text and graphics into meaningful audio signals for visually impaired users. This lack of coordination between programmers and assistive technology manufacturers has created a situation where the ability of a visually impaired individual to access a website depends upon the particular assistive software program being used and the particular website being visited.

In light of this rapidly developing technology, and the accessibility problems faced by numerous visually impaired Internet users, the question remains whether Title III of the ADA mandates that Internet website operators modify their sites so as to provide complete access to visually impaired individuals.[3] Because no court within this Circuit has squarely addressed this issue, the Court is faced with a question of first impression, namely, whether Southwest's Internet website, southwest.com, is a place of public accommodation as defined by the ADA, and if so, whether Title III of the ADA requires Southwest to make the goods and services available at its "virtual ticket counters" accessible to visually impaired persons.

Southwest, the fourth largest U.S. airline (in terms of domestic customers carried), was the first airline to establish a home page on the Internet. See Southwest Airlines Fact Sheet, at http://www.southwest.com/about_swa/press/factsheet.html (Last visited Oct. 16, 2002). Southwest's Internet website, southwest.com, provides consumers with the means to, among other things, check airline fares and schedules, book airline, hotel, and car reservations, and stay informed of Southwest's sales and promotions. Employing more than 35,000 employees, and conducting approximately 2,800 flights per day, Southwest reports that "approximately 46 percent, or over $500 million, of its passenger revenue for first quarter 2002 was generated by online bookings via southwest.com." Id. According to Southwest, "more than 3.5 million people subscribe to Southwest's weekly Click 'N Save e-mails,' " Id. Southwest prides itself on operating an Internet website that provides

[3] Some commentators, while recognizing the paucity of case law in this area, have suggested that Internet websites fall within the scope of the ADA. See, e.g. Jeffrey Scott Raneu, Note, Was Blind But Now I See: The Argument for ADA Applicability to the Internet, 22 B.C. Third World L.J. 389 (2002); Adam M. Schloss, Web-Sight for Visually-Disabled People; Does Title III of the Americans with Disabilities Act Apply to Internet Websites?, 35 Colum. J.L. & Soc. Probs. 35 (2001); Matthew A. Stowe, Note, Interpreting "Place of Public Accommodation" Under Title III of the ADA: A Technical Determination with Potentially Broad Civil Rights Implications, 50 Duke L.J. 297 (2000); Jonathan Bick, Americans with Disabilities Act and the Internet, 10 Alb. L.J. Sci. & Tech. 205 (2000).

"the highest level of business value, design effectiveness, and innovative technology use achievable on the Web today." Id.

Despite the apparent success of Southwest's website, Plaintiffs contend that Southwest's technology violates the ADA, as the goods and services offered on southwest.com are inaccessible to blind persons using a screen reader.[4] (Compl. ¶ 4). Plaintiffs allege that although "southwest.com offers the sighted customer the promise of independence of on-line airline/hotel booking in the comfort and safety of their home . . . even if a blind person like [Plaintiff] Gumson has a screen reader with a voice synthesizer on their computer, they are prevented from using the southwest.com website because of its failure to allow access" (Compl. ¶ 4). Specifically, Plaintiffs maintain that "the southwest.com website fails to provide 'alternative text' which would provide a 'screen reader' program the ability to communicate via synthesized speech what is visually displayed on the website." (Compl. ¶ 11). Additionally, Plaintiffs assert that the southwest.com website "fails to provide online forms which can be readily filled out by [Plaintiffs] and fails to provide a 'skip navigation link' which facilitates access for these blind consumers by permitting them to bypass the navigation bars on a website and proceed to the main content." (Compl. ¶ 12).

Plaintiffs' four-count Complaint seeks a declaratory judgment that Southwest's website violates the communication barriers removal provision of the ADA (Count I), violates the auxiliary aids and services provision of the ADA (Count II), violates the reasonable modifications provisions of the ADA (Count III), and violates the full and equal enjoyment and participation provisions of the ADA (Count IV).[5] Plaintiffs ask this Court to enjoin Southwest from continuing to violate the ADA, to order Southwest to make its website accessible to persons who are blind, and to award Plaintiffs attorneys' fees and costs. Southwest has moved to dismiss Plaintiffs' Complaint pursuant to Fed. R. Civ. P. 12(b)(6). The Court has federal question jurisdiction over this matter pursuant to 28 U.S.C. § 1331.

Discussion

A. Standard of Review

Federal Rule of Civil Procedure 12(b)(6) provides that dismissal of a claim is appropriate when "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Blackston v. Alabama, 30 F.3d 117, 120 (11th Cir. 1994) (quoting Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984)). At this stage of the case, the Court must accept Plaintiffs' allegations in the Complaint as true and view those allegations in a light most favorable to Plaintiffs to determine whether the Complaint fails to

[4] Plaintiffs claim that although purchasing tickets at southwest.com is "technically possible, plaintiffs found purchasing a ticket to be extremely difficult . . ." (Compl. at 7). Plaintiffs do not argue that they are unable to access such goods and services via alternative means such as telephone or by visiting a particular airline ticket counter or travel agency.

[5] Plaintiffs' Counsel informed the Court that Plaintiffs made no effort to resolve this dispute prior to filing their Complaint. Although the law does not require Plaintiffs to confer with Southwest prior to filing this action, in light of Plaintiffs' Counsel's discussion of the proactive measures that other companies, such as Amazon.com, have taken to modify their websites to make them more accessible to visually impaired persons, it is unfortunate that Plaintiffs made no attempt to resolve this matter before resorting to litigation.

state a claim for relief. S & Davis Int'l, Inc. v. Republic of Yemen, 218 F.3d 1292, 1298 (11th Cir. 2000).

B. Plaintiffs Have Failed to State a Claim Upon Which Relief Can be Granted

The threshold issue of whether an Internet website, such as southwest.com, is a "place of public accommodation" as defined by the ADA, presents a question of statutory construction. As in all such disputes, the Court must begin its analysis with the plain language of the statute in question. Rendon v. Valleycrest Prods., Ltd., 294 F.3d 1279, 1283 n. 6 (11th Cir. 2002) (citing Kmart v. Cartier, Inc., 486 U.S. 281, 291, 108 S.Ct. 1811, 100 L.Ed.2d 313 (1988)). The "first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." Rendon, 294 F.3d at 1283 n. 6. (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 340, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997)). A court need look no further where the statute in question provides a plain and unambiguous meaning. Rendon, 294 F.3d at 1283 n.6.

1. Southwest.com is Not a "Place of Public Accommodation" as Defined by the Plain and Unambiguous Language of the ADA

Title III of the ADA sets forth the following general rule against discrimination in places of public accommodation:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any *place of public accommodation* by any person who owns, leases (or leases to), or operates a *place of public accommodation*.
>
> 42 U.S.C. § 12182 (a) (emphasis added).

The statute specifically identifies twelve (12) particularized categories of "places of public accommodation." 42 U.S.C. § 12181(7). "Public accommodations" include:

> (A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;
>
> (B) a restaurant, bar, or other establishment serving food or drink;
>
> (C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
>
> (D) an auditorium, convention center, lecture hall, or other place of public gathering;
>
> (E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;
>
> (F) a laundromat dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance

> office, professional office of a health care provider, hospital, or other service establishment;,
>
> (G) a terminal, depot, or other station used for specified public transportation;
>
> (H) a museum, library, gallery, or other place of public display or collection;
>
> (I) a park, zoo, amusement park, or other place of recreation;
>
> (J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
>
> (K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
>
> (L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

42 U.S.C. § 12181(7).

Furthermore, pursuant to Congress' grant of authority to the Attorney General to issue regulations to carry out the ADA, the applicable federal regulations also define a "place of public accommodation" as "a facility, operated by a private entity, whose operations affect commerce and fall within at least one of the [twelve (12) enumerated categories set forth in 42 U.S.C. § 12181(7).]" 28 C.F.R. § 36.101.[6] Section 36.104 defines "facility" as "all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located." 28 C.F.R. § 36.104. In interpreting the plain and unambiguous language of the ADA, and its applicable federal regulations, the Eleventh Circuit has recognized Congress' clear intent that Title III of the ADA governs solely access to physical, concrete places of public accommodation. Rendon, 294 F.3d at 1283–84; Stevens v. Premier Cruises, Inc., 215 F.3d 1237, 1241 (11th Cir. 2000) (noting that "because Congress has provided such a comprehensive definition of 'public accommodation,' we think that the intent of Congress is clear enough"). Where Congress has created specifically enumerated rights and expressed the intent of setting forth "clear, strong, consistent, enforceable standards," courts must follow the law as written and wait for Congress to adopt or revise legislatively-defined standards that apply to those rights. Here, to fall within the scope of the ADA as presently drafted, a public accommodation must be a physical, concrete structure. To expand the ADA to cover "virtual" spaces would be to create new rights without well-defined standards.

Notwithstanding the fact that the plain and unambiguous language of the statute and relevant regulations does not include Internet websites among the definitions of "places of public accommodation," Plaintiffs allege that the southwest.com website falls within the scope of Title III,

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[6] The Court may consider the C.F.R. definitions, as Congress specifically directed the Attorney General to "issue regulations in an accessible format to carry out the provisions of [the ADA] . . . that include standards applicable to facilities and vehicles covered under section 12182 of [the ADA.]" 42 U.S.C. § 12186(b).

in that it is a place of "exhibition, display and a sales establishment." (Compl. ¶ 9). Plaintiffs' argument rests on a definition they have created by selecting language from three separate statutory subsections of 42 U.S.C. § 12181(7). See § 42 U.S.C. §§ 12181(7)(C), (H) & (E).[7] While Plaintiffs can, as advocates, combine general terms from three separate statutory subsections, and apply them to an unenumerated specific term, namely Internet websites, the Court must view these general terms in the specific context in which Congress placed each of them.

Under the rule of *ejusdem generis*, "where general words follow a specific enumeration of persons or things, the general words should be limited to persons or things similar to those specifically enumerated." Allen v. A.G. Thomas, 161 F.3d 667, 671 (11th Cir. 1998) (quoting United States v. Turkette, 452 U.S. 576, 581–82, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981)). Here, the general terms, "exhibition," "display," and "sales establishment," are limited to their corresponding specifically enumerated terms, all of which are physical, concrete structures, namely: "motion picture house, theater, concert hall, stadium"; and "museum, library, gallery"; and "bakery, grocery store, clothing store, hardware store, shopping center," respectively. 42 U.S.C. §§ 12181(7)(C), (H) & (E). Thus, this Court cannot properly construe "a place of public accommodation" to include Southwest's Internet website, SOUTHWEST.COM.

2. Plaintiffs Have Not Established a Nexus Between Southwest.com and a Physical, Concrete Place of Public Accommodation

Although Internet websites do not fall within the scope of the ADA's plain and unambiguous language, Plaintiffs contend that the Court is not bound by the statute's plain language, and should expand the ADA's application into cyberspace.[8] As part of their argument, Plaintiffs encourage the Court to follow Carparts Distribution Ctr., Inc. v. Automotive Wholesaler's Assoc. of New England, in which the First Circuit broadly held that the ADA's definition of "public accommodation" is not limited to actual physical structures, but includes, *inter alia*, health-benefit plans. *Carparts*, 37 F.3d 12, 19 (1st Cir. 1994).[9] While

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[7] Plaintiffs created definition from the following italicized language in three subsection of 42 U.S.C. § 12181(7);

> "a motion picture house, theater, concert hall, stadium, or other *place of exhibition* or entertainment," 42 U.S.C. § 12181(7)(C);
>
> "a museum, library, gallery, or other place of public *display* or collection," 42 U.S.C. § 12181(7)(H);
>
> and "a bakery, grocery store, clothing store, hardware store, shopping center, or other *sales* or rental *establishment*," 42 U.S.C. § 12181(7)(E).

[8] Plaintiffs concede that neither the legislative history of the ADA nor the plain language of the statute and applicable federal regulations, contain any specific reference to the Internet or cyberspace.

[9] Although *Carparts* does not explicitly address the issue of whether an Internet website falls within the definition of "public accommodation," Plaintiffs focus on the First Circuit's dicta discussing the public policy reasons for why the ADA's definition of "public accommodations" should be read broadly:

> By including "travel service" among the list of services considered "public accommodations," Congress clearly contemplated that "service establishment" include providers of services which do not require a person no physically enter an actual physical structure. Many travel services conduct by telephone or correspondence

application of the broad holding and dicta in *Carparts* to the facts in this case might arguably require this Court to include Internet websites within the ADA's definition of "public accommodations," the Eleventh Circuit has not read Title III of the ADA nearly as broadly as the First Circuit.[10] See *Rendon*, 294 F.3d 1279.

In *Rendon*, a recent Eleventh Circuit case addressing the scope of Title III, a group of individuals with hearing and upper-body mobility impairments sued the producers of the television game show, "Who Wants To Be A Millionaire," alleging that the use of an automated fast finger telephone selection process violated the ADA because it excluded disabled individuals from participating. The district court dismissed the complaint on grounds that the automated telephone selection process was not conducted at a physical location, and therefore, was not a "place of public accommodation" as defined by the ADA. The Eleventh Circuit reversed, holding that the telephone selection process was "a discriminatory screening mechanism . . . which deprives [the plaintiffs] of the opportunity to compete for the privilege of being a contestant on the [game show]." *Rendon*, 294 F.3d at 1286. The Eleventh Circuit

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> without requiring their customers to enter an office in order to obtain their services. Likewise, one can easily imagine the existence of other service establishments conducting business by mail and without providing facilities for their customers to enter in order to utilize their services. It would be irrational to conclude that persons who enter an office to purchase service are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not. Congress could not have intended such an absurd result.

Carparts, 37 F.3d at 19.

[10] In addition to *Carparts*, Plaintiffs encourage this Court to follow Doe v. Mutual of Omaha Ins. Co., 179 F.3d 557 (7th Cir. 1999), in which Chief Judge Posner approvingly cited to *Carparts* and stated in dicta that;

> The core meaning of [42 U.S.C. § 12182(a)], plainly enough, is that the owner or operator of a store, hotel, restaurant, dentist's office, travel agency, theater, Website, or other facility (whether in physical space or in electronic space, [*Carparts*]), that is open to the public cannot exclude disabled persons from entering the facility and, once in, from using the facility in the same way that the nondisabled do.

Plaintiffs also cite to a September 9, 1996 letter from Deval L. Patrick, Assistant Attorney General, Civil Rights Division, United States Department of Justices, to U.S. Senator Tom Harkin, advising the Senator that "covered entities that use the Internet for communications regarding their programs, goods, or services must be prepared to offer those communications through accessible means as well." Finally Plaintiffs cite the recent unpublished opinion in Vincent Martin et al. v. Metro Atlanta Rapid Transit Authority, 225 F. Supp. 2d 1362, 2002 (N.D. Ga. 2002), in which U.S. District Judge Thomas W. Thrash, Jr. held that until the Metropolitan Atlanta Rapid Transit Authority ("MARTA") reformats its Internet website in such a way that it can be read by visually impaired persons using screen readers, MARTA is "violating the ADA mandate of making adequate communications capacity available, through accessible formats and technology, to enable users to obtain information and schedule service." Vincent Martin et. al. v. Metro. Atlanta Rapid Transit Authority, 225 F. Supp. 2d 1362, 1374 (N.D. Ga. Oct. 7, 2002) (quoting 49 C.F.R. § 37.167(f)). That case, however, is distinguishable in one critical respect: Plaintiffs in *Vincent Martin* filed suit under both the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794 et seq., and Title II of the ADA, 42 U.S.C. 12132, not Title III as in the present case. Title II prohibits qualified individuals from being "excluded from participation in or [being] denied the benefits of the services, programs, activities of a public entity, or [being] subjected to discrimination by any such entity." 42 U.S.C. § 12132. Title II of the ADA defines "public entity" as "(A) any State or local government; (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and (C) the National Railroad Passenger Corporation, and any commuter authority. . . ." 42 U.S.C. § 12131. Because the present case deals with Title III, not Title II of the ADA, and Plaintiffs could not allege any facts that would place Southwest within the definition of a "public entity" under Title II, *Vincent Martin* is inapplicable.

observed that "there is nothing in the text of the statute to suggest that discrimination via an imposition of screening or eligibility requirements must occur on site to offend the ADA." Id. at 1283–84. Most significantly, the Eleventh Circuit noted that the plaintiffs stated a claim under Title III because they demonstrated "a nexus between the challenged service and the premises of the public accommodation," namely the concrete television studio. Id. at 1284 n. 8.

Plaintiffs contend that the Eleventh Circuit in *Rendon* aligned itself with the First Circuit in Carparts, and that *Rendon* requires a broad reading of the ADA to include Internet websites within the "public accommodations" definition. However, these arguments, while emotionally attractive, are not legally viable for at least two reasons. First, contrary to Plaintiffs' assertion that the Eleventh Circuit aligned itself with *Carparts*, the Eleventh Circuit in *Rendon* not only did not approve of *Carparts*, it failed even to cite it.

Second, whereas the defendants in *Rendon* conceded, and the Eleventh Circuit agreed, that the game show at issue took place at a physical, public accommodation (a concrete television studio), and that the fast finger telephone selection process used to select contestants tended to screen out disabled individuals, the Internet website at issue here is neither a physical, public accommodation itself as defined by the ADA, nor a means to accessing a concrete space such as the specific television studio in *Rendon*.[11] 294 F.3d at 1284. Although Plaintiffs contend that this "is a case seeking equal access to Southwest's virtual 'ticket counters' as they exist on-line," the Supreme Court and the Eleventh Circuit have both recognized that the Internet is "a unique medium—known to its users as 'cyberspace'—*located in no particular geographical location* but available to anyone, anywhere in the world, with access to the Internet." Voyeur Dorm, L.C. v. City of Tampa, 265 F.3d 1232, 1237 n.3 (11th Cir. 2001) (quoting Reno v. ACLU, 521 U.S. 844, 851, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997)). Thus, because the Internet website, southwest.com, does not exist in any particular geographical location, Plaintiffs are unable to demonstrate that Southwest's website impedes their access to a specific, physical, concrete space such as a particular airline ticket counter or travel agency.[12] Having failed to establish a nexus between southwest.com and a physical, concrete place of public accommodation, Plaintiffs have failed to state a claim upon which relief can be granted under Title III of the ADA.[13]

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[11] In recognizing the requirement that a plaintiff establish "a nexus between the challenged service and the premises of the public accommodation," the Eleventh Circuit noted that the plaintiffs in *Rendon* stated a claim under Title III of the ADA because they sought "the privilege of competing in a contest held in a *concrete space* . . ." *Rendon*, 294 F.3d at 1284 (emphasis added).

[12] It is important to note that aircrafts are explicitly exempt from Title III of the ADA. 42 U.S.C. § 12181(10). Plaintiffs do not argue that Southwest's website impedes their access to aircrafts.

[13] Given the number of visually impaired persons who utilize the Internet for commerce, and the significant amount of business that Southwest obtains through its Internet website, it is unfortunate that the parties have not cooperated to develop a creative solution that benefits both parties and which avoids the costs and polarizing effects of litigation. It is especially surprising that Southwest, a company which prides itself on its consumer relations, has not voluntarily seized the opportunity to employ all available technologies to expand accessibility to its website for visually impaired customers who would be an added source of revenue. That

Conclusion

Accordingly, based upon the foregoing reasons, it is hereby

ORDERED that Defendant Southwest's Motion to Dismiss Plaintiffs' Complaint is GRANTED, and this action is DISMISSED WITH PREJUDICE. All pending motions not otherwise ruled upon are denied as moot, and this case is CLOSED.

NOTE ON DEVICES FOR CHALLENGING THE SUBSTANTIVE SUFFICIENCY OF A COMPLAINT

1. The procedural requirements for a sufficient complaint. As noted above, Rule 8(a) specifies the required components of a pleading in federal court. What component of the plaintiff's complaint in *Access Now* does the defendant contend is defective?

2. Devices for testing legal sufficiency: the motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6). In federal court, and in state courts following the federal Rules, the legal sufficiency of a complaint's allegations is tested by a motion under Rule 12(b)(6) to dismiss for failure to state a claim upon which relief can be granted. Indeed, the "12(b)(6) motion" is common parlance for litigators. A motion to dismiss under Rule 12(b)(6) admits the truth of the allegations of the complaint, for purposes of the motion only, and in ruling on the motion the court must treat them as true. Moreover, where the complaint is ambiguous or permits different readings, the court ruling on the motion is required to construe it in favor of the pleader. If the motion is denied and the suit proceeds, the defendant may later challenge the factual allegations of the complaint as unsupported by the evidence. Did the court properly apply these standards in judging the substantive sufficiency of the complaint in *Access Now?*

In code pleading states, the function served by the Rule 12(b)(6) motion is filled by the demurrer. A demurrer is in essence a motion directed to the face of the complaint. The so-called general demurrer is a motion asserting that the "pleading does not state facts sufficient to constitute a cause of action." Calif.C.Civ.P. § 430.10(e). A general demurrer is described in Raneri v. DePolo, 441 A.2d 1373, 1375, 65 Pa. Cmwlth. 183 (1982):

> A demurrer, which tests a complaint's legal sufficiency, is an assertion that the pleading does not set forth a cause of action upon which relief can be granted . . . and admits every well-pleaded material fact plus all reasonable inferences therefrom. . . . [Plaintiff] is not required here to prove his cause of action; the only issue now before us is whether or not the allegations, if proved, are sufficient to entitle the plaintiff to relief.

In modern federal and code pleading practice, the defendant retains the right to challenge the factual sufficiency of the evidence supporting the complaint if the challenge to legal sufficiency fails. It was not always so. The

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being said, in light of the rapidly developing technology at issue, and the lack of well-defined standards for bringing a virtually infinite number of Internet websites into compliance with the ADA, a precondition for taking the ADA into "virtual" space is a meaningful input from all interested parties via the legislative process. As Congress has created the statutory defined rights under the ADA, it is the role of Congress, and not this Court, to specifically expand the ADA's definition of "public accommodation" beyond physical, concrete places of public accommodation, to include "virtual" places of public accommodation.

early common law demurrer required defendant to elect between the two options. In order to demur generally (that is, to challenge the legal sufficiency of the complaint), a defendant was required to admit *conclusively* the factual allegations of the plaintiff. If the defendant prevailed on the demurrer, judgment could be entered in his favor. But if he lost on the issue of law, then judgment would be entered against him, because he would be deemed to have admitted the truth of plaintiff's claim. Why do you suppose the requirement that defendant elect between challenging legal and factual sufficiency was eliminated?

3. The measure of substantive sufficiency. The substantive "elements" of a sufficient complaint are well established for most commonly recurring claims. When the claim is based on judge-made common law, in most jurisdictions there are cases that recite the elements of a particular type of claim. See Hazard, Leubsdorf & Bassett, Civil Procedure § 4.8 (6th ed. 2011).

When the substantive law governing the claim is statutory, the method for deriving the elements begins with the statutory language. How does the court derive the required elements of a claim from the statutory language in *Access Now*? What element or elements of the claim does the defendant contend has not been pleaded? What other sources of law does the court consider in addition to the language itself in deciding whether that element has been pleaded? If you had to characterize the issue decided in *Access Now* as one of fact or law, which characterization would you think was more nearly correct?

4. The substantive law. Did the *Access Now* court get the substantive law right? The substantive question resolved in *Access Now* has now been considered by another federal district court, which sustained the plaintiff's complaint against a motion to dismiss. National Federation of the Blind v. Target Corp., 452 F. Supp. 2d 946 (N.D. Cal. 2006). The pertinent part of the court's decision reads as follows:

> Defendant contends that Target.com is not a place of public accommodation within the meaning of the ADA, and therefore plaintiffs cannot state a claim under the ADA. Specifically, defendant claims that the complaint is deficient because it does not allege that "individuals with vision impairments are denied access to one of Target's brick and mortar stores or the goods they contain." However, the complaint states that "due to Target's failure and refusal to remove access barriers to Target.com, blind individuals have been and are being denied equal access to Target stores, as well as to the numerous goods, services and benefits offered to the public through Target.com." Complaint P 24. Plaintiffs' legal theory is that unequal access to Target.com denies the blind the full enjoyment of the goods and services offered at Target stores, which are places of public accommodation.
>
> Defendant contends that even if Target.com is the alleged service of Target stores, plaintiffs still do not state a claim because they fail to assert that they are denied physical access to Target stores. * * * *
>
> The case law does not support defendant's attempt to draw a false dichotomy between those services which impede physical

> access to a public accommodation and those merely offered by the facility. Such an interpretation would effectively limit the scope of Title III to the provision of ramps, elevators and other aids that operate to remove physical barriers to entry. Although the Ninth Circuit has determined that a place of public accommodation is a physical space, the court finds unconvincing defendant's attempt to bootstrap the definition of accessibility to this determination, effectively reading out of the ADA the broader provisions enacted by Congress. In *Rendon* [*v. Valleycrest Prods, Inc.*], even though the disabled individual did not contest the actual physical barriers of the facility in question, the Eleventh Circuit found that Title III was implicated because a "discriminatory procedure that deprived [the individual] of the opportunity to compete to be a contestant * * * *at* a place of public accommodation" was utilized. *Rendon*, 294 F.3d at 1281 (emphasis added). Similarly, in the present action, plaintiffs have alleged that the inaccessibility of Target.com denies the blind the ability to enjoy the services of Target stores. The Ninth Circuit has stated that the "ordinary meaning" of the ADA's prohibition against "discrimination in the enjoyment of goods, services, facilities or privileges, is 'that *whatever* goods or services the place provides, it cannot discriminate on the basis of disability in providing enjoyment of those goods and services.' " Defendant's argument is unpersuasive and the court declines to dismiss the action for failure to allege a denial of physical access to the Target stores.

452 F. Supp. 2d 946, 951–52, 955. Does the difference in outcomes between *Access Now* and *National Federation of the Blind* reflect a difference in what was pleaded in the two cases or a different view of the applicable substantive law?

District courts continue to remain divided over whether a website itself may be a place of public accommodation even if there is no plausible nexus to a physical location. In National Association of the Deaf v. Netflix, Inc., 869 F. Supp. 2d 196 (D. Mass. 2012), deaf and hearing-impaired plaintiffs sued Netflix under the ADA for discrimination on the ground that only a small portion of its content provided closed captioning. The district court rejected the defendant's 12(b)(6) motion, which was premised on the argument that Netflix's in-home video-streaming service was not a place of public accommodation:

> Plaintiffs convincingly argue that the Watch Instantly web site falls within at least one, if not more, of the enumerated ADA categories. The web site may qualify as: a "service establishment" in that it provides customers with the ability to stream video programming through the internet; a "place of exhibition or entertainment" in that it displays movies, television programming, and other content; and a "rental establishment" in that it engages customers to pay for the rental of video programming.

Id. at. 200.

Conversely, in dealing with a virtually identical lawsuit against Netflix, a California district court dismissed the plaintiff's ADA claim under Rule 12(b)(6) on the ground that "websites are not places of public

accommodations under the ADA because they are not actual physical places." Cullen v. Netflix, 880 F. Supp. 2d 1017 (N.D. Cal. 2012). See also Young v. Facebook, Inc., 790 F. Supp. 2d 1110 (N.D. Cal. 2011) (dismissing ADA claim against Facebook because it "operates only in cyberspace and is thus not 'a place of public accommodation' ").

5. Leave to amend. If the court grants a motion to dismiss under Rule 12(b)(6), the plaintiff is routinely given leave to amend the complaint. The rationale behind granting leave to amend is to ensure that the failure to plead the missing element or elements reflects a real lack of proof available to the plaintiff, rather than remediable error or inadvertence. Under such circumstances, a plaintiff should not lose the opportunity to litigate a meritorious claim due to a curable deficiency in the complaint. Failure to grant leave to amend at least once is almost invariably held an abuse of discretion, unless it is certain that any amendment would be futile. The measure of indulgence varies from jurisdiction to jurisdiction, but on the whole it is quite generous. Federal courts are likely to grant leave to amend even when the proposed amendments are inconsistent with the original allegations in the complaint. See West Run Student Housing Associates v. Huntington National Bank, 712 F.3d 165 (3d Cir. 2013).

For a description of federal practice under Rule 12(b)(6), see, e.g., Bausch v. Stryker Corp., 630 F.3d 546 (7th Cir. 2010) (denial of motions for leave to amend are disfavored). According to the subsequent opinion in the court of appeals, Access Now, Inc. v. Southwest Airlines Co., 385 F.3d 1324, 1331 n.3 (11th Cir. 2004), the plaintiffs did not seek leave to amend their complaint. Had they done so, it would presumably have been an abuse of discretion for the district court to deny at least one such opportunity.

6. What next for the plaintiff? When, as in *Access Now*, the dismissal of the complaint for failure to state a claim leaves plaintiff with no remaining viable theory on which relief can be sought, plaintiff is entitled to appeal from the court's final judgment dismissing the action. Because the question is one of law, the reviewing court will apply a de novo standard of review. In *Access Now*, the court of appeals dismissed the plaintiff's appeal. 385 F.3d 1324 (11th Cir. 2004). The plaintiff's principal argument on appeal was that its complaint should have been sustained because it had pleaded that Southwest.com was a "nexus" to Southwest Airlines, which was itself a "travel service" within the meaning of 42 U.S.C. § 12181(7)(F). The court of appeals responded to this argument by refusing to consider the merits: "[T]he claim presented to the district court—that Southwest.com is itself a place of public accommodation—appears to us to have been abandoned on appeal, and a new (and fact-specific) theory—that Southwest.com has a 'nexus' to Southwest Airlines' 'travel service'—has been raised for the first time on appeal." 385 F.3d at 1329. The court refused to consider either theory, on the ground that the first had been abandoned, while the second had not been pleaded or argued in the lower court. Rereading the complaint in the light most favorable to the plaintiff, and considering the district court's discussion of *Rendon*, do you agree with the court of appeals that the plaintiff's "nexus" theory was not adequately pleaded or argued in the district court? Was the failure of plaintiff's counsel to seek leave to amend in the district court a serious error in judgment?

C. ALLOCATING THE BURDEN OF PLEADING

Gomez v. Toledo

Supreme Court of the United States, 1980.
446 U.S. 635, 100 S.Ct. 1920, 64 L.Ed.2d 572.

■ MR. JUSTICE MARSHALL delivered the opinion of the Court.

The question presented is whether, in an action brought under 42 U.S.C. § 1983 against a public official whose position might entitle him to qualified immunity, a plaintiff must allege that the official has acted in bad faith in order to state a claim for relief or, alternatively, whether the defendant must plead good faith as an affirmative defense.

I

Petitioner Carlos Rivera Gomez brought this action against respondent, the Superintendent of the Police of the Commonwealth of Puerto Rico, contending that respondent had violated his right to procedural due process by discharging him from employment with the Police Department's Bureau of Criminal Investigation. Basing jurisdiction on 28 U.S.C. § 1343(3),[2] petitioner alleged the following facts in his complaint.[3] Petitioner had been employed as an agent with the Puerto Rican police since 1968. In April 1975, he submitted a sworn statement to his supervisor in which he asserted that two other agents had offered false evidence for use in a criminal case under their investigation. As a result of this statement, petitioner was immediately transferred from the Criminal Investigation Corps for the Southern Area to Police Headquarters in San Juan, and a few weeks later to the Police Academy in Gurabo, where he was given no investigative authority. In the meantime respondent ordered an investigation of petitioner's claims, and the Legal Division of the Police Department concluded that all of petitioner's factual allegations were true.

In April 1976, while still stationed at the Police Academy, petitioner was subpoenaed to give testimony in a criminal case arising out of the evidence that petitioner had alleged to be false. At the trial petitioner, appearing as a defense witness, testified that the evidence was in fact false. As a result of this testimony, criminal charges, filed on the basis of information furnished by respondent, were brought against petitioner for the allegedly unlawful wiretapping of the agents' telephones. Respondent suspended petitioner in May 1976 and discharged him without a hearing in July. In October, the District Court of Puerto Rico found no probable cause to believe that petitioner was guilty of the allegedly unlawful wiretapping and, upon appeal by the prosecution, the Superior Court affirmed. Petitioner in turn sought review of his discharge before the Investigation, Prosecution, and Appeals Commission of Puerto Rico,

[2] That section grants the federal district courts jurisdiction "[t]o redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

[3] At this stage of the proceedings, of course, all allegations of the complaint must be accepted as true.

which, after a hearing, revoked the discharge order rendered by respondent and ordered that petitioner be reinstated with back pay.

Based on the foregoing factual allegations, petitioner brought this suit for damages, contending that his discharge violated his right to procedural due process, and that it had caused him anxiety, embarrassment, and injury to his reputation in the community. In his answer, respondent denied a number of petitioner's allegations of fact and asserted several affirmative defenses. Respondent then moved to dismiss the complaint for failure to state a cause of action, see Fed. Rule Civ. Proc. 12(b)(6), and the District Court granted the motion. Observing that respondent was entitled to qualified immunity for acts done in good faith within the scope of his official duties, it concluded that petitioner was required to plead as part of his claim for relief that, in committing the actions alleged, respondent was motivated by bad faith. The absence of any such allegation, it held, required dismissal of the complaint. The United States Court of Appeals for the First Circuit affirmed. 602 F.2d 1018 (1979).

* * *

II

Section 1983 provides a cause of action for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" by any person acting "under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory." 42 U.S.C. § 1983.[6] This statute, enacted to aid in " 'the preservation of human liberty and human rights,' " Owen v. City of Independence, 445 U.S. 622, 636 (1980), quoting Cong.Globe, 42d Cong., 1st Sess., App. 68 (1871) (Rep. Shellabarger), reflects a congressional judgment that a "damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees," 445 U.S., at 651, 100 S.Ct., at 1415. As remedial legislation, § 1983 is to be construed generously to further its primary purpose. See 445 U.S., at 636.

In certain limited situations, we have held that public officers are entitled to a qualified immunity from damages liability under § 1983. This conclusion has been based on an unwillingness to infer from legislative silence a congressional intention to abrogate immunities that were both "well-established at common law" and "compatible with the purposes of the Civil Rights Act." 445 U.S., at 638. Findings of immunity have thus been "predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the intentions behind it." Imbler v. Pachtman, 424 U.S. 409, 421 (1976). In Pierson v. Ray, 386 U.S. 547, 555 (1967), for example, we concluded that a police officer would be "excus[ed] from liability for acting under a statute that he reasonably believed to be valid but that was later held unconstitutional, on its face or as applied." And in other contexts we have held, on the basis of "[c]ommon-law tradition . . . and strong public-policy reasons," Wood v. Strickland, 420 U.S. 308, 318 (1975), that certain

[6] Section 1983 provides in full: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the person injured in an action at law, suit in equity, or other proper proceeding for redress."

categories of executive officers should be allowed qualified immunity from liability for acts done on the basis of an objectively reasonable belief that those acts were lawful. * * *

Nothing in the language or legislative history of § 1983, however, suggests that in an action brought against a public official whose position might entitle him to immunity if he acted in good faith, a plaintiff must allege bad faith in order to state a claim for relief. By the plain terms of § 1983, two—and only two—allegations are required in order to state a cause of action under that statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law. See Monroe v. Pape, 365 U.S. 167 (1961). Petitioner has made both of the required allegations. He alleged that his discharge by respondent violated his right to procedural due process, see Board of Regents v. Roth, 408 U.S. 564 (1972), and that respondent acted under color of Puerto Rican law. See Monroe v. Pape, supra, at 172–187.

Moreover, this Court has never indicated that qualified immunity is relevant to the existence of the plaintiff's cause of action; instead we have described it as a defense available to the official in question. See Procunier v. Navarette, 434 U.S. 555, at 562 (1978); Pierson v. Ray, supra, 386 U.S. 547, at 556, 557 (1967); Butz v. Economou, 438 U.S. 478, 508 (1978). Since qualified immunity is a defense, the burden of pleading it rests with the defendant. See Fed. Rule Civ.Proc. 8(c) (defendant must plead any "matter constituting an avoidance or affirmative defense"); 5 C. Wright & A. Miller, Federal Practice and Procedure § 1271 (1969). It is for the official to claim that his conduct was justified by an objectively reasonable belief that it was lawful. We see no basis for imposing on the plaintiff an obligation to anticipate such a defense by stating in his complaint that the defendant acted in bad faith.

Our conclusion as to the allocation of the burden of pleading is supported by the nature of the qualified immunity defense. As our decisions make clear, whether such immunity has been established depends on facts peculiarly within the knowledge and control of the defendant. Thus we have stated that "[i]t is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct." Scheuer v. Rhodes, [416 U.S. 232] at 247–248 (1974). The applicable test focuses not only on whether the official has an objectively reasonable basis for that belief, but also on whether "[t]he official himself [is] acting sincerely and with a belief that he is doing right," Wood v. Strickland, supra, 420 U.S. 308, at 321(1975). There may be no way for a plaintiff to know in advance whether the official has such a belief or, indeed, whether he will even claim that he does. The existence of a subjective belief will frequently turn on factors which a plaintiff cannot reasonably be expected to know. For example, the official's belief may be based on state or local law, advice of counsel, administrative practice, or some other factor of which the official alone is aware. To impose the pleading burden on the plaintiff would ignore this elementary

fact and be contrary to the established practice in analogous areas of the law.[7]

The decision of the Court of Appeals is reversed, and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

■ MR. JUSTICE REHNQUIST joins the opinion of the Court, reading it as he does to leave open the issue of the burden of persuasion, as opposed to the burden of pleading, with respect to a defense of qualified immunity.

NOTE ON ALLOCATING THE BURDEN OF PLEADING

1. The elements of a sufficient complaint. If a plaintiff's claim fails to include allegations of all of the elements of a claim, it is legally insufficient. In most cases, the required elements of a legal claim are clearly defined, either by the relevant common law or the statute creating the claim. In *Gomez*, for instance, Justice Marshall explains that there are only two elements of a claim under 28 U.S.C. § 1983 that must be included in the complaint: (1) that "some person has deprived him of a federal right," and (2) that "the person who has deprived him of that right acted under color of state or territorial law." Although the complaint need not specifically reference § 1983, the factual allegations in the complaint must satisfy each of the elements. As the Supreme Court recently explained in Johnson v. City of Shelby, Miss., 574 U.S. ___, 135 S.Ct. 346, 190 L.Ed.2d 309 (2014) (per curiam), "no heightened pleading rule requires plaintiffs seeking damages for violations of constitutional rights to invoke § 1983 expressly in order to state a claim. * * * A plaintiff * * * must plead facts to show that her claim has substantive plausibility."

2. Affirmative defenses. Rule 8(c) lists nineteen "affirmative defenses" that must be pleaded by a defendant (or, more broadly, by a party responding to a "pleading"). This list, which is not exclusive, includes such defenses as "contributory negligence," "statute of limitations," and "res judicata." An affirmative defense (as opposed to a denial of plaintiff's allegations, which is a "negative defense") alleges facts not included in the plaintiff's complaint that will defeat the plaintiff's claim. Consider *Gomez* and the defense of qualified immunity. Qualified immunity is an affirmative defense because it rests on an allegation not included in the complaint (that the defendant's actions were based on a reasonable belief that they were lawful), and it provides a defense to the plaintiff's claim without which that claim would be valid.

3. Allocating the burden of pleading. *Gomez* holds that the plaintiff need not plead that the defendant acted in bad faith because

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[7] As then-Dean Charles Clark stated over forty years ago: "It seems to be considered only fair that certain types of things which in common law pleading were matters in confession and avoidance—i.e., matters which seemed more or less to admit the general complaint and yet to suggest some other reason why there was no right—must be specifically pleaded in the answer, and that has been a general rule." ABA Proceedings, Institute at Washington and Symposium at New York City on the Federal Rules of Civil Procedure 49 (1939). See also 5 C. Wright & A. Miller, Federal Practice and Procedure §§ 1270–1271 (1969). Cf. FTC v. A.E. Staley Mfg. Co., 324 U.S. 746, 759 (1945) (good-faith defense under Robinson-Patman Act); Barcellona v. Tiffany English Pub, Inc., 597 F.2d 464, 468 (C.A.5 1979); Cohen v. Ayers, 596 F.2d 733, 739–740 (C.A.7 1979); United States v. Kroll, 547 F.2d 393 (C.A.7 1977).

qualified immunity is an affirmative defense. The lack of bad faith on the part of the defendant is not an element of the claim that must be pleaded in the complaint. Indeed, courts often repeat that a plaintiff "is not required to negate an affirmative defense in his complaint." Tregenza v. Great American Communications Co., 12 F.3d 717 (7th Cir. 1993). See also Jones v. Bock, 549 U.S. 199, 127 S.Ct. 910, 166 L.Ed.2d 798 (2007) (holding that a plaintiff need not plead that it exhausted administrative remedies because such exhaustion is an affirmative defense).

But what determines which allegations are elements of a claim, and which are affirmative defenses? That is, how are we to know what a plaintiff must include in her complaint, and what she can save for later in response to a defense asserted by the defendant in the answer? As Professors Hazard, Leubsdorf, and Bassett summarize, "there is often room to dispute which party should be required to plead and prove a given circumstance. Allocation to either plaintiff or defendant is coherent as a matter of substantive law and procedural logic." Hazard, Leubsdorf & Bassett, Civil Procedure § 4.9 (6th ed. 2011). So how should the allocation be done?

In an influential article, Professor Cleary suggested three benchmarks courts might follow when allocating burdens between the plaintiff and defendant. One such benchmark is policy, which "extend[s] into the stage of allocating those elements by way of favoring one or the other party to a particular kind of litigation." Allocating burdens to the plaintiff makes pleading in the complaint a more difficult enterprise, and vice versa, so the allocation of pleading burdens is inescapably a policy decision about how difficult pleading a particular claim ought to be. The second benchmark is fairness: "The nature of a particular element may indicate that evidence relating to it lies more within the control of one party, which suggests the fairness of allocating that element to him. Examples are payment, discharge in bankruptcy, and license, all of which are commonly treated as affirmative defenses." The third benchmark Cleary offers is probability: "a judicial, i.e., wholly nonstatistical, estimate of the probabilities of the situation, with the burden being put on the party who will be benefited by a departure from the supposed norm." Cleary, Presuming and Pleading: An Essay on Juristic Immaturity, 12 Stan. L. Rev. 5 (1959).

Commenting on Professor Cleary's article, Professor Hazard explains:

> I understand him to say that the definition of a prima facie case of legal wrong is a construct based on experience of two kinds. One is experience with everyday events that give rise to disputes over claims of right. That experience is the origin of our expectations about people's capacities, limitations, and propensities, and hence the points on which the outcome is likely to depend. The other body of experience is with legal controversy itself, particularly litigation. It is from that experience that we learn what points are likely to be difficult to resolve in disputes of various kinds, and hence the points on which outcome is likely to depend.

Hazard, Introduction to Cleary's Presuming and Pleading: An Essay on Juristic Immaturity, 1979 Ariz. St. L.J. 111 (1979).

How do Professor Cleary's standards apply to the issue of official immunity that was contested in *Gomez v. Toledo*? Is Justice Marshall correct that the relevant statutory language suggests that immunity is a defense? Assuming that the statute provides limited guidance, what is the proper

allocation of the pleading burden in light of the considerations of fairness, probability, and policy that Professor Cleary suggests should control? Which factor does Justice Marshall think is decisive?

4. Does it matter who bears the burden of pleading? The Supreme Court in *Gomez* holds that plaintiff is not required to allege in the complaint that defendant acted in bad faith. Instead the defendant must allege good faith as an affirmative defense in the answer. Most lawyers would probably say that, standing alone, the question of who bears the burden of pleading an element of the claim is not very important. A lawyer may properly plead bad or good faith if she has evidentiary support for the claim or reasonably believes she will do so after discovery. See Fed. R. Civ. P. 11(b). In practice, this standard will seldom bar an averment of bad faith by the plaintiff or an averment of good faith by the defendant.

5. Burden of pleading and burdens of production and persuasion. The more important issues are not the "burden of pleading," but rather the "burden of production" and the "burden of persuasion." What is the difference? The burden of pleading an element determines who must *allege* that element in the pleadings. The burdens of production and persuasion, however, go to the method and adequacy of the proof of a claim before the finder of fact. Though these two terms are often lumped together by laypersons (and casual lawyers) under the heading "burden of proof," they in fact have distinct meanings and practical significance. The classic article explaining the difference is James, Burdens of Proof, 47 Va. L. Rev. 51 (1961).

A party having the "burden of production" has the burden of placing sufficient evidence in the record supporting all essential elements of her claim to allow the finder of fact—judge or jury—to find in her favor. If the party with the burden of production presents no evidence, or evidence that the judge decides does not meet the sufficiency standard, then the judge has the power to declare her the loser without any consideration of her case by the jury. See discussion of judgment as a matter of law and Fed. R. Civ. P. 50, infra at pp. 993–1001. Note that "burden of pleading," as used in *Gomez*, is not the same thing as burden of production. "Pleading" refers to making allegations; "production" refers to producing evidence supporting those allegations. Thus, when the Court in *Gomez* holds that defendant has the burden of pleading good faith, this burden requires only that defendant assert good faith as a defense in his pleadings. Defendant may also have at least the initial burden of producing evidence on the issue of his good faith, but that is an analytically distinct issue from whether he has the burden of pleading.

The "burden of persuasion," in contrast, describes the standard that the finder of fact is required to apply in determining whether it believes that a factual claim is true. Depending on the issue and on the type of case, the party with the burden of persuasion must meet different standards of persuasiveness. In ordinary civil cases, the burden of persuasion is that plaintiff must prove her case by a "preponderance of the evidence." On certain issues in a civil case, such as fraud, the burden of proof can be higher, requiring proof by "clear and convincing evidence." In a criminal case, the burden of proof requires that the prosecutor prove a defendant's guilt "beyond a reasonable doubt."

A party is said to bear the "burden of persuasion" or "the risk of nonpersuasion" on an issue when the finder of fact must hold against that

party if the evidence fails to meet the specified degree of persuasiveness. For example, if the plaintiff has presented sufficient evidence to permit a decision in her favor (that is, if the plaintiff has satisfied her burden of production), the full case is then submitted to the finder of fact, judge or jury. The jury or judge may still find, after considering both the plaintiff's and the defendant's evidence, that the plaintiff has not proved her case, meaning that the plaintiff has failed to satisfy her burden of persuasion. An example of this usage is the federal Administrative Procedure Act, which provides that a "proponent of a rule or order has the burden of proof." 5 U.S.C. § 556(d). The Supreme Court explained that burden of proof, as used in the Act, means burden of persuasion: "Burden of proof was frequently used [in the past] to refer to what we now call the burden of persuasion—the notion that if the evidence is evenly balanced, the party that bears the burden of persuasion must lose." Director, Office of Workers' Comp. Programs v. Greenwich Collieries, 512 U.S. 267, 272, 114 S.Ct. 2251, 129 L.Ed.2d 221 (1994).

6. Burden of persuasion of defendant's good faith under 42 U.S.C. § 1983. The normal rule of thumb is, "He who pleads must prove," meaning that the party with the burden of pleading also has the burdens of production and persuasion. Justice Rehnquist in *Gomez* points out that the Court decides only who has the burden of pleading, explicitly leaving the burden of persuasion (and implicitly, the burden of production) for another day. Assuming that the *Gomez* Court's holding on the burden of pleading is correct, does Professor Cleary's analysis suggest any reason to depart from the normal rule that the pleader bears the burden of production and persuasion when the issue is the good faith of an official sued under 42 U.S.C. § 1983?

7. Immunity for an official's good faith actions becomes an objective standard. Justice Marshall, writing for the Court in *Gomez*, assumed that an official's good faith immunity was a subjective question, depending on what was actually in the defendant's mind. But in a series of later decisions beginning with Harlow v. Fitzgerald, 457 U.S. 800, 818–19, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), the Court reached a different conclusion, ultimately holding that the officer's subjective belief was entirely irrelevant. The Court later explained "The relevant question * * * is the objective (albeit fact-specific) question whether a reasonable officer could have believed [the search] to be lawful, in light of clearly established law and the information the searching officers possessed. [The officer's] subjective beliefs about the search are irrelevant." Anderson v. Creighton, 483 U.S. 635, 641, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). Note that one of the grounds given by Justice Marshall for allocating the burden of pleading (and burdens of production and of persuasion, too?)—that the defendant knows his own state of mind—is inapplicable now that the standard for the official's good faith is entirely objective.

8. The Supreme Court revisits pleading and proof of official immunity. In Crawford-El v. Britton, 523 U.S. 574, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998), while citing with apparent approval its holding in *Gomez*, the Supreme Court offered the following dictum on the handling of cases involving the qualified immunity defense:

> When a plaintiff files a complaint against a public official alleging a claim that requires proof of wrongful motive, the trial court must exercise its discretion in a way that protects the substance of the

> qualified immunity defense. * * * The district judge has two primary options prior to permitting any discovery at all. First, the court may order a reply to the defendant's or a third party's answer under Federal Rule of Civil Procedure 7(a), or grant the defendant's motion for a more definite statement under Rule 12(e). Thus, the court may insist that the plaintiff "put forward specific, nonconclusory factual allegations" that establish improper motive causing cognizable injury in order to survive a prediscovery motion for dismissal or summary judgment. This option exists even if the official chooses not to plead the affirmative defense of qualified immunity. Second, if the defendant does plead the immunity defense, the district court should resolve that threshold question before permitting discovery.

Id. at 597–98.

What is the source of legal authority for the Court's statement in *Crawford-El* that the district court is required to order a reply or more definite statement and to resolve the immunity issue before allowing discovery? Is it the doctrine of qualified immunity itself? In the wake of *Crawford-El* most courts of appeal that have considered the issue have concluded, based on the Court's continued citation of *Gomez*, that it is not proper to require the plaintiff to plead specifically the absence of official immunity in the complaint. See Goad v. Mitchell, 297 F.3d 497 (6th Cir. 2002) (citing cases). Given the Court's statement in *Crawford-El*, does this outcome preserve the shell of *Gomez* while gutting its substance? If so, what factor or combination of factors best explains the shift in the Court's position?

D. THE FORMAL SUFFICIENCY OF THE COMPLAINT: HOW SPECIFIC MUST A PLEADING BE?

1. THE STANDARD REQUIREMENT FOR PLEADING UNDER FEDERAL RULE 8

NOTE ON THE PHILOSOPHY OF MODERN PLEADING

1. From common law to code pleading. The law of pleading has been an intermittent sore spot in Anglo-American law. The system of common law pleading aimed at narrowing sharply the issues in dispute on the basis of an extended exchange of written pleadings. The resulting system was heavily criticized for its cost and complexity. As Professor Burbank describes it, "Perhaps the single most salient feature of common law procedure was its unremitting search, pursued in pleading practice that sometimes resembled a ping pong match, for a single issue (of law or fact) that would enable decision of the case. The quest, in other words, was to avoid complexity at all costs, and the most important cost of common law procedure was that so many cases were decided on pleading points rather than the merits." Burbank, The Complexity of Modern American Civil Litigation: Curse or Cure, 91 Judicature 163 (2008). The successor to common law pleading in England, the notorious Hilary Term Rules of 1834, was regarded as even worse.

Code pleading, which replaced common law pleading in most American jurisdictions, avoided much of the technicality of its predecessor. But its

requirement that the complaint state "facts constituting a cause of action" came, over time, to engender significant complications centering on the definition of a "fact." "Facts," the courts held, were more specific than, and distinguishable from, "legal conclusions." A complaint that pleaded "facts" would survive a motion to dismiss; one that pleaded legal conclusions might be held insufficient, as if the element pleaded in conclusory terms had not been pleaded at all. In the words of a leading nineteenth century scholar, "the allegations must be of dry, naked, actual facts." Pomeroy, Remedies and Remedial Rights § 529, at 566.

In the words of one modern critique:

> Many judges and some legal scholars did not clearly recognize that only a matter of degree differentiates "facts" from "mere conclusions," in one direction of specificity, and differentiates them from "evidence" in the opposite direction of specificity. For example, many courts held that an allegation that a defendant acted "negligently" was a "mere conclusion," while others held that such a description was sufficient in a story about handling a horse or operating a car. There was considerable naivete, and not a little manipulation and cynicism, centering on what, exactly, were "facts." A mass of conflicting decisional law accrued on these and other particulars.

Hazard, Leubsdorf & Bassett, Civil Procedure § 4.12 (6th ed. 2011).

2. The philosophy of notice pleading under the federal Rules. The next major stage of modernization in American pleading was the Federal Rules of Civil Procedure. On the one hand, the federal Rules sought to abandon altogether the technical terminology of code pleading and its accompanying case law. The adequacy of a claim for relief under Rule 8(a) was not to turn on whether it pleaded "facts" or "legal conclusions," but rather on whether it provided fair notice of the plaintiff's claim. Instead of serving the purpose of ultimately narrowing the factual issues for trial, the drafters of the original federal Rules meant for pleading to provide the parties with fair notice of the claims and defenses alleged. Assuming the plaintiff's complaint stated a claim upon which relief could be granted, it would then open the door to discovery: the required exchange of information by the parties, based on which they could later prove their claims and defenses.

Underlying this theoretical shift are three basic insights. First, the judgment as to how much specificity to require should be based on pragmatic considerations of cost, accuracy, and fairness, not on conclusory labels. Second, resolving a dispute at the pleading stage of the litigation is the ultimate "summary" process, decided wholly on the basis of an exchange of written claims about the facts, but without any opportunity to test those claims with evidence, cross-examination or discovery. Accordingly, such resolutions should be limited to cases where it is apparent that a deeper factual inquiry is unlikely to yield improved accuracy in proportion to its cost. Otherwise, using pleading in its pure summary form to try to resolve or even significantly narrow factual disputes on the merits would result in too many cases being decided inaccurately or unfairly. Third, if the pleading process is extended, for example by permitting or requiring multiple rounds of pleading, it may itself become a significant source of cost and delay, which would be particularly unfair in cases involving modest stakes. For a concise

history of these developments, see Langbein, The Disappearance of Civil Trial in the United States, 122 Yale L.J. 522 (2012).

3. ***Conley v. Gibson.*** Until 2007, the leading case interpreting federal Rule 8's requirement of "a short and plain statement of the claim showing the pleader is entitled to relief" was Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). In *Conley*, a group of African-American railroad employees brought suit, alleging that their union had violated the federal Railway Labor Act by failing to represent them fairly in collective bargaining with the employer. Defendant sought to dismiss on several grounds, including for failure to state a claim under Rule 12(b)(6). In an opinion by Justice Black, the Supreme Court wrote:

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

355 U.S. at 42–43, 45–46 (emphasis added).

The Court had no difficulty in holding that under the Railway Labor Act the union had an obligation to represent its members fairly, and that systematic discrimination against African-American members, if proven, would violate that obligation. It then rejected the argument that the complaint had not described the claim with sufficient specificity:

> 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" that will give the defendant fair notice of what the plaintiff's claim is and the

> grounds upon which it rests. * * * Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. Following the simple guide of Rule 8(f) that "all pleadings shall be so construed as to do substantial justice," we have no doubt that petitioners' complaint adequately set forth a claim and gave the respondents fair notice of its basis. The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.

Id. at 47–48. The case that follows is a representative example of how the Supreme Court applied *Conley* for fifty years.

Swierkiewicz v. Sorema, N.A.

Supreme Court of the United States, 2002.
534 U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1.

■ JUSTICE THOMAS delivered the opinion of the Court.

This case presents the question whether a complaint in an employment discrimination lawsuit must contain specific facts establishing a prima facie case of discrimination under the framework set forth by this Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973). We hold that an employment discrimination complaint need not include such facts and instead must contain only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. Rule Civ. Proc. 8(a)(2).

I

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

Following his demotion, petitioner contends that he "was isolated by Mr. Chavel . . . excluded from business decisions and meetings and denied the opportunity to reach his true potential at SOREMA." Petitioner unsuccessfully attempted to meet with Mr. Chavel to discuss his discontent. Finally, in April 1997, petitioner sent a memo to Mr. Chavel

outlining his grievances and requesting a severance package. Two weeks later, respondent's general counsel presented petitioner with two options: He could either resign without a severance package or be dismissed. Mr. Chavel fired petitioner after he refused to resign.

Petitioner filed a lawsuit alleging that he had been terminated on account of his national origin in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*., and on account of his age in violation of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 *et seq*. The United States District Court for the Southern District of New York dismissed petitioner's complaint because it found that he "had not adequately alleged a prima facie case, in that he had not adequately alleged circumstances that support an inference of discrimination." The United States Court of Appeals for the Second Circuit affirmed the dismissal, relying on its settled precedent, which requires a plaintiff in an employment discrimination complaint to allege facts constituting a prima facie case of discrimination under the framework set forth by this Court in *McDonnell Douglas, supra,* at 802. The Court of Appeals held that petitioner had failed to meet his burden because his allegations were "insufficient as a matter of law to raise an inference of discrimination." We granted certiorari to resolve a split among the Courts of Appeals concerning the proper pleading standard for employment discrimination cases, and now reverse.

II

Applying Circuit precedent, the Court of Appeals required petitioner to plead a prima facie case of discrimination in order to survive respondent's motion to dismiss. In the Court of Appeals' view, petitioner was thus required to allege in his complaint: (1) membership in a protected group; (2) qualification for the job in question; (3) an adverse employment action; and (4) circumstances that support an inference of discrimination. *Ibid*.; cf. *McDonnell Douglas,* 411 U.S. at 802; Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253–254, n. 6, 67 L.Ed.2d 207, 101 S.Ct. 1089 (1981).

The prima facie case under *McDonnell Douglas*, however, is an evidentiary standard, not a pleading requirement. In *McDonnell Douglas*, this Court made clear that "the critical issue before us concerned the order and allocation *of proof* in a private, non-class action challenging employment discrimination." 411 U.S. at 800 (emphasis added). In subsequent cases, this Court has reiterated that the prima facie case relates to the employee's burden of presenting evidence that raises an inference of discrimination. See *Burdine,* 450 U.S. at 252–253.

This Court has never indicated that the requirements for establishing a prima facie case under *McDonnell Douglas* also apply to the pleading standard that plaintiffs must satisfy in order to survive a motion to dismiss. For instance, we have rejected the argument that a Title VII complaint requires greater "particularity," because this would "too narrowly constrict the role of the pleadings." McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 283, n. 11, 49 L.Ed.2d 493, 96 S.Ct. 2574 (1976). Consequently, the ordinary rules for assessing the sufficiency of a complaint apply. See, e.g., Scheuer v. Rhodes, 416 U.S. 232, 236, 40 L.Ed.2d 90, 94 S.Ct. 1683 (1974) ("When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by

affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims").

In addition, under a notice pleading system, it is not appropriate to require a plaintiff to plead facts establishing a prima facie case because the *McDonnell Douglas* framework does not apply in every employment discrimination case. For instance, if a plaintiff is able to produce direct evidence of discrimination, he may prevail without proving all the elements of a prima facie case. See Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121, 83 L.Ed.2d 523, 105 S.Ct. 613 (1985) ("The *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination"). Under the Second Circuit's heightened pleading standard, a plaintiff without direct evidence of discrimination at the time of his complaint must plead a prima facie case of discrimination, even though discovery might uncover such direct evidence. It thus seems incongruous to require a plaintiff, in order to survive a motion to dismiss, to plead more facts than he may ultimately need to prove to succeed on the merits if direct evidence of discrimination is discovered.

Moreover, the precise requirements of a prima facie case can vary depending on the context and were "never intended to be rigid, mechanized, or ritualistic." Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577, 57 L.Ed.2d 957, 98 S.Ct. 2943 (1978);. Before discovery has unearthed relevant facts and evidence, it may be difficult to define the precise formulation of the required prima facie case in a particular case. Given that the prima facie case operates as a flexible evidentiary standard, it should not be transposed into a rigid pleading standard for discrimination cases.

Furthermore, imposing the Court of Appeals' heightened pleading standard in employment discrimination cases conflicts with Federal Rule of Civil Procedure 8(a)(2), which provides that a complaint must include only "a short and plain statement of the claim showing that the pleader is entitled to relief." Such a statement must simply "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Conley v. Gibson, 355 U.S. 41, 47, 2 L.Ed.2d 80, 78 S.Ct. 99 (1957). This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims. See *id.* at 47–48, Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 168–169, 122 L.Ed.2d 517, 113 S.Ct. 1160 (1993). "The provisions for discovery are so flexible and the provisions for pretrial procedure and summary judgment so effective, that attempted surprise in federal practice is aborted very easily, synthetic issues detected, and the gravamen of the dispute brought frankly into the open for the inspection of the court." 5 C. Wright & A. Miller, Federal Practice and Procedure § 1202, p. 76 (2d ed. 1990).

Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions. Rule 9(b), for example, provides for greater particularity in all averments of fraud or mistake. This Court, however, has declined to extend such exceptions to other contexts. In *Leatherman* we stated: "The Federal Rules do address in Rule 9(b) the question of the need for greater particularity in pleading certain actions, but do not

include among the enumerated actions any reference to complaints alleging municipal liability under § 1983. *Expressio unius est exclusio alterius*." 507 U.S. at 168. Just as Rule 9(b) makes no mention of municipal liability under Rev. Stat. § 1979, 42 U.S.C. § 1983, neither does it refer to employment discrimination. Thus, complaints in these cases, as in most others, must satisfy only the simple requirements of Rule 8(a).

Other provisions of the Federal Rules of Civil Procedure are inextricably linked to Rule 8(a)'s simplified notice pleading standard. Rule 8(e)(1) states that "no technical forms of pleading or motions are required," and Rule 8(f) provides that "all pleadings shall be so construed as to do substantial justice." Given the Federal Rules' simplified standard for pleading, "[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73, 81 L.Ed.2d 59, 104 S.Ct. 2229 (1984). If a pleading fails to specify the allegations in a manner that provides sufficient notice, a defendant can move for a more definite statement under Rule 12(e) before responding. Moreover, claims lacking merit may be dealt with through summary judgment under Rule 56. The liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim. See *Conley, supra,* at 48 ("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").

Applying the relevant standard, petitioner's complaint easily satisfies the requirements of Rule 8(a) because it gives respondent fair notice of the basis for petitioner's claims. Petitioner alleged that he had been terminated on account of his national origin in violation of Title VII and on account of his age in violation of the ADEA. His complaint detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination. These allegations give respondent fair notice of what petitioner's claims are and the grounds upon which they rest. See *Conley, supra,* at 47. In addition, they state claims upon which relief could be granted under Title VII and the ADEA.

Respondent argues that allowing lawsuits based on conclusory allegations of discrimination to go forward will burden the courts and encourage disgruntled employees to bring unsubstantiated suits. Whatever the practical merits of this argument, the Federal Rules do not contain a heightened pleading standard for employment discrimination suits. A requirement of greater specificity for particular claims is a result that "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation." *Leatherman, supra,* at 168. Furthermore, Rule 8(a) establishes a pleading standard without regard to whether a claim will succeed on the merits. "Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." *Scheuer,* 416 U.S. at 236.

For the foregoing reasons, we hold that an employment discrimination plaintiff need not plead a prima facie case of discrimination and that petitioner's complaint is sufficient to survive respondent's motion to dismiss. Accordingly, the judgment of the Court

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

It is so ordered.

NOTES AND QUESTIONS

1. Background. The claim in *Swierkiewicz* arises under federal employment discrimination law. The pleading issue turns in part on ways of proving discrimination through direct or circumstantial evidence. An example of direct evidence of discrimination would be a statement by an employer that expressly attributed an employment action to an individual's race, gender, or age. Because few employers will admit to discriminatory motives or attitudes, such evidence can be hard to come by. Accordingly, the courts have developed doctrines allowing circumstantial proof of discrimination. In McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), the Supreme Court set out a four-part test for proving a *prima facie* case of discrimination—that is, a case, based on circumstantial evidence that, unless rebutted, would permit the jury to infer discrimination even in the absence of direct evidence. The four elements of proof were: (1) membership in a protected group; (2) qualification for the job in question; (3) an adverse employment action; and (4) circumstances that support an inference of discrimination. 411 U.S. at 802.

2. The holding. It seems clear that the *prima facie* case created in *McDonnell Douglas* was intended to smooth the way for plaintiffs. What then was wrong with requiring the plaintiff to allege a *prima facie* case in the complaint? Is the problem that plaintiff cannot be expected to know the facts which would allow him to plead a *prima facie* case? Or is the problem that making the plaintiff plead such a case might undermine his ability to prove his case through direct evidence, if it were to surface? Or is the problem that making the plaintiff plead a *prima facie* case doesn't greatly increase our confidence in the merits of his claim and invites extra litigation about the details of the complaint?

3. "Notice pleading." The Court in *Conley* refers to pleading under Rule 8(a) as "simplified 'notice pleading.' " Judge Charles Clark, the great scholar of procedure who was the principal draftsman of the Federal Rules of Civil Procedure, disliked the label "notice pleading." He objected, "It is too often overlooked that federal pleading is still issue pleading, presenting a definite issue for adjudication; the use of the term 'notice pleading'—which was rejected by the rule-makers and never employed by them—is prejudicial to a proper operation of the federal system, since it suggests the absence of all pleadings and the necessity of some substitute by way of pre-pre-trial." Padovani v. Bruchhausen, 293 F.2d 546, 550–51 (2d Cir. 1961). Despite these pleas, it has become common to call pleading under the federal Rules "notice pleading."

What are the limits of notice pleading? One possibility is that a claim may be so vague that it simply does not tell the defendant the "who, what, where, and why" of the dispute so that it can investigate and prepare a response. Was that a problem in *Swierkiewicz*? Another possibility is that the complaint itself discloses sufficient specific facts to indicate that, no matter what other evidence plaintiff adduces, the claim is doomed to fail because a critical element of proof cannot be supplied—or as *Conley* puts it, that there is no set of facts that plaintiff could prove in support of his claim

that would entitle him to relief. Was there any fatal defect like that in the *Swierkiewicz* complaint?

4. Who should decide what Rule 8 means? In *Swierkiewicz*, the defendant argued that "allowing lawsuits based on conclusory allegations of discrimination to go forward will burden the courts and encourage disgruntled employees to bring unsubstantiated suits." The Court rejected that argument, stating that imposition of any such "heightened pleading" standard for employment discrimination cases could be created only through amendment of the federal Rules. In a subsequent case, citing *Swierkiewicz*, the Court stated that "courts should generally not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns," and any such policy changes "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation." Jones v. Bock, 549 U.S. 199, 127 S.Ct. 910, 166 L.Ed.2d 798 (2007). Recall the discussion in Chapter 1 of the process for making and amending Federal Rules of Civil Procedure, supra at 27. Why would the Court state that a change to the interpretation of the Rules must be accomplished through that process? Is such an argument convincing?

5. Motion for more definite statement. The classic remedy for a vague complaint is not a motion to dismiss, but rather a motion for more definite statement under Rule 12(e). In fact, however, such motions are rarely made and even more rarely granted. Rule 12(e) is in obvious tension with the notice pleading policy articulated in Rule 8(a), which requires only "a short and plain statement" of plaintiff's claim. Not surprisingly, district courts are reluctant to grant Rule 12(e) motions, for if a pleading satisfies Rule 8(a) it almost certainly satisfies Rule 12(e). As a result, it is often stated that Rule 12(e) motions are "disfavored." See, e.g., Premier Payments Online, Inc. v. Payment Systems Worldwide, 848 F. Supp. 2d 514 (E.D. Pa. 2013); E.E.O.C. v. Alia Corp., 842 F. Supp. 2d 1243 (E.D. Cal. 2012).

6. When should a lawyer provide more than the minimum required by Rule 8(a)? It is clearly possible to provide more detail than the minimum that Rule 8 requires, and most lawyers will do so in cases of any complexity. Notice how much we know about plaintiff's case from the complaint in *Conley v. Gibson*, as summarized in Justice Black's opinion. Was all that information required by Rule 8(a)? A lawyer should always think about the function of the complaint in the particular case she is filing. Providing more detail can educate the defendant and the court to the compelling nature of the case or to the strength of the proof, it can help to strengthen the court's resolve in addressing the issues of law raised by the complaint, and it may help in mobilizing public opinion or other constituencies. *Access Now* may have been such a case. For another example, see Pelman v. McDonald's Corp., 2003 WL 22052778 (S.D.N.Y. 2003), rev'd, 396 F.3d 508 (2d Cir. 2005) (complaint charging that defendant was responsible for contributing to plaintiff's obesity). On the other hand, a lawyer who provides more information than strictly necessary may end up pleading the plaintiff out of court without any discovery. Did the lawyers in *Access Now* provide more information than they had to?

If, based on what she now knows, the plaintiff has a weak case, what should she do? If the currently known facts are unfavorable or inconclusive, should she draft a generally worded complaint and hope to learn better facts through discovery? If the legal arguments are weak, should she disguise the weakness by drafting a vague complaint, hoping to postpone the court's

decision on the law? Should plaintiff be allowed to pursue a case she knows is weak? Frivolous? See discussion of Fed. R. Civ. P. 11, infra p. 519.

7. The complaint as a literary work? For a fascinating though somewhat dreamy view of what a complaint could be, consider the following:

> I once had a client named Hattie Kendrick. She was a woman and an African-American, a school teacher and a civil rights warrior, spit upon, arrested, and tossed out of restaurants and clothing stores that did not "cater to the colored trade." She marched and spoke out for integration and against oppression. Her school fired her, but not before she had taught generations of black children in Cairo, Illinois, that participation in American democracy was their right and duty. In the 1940's, she sued to win equal pay for black teachers, with Thurgood Marshall as her lawyer. And in the 1970's, she was a named plaintiff in a class action asserting the voting rights of black citizens in Cairo against a city electoral system rigged to reduce the value of their votes to nothingness. All she wanted was to cast a meaningful vote in a democratic election before she died—she was in her nineties, growing blind and weak. Such a woman. Such a story. And such a voice. Listen to how she discerns the problems of her town: "Too long have the two races stood grinning in each other's faces, while they carry the fires of resentment and hate in their hearts, and with their hands hid behind their backs they carry the unsheathed sword." Yet here is how the complaint filed in federal court identifies the named plaintiffs, including Hattie Kendrick: "All plaintiffs are Blacks, citizens of the United States and of the State of Illinois, and residents of Cairo, Illinois registered to vote in Municipal Elections conducted in Cairo."

Eastman, Speaking Truth to Power: The Language of Civil Rights Litigators, 104 Yale L.J. 763, 765–66 (1995). Professor Eastman reproduces the full complaint actually filed in the case, and a complaint that, in retrospect, he would like to have filed. See id. at 836–49, 865–79.

Bell Atlantic Corp. v. Twombly

Supreme Court of the United States, 2007.
550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929.

■ JUSTICE SOUTER delivered the opinion of the Court.

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 competition, 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), which "fundamentally restructured local telephone markets" and "subjected [ILECs] to a host of duties intended to facilitate market entry." In recompense, the 1996 Act set conditions for authorizing ILECs to enter the long-distance market.

"Central to the [new] scheme [was each ILEC's] obligation . . . to share its network with competitors," which came to be known as "competitive local exchange carriers" (CLECs). A CLEC could make use of an ILEC's network in any of three ways: by (1) "purchasing local telephone services at wholesale rates for resale to end users," (2) "leasing elements of the [ILEC's] network 'on an unbundled basis,' " or (3) "interconnecting its own facilities with the [ILEC's] network." Owing to the "considerable expense and effort" required to make unbundled network elements available to rivals at wholesale prices, the ILECs vigorously litigated the scope of the sharing obligation imposed by the 1996 Act, with the result that the Federal Communications Commission (FCC) three times revised its regulations to narrow the range of network elements to be shared with the CLECs.

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, 15 U.S.C. § 1, which prohibits "every 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. * * * *

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] pursue" "attractive business opportunities" in contiguous markets where they possessed "substantial competitive advantages," id., ¶¶ 40–41, 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.

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[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. Together, these ILECs allegedly control 90 percent or more of the market for local telephone service in the 48 contiguous States. Id., ¶ 48.

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.[2]

The United States District Court for the Southern District of New York dismissed the complaint for failure to state a claim upon which relief can be granted. * * * *

The Court of Appeals for the Second Circuit reversed. * * * *

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

II

A

Because § 1 of the Sherman Act "does not prohibit [all] unreasonable restraints of trade . . . but only restraints effected by a contract, combination, or conspiracy," "the crucial question" is whether the challenged anticompetitive conduct "stems from independent decision or from an agreement, tacit or express." 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." Even "conscious parallelism," a common reaction of "firms in a concentrated market [that] recognize their shared economic interests and their interdependence with respect to price and output decisions" 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. * * * *

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[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 prevent 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.

B

This case presents the antecedent question of what a plaintiff must plead in order to state a claim under § 1 of the Sherman Act. Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests," Conley v. Gibson, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (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 "entitlement 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), see, e.g., Swierkiewicz v. Sorema N. A., 534 U.S. 506, 508, n. 1, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002).

In applying these general standards to a § 1 claim, we hold that stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and "that a recovery is very remote and unlikely." In identifying facts that are suggestive enough to render a § 1 conspiracy plausible, we have the benefit of the prior rulings and considered views of leading commentators * * * 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 more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality. Hence, when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.

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 "show 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 complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of "entitlement to relief."

* * *

Thus, it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that

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

It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through "careful case management," given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side. And it is self-evident that the problem of discovery abuse cannot be solved by "careful scrutiny of evidence at the summary judgment stage," much less "lucid instructions to juries;" the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings. Probably, then, it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no " 'reasonably founded hope that the [discovery] process will reveal relevant evidence' " to support a § 1 claim. *Dura*, 544 U.S., at 347, 125 S.Ct. 1627, 161 L.Ed.2d 577.

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

On such a focused and literal reading of *Conley's* "no set of facts," a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some "set of [undisclosed] facts" to support recovery. So here, the Court of Appeals specifically found the prospect of unearthing direct evidence of conspiracy sufficient to preclude dismissal, even though the complaint does not set forth a single fact in a context that suggests an agreement. It seems fair to say that this approach to pleading would dispense with any showing of a " 'reasonably founded hope' " that a plaintiff would be able to make a case, see *Dura*, 544 U.S., at 347, 125 S.Ct. 1627, 161 L.Ed.2d 577; Mr. Micawber's optimism would be enough.

Seeing this, a good many judges and commentators have balked at taking the literal terms of the *Conley* passage as a pleading standard. * * *

* * * *Conley's* "no set of facts" language has been questioned, criticized, and explained away long enough. To be fair to the *Conley* Court, the passage should be understood in light of the opinion's

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

III

When we look for plausibility in this complaint, we agree with the District Court that plaintiffs' claim of conspiracy in restraint of trade comes up short. To begin with, the complaint leaves no doubt that plaintiffs rest their § 1 claim on descriptions of parallel conduct and not on any independent allegation of actual agreement among the ILECs. Although in form a few stray statements speak directly of agreement,[9] on fair reading these are merely legal conclusions resting on the prior allegations. Thus, the complaint 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.[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.

We 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

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[9] See Complaint ¶¶ 51, 64 (alleging that ILECs engaged in a "contract, combination or conspiracy" and agreed not to compete with one another).

[10] If the complaint had not explained that the claim of agreement rested on the parallel conduct described, we doubt that the complaint's references to an agreement among the ILECs would have given the notice required by Rule 8. Apart from identifying a seven-year span in which the § 1 violations were supposed to have occurred (*i.e.*, "beginning at least as early as February 6, 1996, and continuing to the present," *id.*, ¶ 64), the pleadings mentioned no specific time, place, or person involved in the alleged conspiracies. This lack of notice contrasts sharply with the model form for pleading negligence, Form 9 [eds. note: now Form 11], which the dissent says exemplifies the kind of "bare allegation" that survives a motion to dismiss. Whereas the model form alleges that the defendant struck the plaintiff with his car while plaintiff was crossing a particular highway at a specified date and time, the complaint here furnishes no clue as to which of the four ILECs (much less which of their employees) supposedly agreed, or when and where the illicit agreement took place. A defendant wishing to prepare an answer in the simple fact pattern laid out in Form 9 would know what to answer; a defendant seeking to respond to plaintiffs' conclusory allegations in the § 1 context would have little idea where to begin.

was anything more than the natural, unilateral reaction of each ILEC intent on keeping its regional dominance. * * *

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 " 'hope that the large incumbent local monopoly companies . . . might attack their neighbors' service areas, as they are the best situated to do so.' " Complaint ¶ 38. Contrary to hope, the ILECs declined " 'to enter each other's service territories in any significant way,' " *id.*, 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.

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 preceding the 1996 Act and well before that, monopoly was the norm in telecommunications, not the exception. The ILECs were born in that world, doubtless liked the world the way it was, and surely knew the adage about him who lives by the sword. Hence, a natural explanation for the noncompetition alleged is that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same thing.

* * * * 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 v. Sorema N. A., 534 U.S. 506, 508, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002), [in] which [the Court held] 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.

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.

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[14] In reaching this conclusion, we do not apply any "heightened" pleading standard, nor do we seek to broaden the scope of Federal Rule of Civil Procedure 9, which can only be accomplished " 'by the process of amending the Federal Rules, and not by judicial interpretation.' " Swierkiewicz v. Sorema N. A., 534 U.S. 506, 515, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) (quoting Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 168, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993)). On certain subjects understood to raise a high risk of abusive litigation, a plaintiff must state factual allegations with greater particularity than Rule 8 requires. Fed. Rules Civ. Proc. 9(b)–(c). Here, our concern is not that the allegations in the complaint were insufficiently "particularized", ibid.; rather, the complaint warranted dismissal because it failed in toto to render plaintiffs' entitlement to relief plausible.

* * *

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

It is so ordered.

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

* * *

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

* * * *

I

Rule 8(a)(2) of the Federal Rules requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." The rule did not come about by happenstance and its language is not inadvertent. The English experience with Byzantine special pleading rules—illustrated by the hypertechnical Hilary rules of 1834—made obvious the appeal of a pleading standard that was easy for the common litigant to understand and sufficed to put the defendant on notice as to the nature of the claim against him and the relief sought. Stateside, David Dudley Field developed the highly influential New York Code of 1848, which required "[a] statement of the facts constituting the cause of action, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended." Substantially similar language appeared in the Federal Equity Rules adopted in 1912.

A difficulty arose, however, in that the Field Code and its progeny required a plaintiff to plead "facts" rather than "conclusions," a distinction that proved far easier to say than to apply. As commentators have noted,

> "it is virtually impossible logically to distinguish among 'ultimate facts,' 'evidence,' and 'conclusions.' Essentially any allegation in a pleading must be an assertion that certain occurrences took place. The pleading spectrum, passing from evidence through ultimate facts to conclusions, is largely a continuum varying only in the degree of particularity with which the occurrences are described." Weinstein & Distler, Comments on Procedural Reform: Drafting Pleading Rules, 57 Colum. L. Rev. 518, 520–521 (1957).

Rule 8 was directly responsive to this difficulty. Its drafters intentionally avoided any reference to "facts" or "evidence" or "conclusions."

Under the relaxed pleading standards of the Federal Rules, the idea was not to keep litigants out of court but rather to keep them in. The merits of a claim would be sorted out during a flexible pretrial process and, as appropriate, through the crucible of trial. See *Swierkiewicz*, 534 U.S., at 514, 122 S.Ct. 992, 152 L.Ed.2d 1 ("The liberal notice pleading of Rule 8(a) is the starting point of a system, which was adopted to focus litigation on the merits of a claim"). * * * *

II

It is in the context of this history that Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), must be understood. The *Conley* plaintiffs were black railroad workers who alleged that their union local had refused to protect them against discriminatory discharges, in violation of the National Railway Labor Act. The union sought to dismiss the complaint on the ground that its general allegations of discriminatory treatment by the defendants lacked sufficient specificity. Writing for a unanimous Court, Justice Black rejected the union's claim as foreclosed by the language of Rule 8. In the course of doing so, he articulated the formulation the Court rejects today: "In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

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

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

* * * *

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

policy choice embodied in the Federal Rules and binding on the federal courts.

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

As in the discrimination context, we have developed an evidentiary framework for evaluating claims under § 1 of the Sherman Act when those claims rest on entirely circumstantial evidence of conspiracy. See Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Under *Matsushita*, a plaintiff's allegations of an illegal conspiracy may not, at the summary judgment stage, rest solely on the inferences that may be drawn from the parallel conduct of the defendants. In order to survive a Rule 56 motion, a § 1 plaintiff "must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently.' " That is, the plaintiff "must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action."

Everything today's majority says would therefore make perfect sense if it were ruling on a Rule 56 motion for summary judgment and the evidence included nothing more than the Court has described. * * * *

This case is a poor vehicle for the Court's new pleading rule, for we have observed that "in antitrust cases, where 'the proof is largely in the hands of the alleged conspirators,' . . . dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." Moreover, the fact that the Sherman Act authorizes the recovery of treble damages and attorney's fees for successful plaintiffs indicates that Congress intended to encourage, rather than discourage, private enforcement of the law. It is therefore more, not less, important in antitrust cases to resist the urge to engage in armchair economics at the pleading stage.

* * * *

III

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

* * * [T]he plaintiffs allege in three places in their complaint, ¶¶ 4, 51, 64, that the ILECs did in fact agree both to prevent competitors from entering into their local markets and to forgo competition with each other. And as the Court recognizes, at the motion to dismiss stage, a judge assumes "that all the allegations in the complaint are true (even if doubtful in fact)."

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

Even if I were inclined to accept the Court's anachronistic dichotomy and ignore the complaint's actual allegations, I would dispute the Court's suggestion that any inference of agreement from petitioners' parallel conduct is "implausible." Many years ago a truly great economist perceptively observed that "people of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices." A. Smith, An Inquiry Into the Nature and Causes of the Wealth of Nations, in 39 Great Books of the Western World 55 (R. Hutchins & M. Adler eds. 1952). I am not so cynical as to accept that sentiment at face value, but I need not do so here. Respondents' complaint points not only to petitioners' numerous opportunities to meet with each other, but also to Notebaert's curious statement that encroaching on a fellow incumbent's territory "might be a good way to turn a quick dollar but that doesn't make it right," id., ¶ 42. What did he mean by that? One possible (indeed plausible) inference is that he meant that while it would be in his company's economic self-interest to compete with its brethren, he had agreed with his competitors not to do so. * * *

* * * * [T]he District Court was required at this stage of the proceedings to construe Notebaert's ambiguous statement in the plaintiffs' favor. The inference the statement supports—that simultaneous decisions by ILECs not even to attempt to poach customers from one another once the law authorized them to do so were the product of an agreement—sits comfortably within the realm of possibility. That is all the Rules require.

NOTES AND QUESTIONS

1. The Court's holding. The majority states its holding as follows:

> In applying these general standards [derived from Rule 8 (a)(2)] to a [claim of conspiracy under Section 1 of the Sherman Act], 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.

Does this holding necessarily imply a change in traditional standards of notice pleading? Consider the following questions.

2. Revival of the code pleading prohibition on legal conclusions? The plaintiff's complaint pleads, in so many words, that the defendants "have entered into a contract, combination or conspiracy" in restraint of trade. Why isn't that allegation sufficient, in the Court's view, to satisfy the requirements of Rule 8(a)(2)? Would the complaint in *Swierkiewicz v. Sorema* survive under the standard applied in *Twombly*?

3. Meanings of *Conley v. Gibson*. The most plaintiff-favoring view of the rule of *Conley v. Gibson* was that if plaintiff pleaded an element of a claim, even in conclusory form, then the complaint could not be dismissed unless the defendant had pleaded other specific facts which indisputably demonstrated that the "conclusion" would never be provable at trial. *Access Now v. Southwest Airlines Co.* is arguably an example of a case where the

specific facts pleaded demonstrated the untenable nature of a conclusory claim. In *Twombly*, are plaintiff's allegations of parallel conduct wholly inconsistent with the existence of the agreement among the defendants that the plaintiff has described, or do they merely fail to affirmatively suggest the existence of an agreement? If the latter is the case, then hasn't the strong plaintiff-favoring version of *Conley* been rejected?

Another less dramatic reading of *Conley* is that in determining whether an element has been pleaded, the court must take what has been pleaded as true and read the allegations of the complaint in the light most favorable to the plaintiff. Did the Court read every allegation of Twombly's complaint in the light most favorable to the plaintiff?

4. Determining plausibility for other kinds of claims. In assessing whether the *Twombly* complaint pleads a "plausible" claim of combination or conspiracy, the Court offers a variety of potential non-conspiratorial explanations for defendants' alleged conduct. Does this imply that in construing complaints the court should similarly theorize about the potential non-discriminatory motivations for defendants' alleged conduct in discrimination cases? About the non-negligent explanations for defendants' alleged conduct in negligence cases? What problems do you see with such theorizing?

The Court also appears to give great weight in its formulation of the "plausibility" principle to the goal of preventing costly and unproductive discovery in complex cases and to the presumed inability of judicial management or summary judgment to do so. As the Court points out, those problems are especially severe in antitrust class actions. But across the federal docket, the number of cases involving massive discovery is small as a percentage of all cases filed. Does this imply that in deciding how much "plausibility" to demand in particular kinds of complaints lower courts should analyze the risks of wasteful discovery on a claim-by-claim or subject-area-by-subject-area basis? If not, hasn't the Court allowed an unusual kind of "big case" litigation to skew the pleading standards that will apply to many routine cases which don't present the risk of extraordinary discovery costs?

For a brief period following the *Twombly* decision, some believed that its holding would be limited to the antitrust area—or at least to other kinds of cases thought to generate high discovery costs. The Supreme Court ended that speculation in the following case, decided in 2009.

Ashcroft v. Iqbal

Supreme Court of the United States, 2009.
556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868.

■ JUSTICE KENNEDY delivered the opinion of the Court.

Respondent Javaid Iqbal 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. Of those individuals, some 762 were held on immigration charges; and a 184-member subset of that group was deemed to be "of 'high interest' " to the investigation. The high-interest detainees were held under restrictive conditions designed to prevent them from communicating with the general prison population or the outside world.

Respondent was one of the detainees. According to his complaint, in November 2001 agents of the FBI and Immigration and Naturalization Service arrested him on charges of fraud in relation to identification documents and conspiracy to defraud the United States. Pending trial for those crimes, respondent was housed at the Metropolitan Detention Center (MDC) in Brooklyn, New York. Respondent was designated a person "of high interest" to the September 11 investigation and in January 2002 was placed in a section of the MDC known as the Administrative Maximum Special Housing Unit (ADMAX SHU). As the facility's name indicates, the ADMAX SHU incorporates the maximum security conditions allowable under Federal Bureau of Prison regulations. ADMAX SHU detainees were kept in lockdown 23 hours a day, spending the remaining hour outside their cells in handcuffs and leg irons accompanied by a four-officer escort.

Respondent pleaded guilty to the criminal charges, served a term of imprisonment, and was removed to his native Pakistan. He then filed a *Bivens* action in the United States District Court for the Eastern District

of New York against 34 current and former federal officials 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, subjected him to serial strip and body-cavity searches when he posed no safety risk to himself or others, and refused 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 designated respondent a person of high interest on account of his race, religion, or national origin, in contravention of the First and Fifth Amendments to the Constitution. The complaint alleges that "the [FBI], under the direction of Defendant MUELLER, arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11." It further alleges that "[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were 'cleared' by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001." 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, 78 S.Ct. 99, 2 L.Ed.2d 80 (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, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), which discussed the standard for evaluating whether a complaint is sufficient to survive a motion to dismiss.

The Court of Appeals * * * concluded that *Twombly* called for a "flexible 'plausibility standard,' which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*." The court found that petitioners' appeal did not present one of "those contexts" requiring amplification. * * *

* * * We granted certiorari and now reverse.

III

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.

* * * *

* * * 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.

* * * 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." *Personnel Administrator of Mass. v. Feeney,* 442 U.S. 256, 279, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979). It instead involves a decisionmaker's undertaking 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.

* * * 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. * * *

IV

A

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

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it

asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.' "

Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. *Id.,* at 555, 127 S.Ct. 1955 (Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we "are not bound to accept as true a legal conclusion couched as a factual allegation" (internal quotation marks omitted)). Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not "show[n]"—"that the pleader is entitled to relief." Fed. Rule Civ. Proc. 8(a)(2).

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

B

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

We begin our analysis by identifying the allegations in the complaint that are not entitled to the assumption of truth. Respondent pleads that petitioners "knew of, condoned, and willfully and maliciously agreed to subject [him]" to harsh conditions of confinement "as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest." The complaint alleges that Ashcroft was the "principal architect" of this invidious policy, 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. To be clear, we do not reject these bald allegations on the ground that they are unrealistic or nonsensical. We do not so characterize them any more than the Court in *Twombly* rejected the plaintiffs' express allegation of a

" 'contract, combination or conspiracy to prevent competitive entry,' "because it thought that claim too chimerical to be maintained. It is the conclusory nature of respondent's allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth.

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

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

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

This the complaint fails to do. Though respondent alleges that various other defendants, who are not before us, may have labeled him a person of "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, 127 S.Ct. 1955.

* * * *

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

C

* * *

1

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

2

Respondent next implies that our construction of Rule 8 should be tempered where, as here, the Court of Appeals has "instructed the district court to cabin discovery[.]" * * * We have held, however, that the question presented by a motion to dismiss a complaint for insufficient pleadings does not turn on the controls placed upon the discovery process. *Twombly, supra,* at 559 ("It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through careful case management given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side" (internal quotation marks and citation omitted)).

* * * *

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

It is so ordered.

■ JUSTICE SOUTER, with whom JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

* * * I respectfully dissent from both the rejection of supervisory liability as a cognizable claim in the face of petitioners' concession, and from the holding that the complaint fails to satisfy Rule 8(a)(2) of the Federal Rules of Civil Procedure.

I

A

Respondent Iqbal was arrested in November 2001 on charges of conspiracy to defraud the United States and fraud in relation to identification documents, and was placed in pretrial detention at the Metropolitan Detention Center in Brooklyn, New York. He alleges that FBI officials carried out a discriminatory policy by designating him as a person " 'of high interest' " in the investigation of the September 11 attacks solely because of his race, religion, or national origin. Owing to this designation he was placed in the detention center's Administrative Maximum Special Housing Unit for over six months while awaiting the fraud trial. As I will mention more fully below, Iqbal contends that Ashcroft and Mueller were at the very least aware of the discriminatory detention policy and condoned it (and perhaps even took part in devising it), thereby violating his First and Fifth Amendment rights.

Iqbal claims that on the day he was transferred to the special unit, prison guards, without provocation, "picked him up and threw him against the wall, kicked him in the stomach, punched him in the face, and dragged him across the room." He says that after being attacked a second time he sought medical attention but was denied care for two weeks. According to Iqbal's complaint, prison staff in the special unit subjected him to unjustified strip and body cavity searches, verbally berated him as a " 'terrorist' " and " 'Muslim killer,' " refused to give him adequate food, and intentionally turned on air conditioning during the winter and heating during the summer. He claims that prison staff interfered with his attempts to pray and engage in religious study and with his access to counsel.

* * *

* * * Ashcroft and Mueller * * * conceded in their petition for certiorari [and in their brief on the merits] that they would be liable if they had "actual knowledge" of discrimination by their subordinates and exhibited " 'deliberate indifference' " to that discrimination. * * * *

II

Given petitioners' concession, the complaint satisfies Rule 8(a)(2). Ashcroft and Mueller admit they are liable for their subordinates' conduct if they "had actual knowledge of the assertedly discriminatory nature of the classification of suspects as being 'of high interest' and they were deliberately indifferent to that discrimination." Iqbal alleges that after the September 11 attacks the Federal Bureau of Investigation (FBI) "arrested and detained thousands of Arab Muslim men," that many of these men were designated by high-ranking FBI officials as being " 'of high interest,' " and that in many cases, including Iqbal's, this designation was made "because of the race, religion, and national origin of the detainees, and not because of any evidence of the detainees'

involvement in supporting terrorist activity." The complaint further alleges that Ashcroft was the "principal architect of the policies and practices challenged," and that Mueller "was instrumental in the adoption, promulgation, and implementation of the policies and practices challenged." According to the complaint, Ashcroft and Mueller "knew of, condoned, and willfully and maliciously agreed to subject [Iqbal] to these conditions of confinement as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest." The complaint thus alleges, at a bare minimum, that Ashcroft and Mueller knew of and condoned the discriminatory policy their subordinates carried out. Actually, the complaint goes further in alleging that Ashcroft and Muller affirmatively acted to create the discriminatory detention policy. If these factual allegations are true, Ashcroft and Mueller were, at the very least, aware of the discriminatory policy being implemented and deliberately indifferent to it.

Ashcroft and Mueller argue that these allegations fail to satisfy the "plausibility standard" of *Twombly*. They contend that Iqbal's claims are implausible because such high-ranking officials "tend not to be personally involved in the specific actions of lower-level officers down the bureaucratic chain of command." But this response bespeaks a fundamental misunderstanding of the enquiry that *Twombly* demands. *Twombly* does not require a court at the motion-to-dismiss stage to consider whether the factual allegations are probably true. We made it clear, on the contrary, that a court must take the allegations as true, no matter how skeptical the court may be. See *Twombly*, 550 U.S., at 555 (a court must proceed "on the assumption that all the allegations in the complaint are true (even if doubtful in fact). The sole exception to this rule lies with allegations that are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff's recent trip to Pluto, or experiences in time travel. That is not what we have here.

[Unlike in *Twombly*,] the allegations in the complaint are neither confined to naked legal conclusions nor consistent with legal conduct. The complaint alleges that FBI officials discriminated against Iqbal solely on account of his race, religion, and national origin, and it alleges the knowledge and deliberate indifference that, by Ashcroft and Mueller's own admission, are sufficient to make them liable for the illegal action. Iqbal's complaint therefore contains "enough facts to state a claim to relief that is plausible on its face."

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

disparate, incidental impact on Arab Muslims." And I agree that the two allegations selected by the majority, standing alone, do not state a plausible entitlement to relief for unconstitutional discrimination.

But these allegations do not stand alone as the only significant, nonconclusory statements in the complaint, for the complaint contains many allegations linking Ashcroft and Mueller to the discriminatory practices of their subordinates. See Complaint ¶ 10 (Ashcroft was the "principal architect" of the discriminatory policy); *id.,* ¶ 11 (Mueller was "instrumental" in adopting and executing the discriminatory policy); *id.,* ¶ 96 (Ashcroft and Mueller "knew of, condoned, and willfully and maliciously agreed to subject" Iqbal to harsh conditions "as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest").

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

That aside, the majority's holding that the statements it selects are conclusory cannot be squared with its treatment of certain other allegations in the complaint as nonconclusory. For example, the majority takes as true the statement that "[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were 'cleared' by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001." This statement makes two points: (1) after September 11, the FBI held certain detainees in highly restrictive conditions, and (2) Ashcroft and Mueller discussed and approved these conditions. If, as the majority says, these allegations are not conclusory, then I cannot see why the majority deems it merely conclusory when Iqbal alleges that (1) after September 11, the FBI designated Arab Muslim detainees as being of " 'high interest' " "because of the race, religion, and national origin of the detainees, and not because of any evidence of the detainees' involvement in supporting

terrorist activity," Complaint ¶¶ 48–50, and (2) Ashcroft and Mueller "knew of, condoned, and willfully and maliciously agreed" to that discrimination, *id.*, ¶ 96. By my lights, there is no principled basis for the majority's disregard of the allegations linking Ashcroft and Mueller to their subordinates' discrimination.

I respectfully dissent.

NOTES AND QUESTIONS

1. The legal theory of *Iqbal*'s complaint. The majority says that the only legally available claim against Ashcroft and Mueller is for their own intentional discrimination—that is, for decisions that they themselves made or actions that they took "because of" the race, religion or national origin of the plaintiffs. Accordingly, the majority holds that the plaintiff was required to adequately plead that Ashcroft and Mueller "purposefully adopted a policy of classifying post-September-11 detainees as 'of high interest' because of their race, religion, or national origin." The dissent, relying on an explicit concession by Ashcroft and Mueller, assumes without deciding that liability is also permitted on the basis that defendants, as supervisors, "had actual knowledge of the assertedly discriminatory nature of the classification of suspects as being 'of high interest' and they were deliberately indifferent to that discrimination." Does this difference in applicable legal theory explain the disagreement between the majority and the dissent concerning the adequacy of the complaint?

2. Does the complaint fail to provide fair notice? If you were a lawyer for Ashcroft or Mueller, could you figure out what events the plaintiffs are complaining about and what Ashcroft and Mueller's roles in those events allegedly were? Is there any doubt about what policy is being challenged? Is there any doubt about the time period in which it was adopted? Does the complaint describe any instances of how the policy was administered? Do the allegations describe the alleged illegal conduct of Ashcroft and Mueller in sufficient detail to allow them to prepare their defense? How do the allegations compare, in terms of specificity, with those approved in *Swierkiewicz* and those disapproved in *Twombly*?

3. When is an allegation conclusory? A key difference between the majority and dissent is how they handle the allegations (a) that defendants "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," (b) that Ashcroft was the "principal architect of the policies and practices challenged," and (c) that Mueller "was instrumental in the adoption, promulgation, and implementation of the policies and practices challenged."

As noted, supra p. 462, the drafters of the federal Rules sought to abolish the distinction in code pleading between properly pleaded facts and improperly pleaded legal conclusions. The drafters reasoned that there was no clear dividing line conceptually between facts and legal conclusions, so the emphasis on that distinction provoked litigation and resulted in inconsistent and often erroneous results. If the complaint provided adequate notice, there would be no reason to treat legal conclusions as inadequate—discovery would expose their flaws. Was the majority's dismissal of the above

allegations as "conclusory" based on any concern that those allegations did not, in context, provide sufficient notice of the claim?

Another possible reason for disregarding "conclusions" is that they add nothing to what is pleaded elsewhere in the complaint. But don't the allegations that Ashcroft was "principal architect" and that Mueller was "instrumental in the adoption, promulgation, and implementation" of the policy go beyond the simple statement of the elements of the claim and convey additional information?

Twombly seems to have added an additional concern: if a legal conclusion were sufficient, standing alone, to satisfy the requirements of Rule 8(a), then too many baseless suits might reach discovery. If the concern that justifies ignoring "conclusory" language is that more detail is required in order to determine whether the allegations are worth crediting, then isn't the majority disingenuous in suggesting that it is not in fact dismissing those allegations because they are unworthy of being credited? How fair is it to require greater detail from a plaintiff in Iqbal's position who has not had any discovery?

After *Iqbal* how would you distinguish language that is impermissibly conclusory (whether or not it parrots a legal rule) from language that is sufficiently factual? Does the majority explain the distinction between the two in a way that trial judges in other cases can discern and apply?

4. Testing plausibility. The majority and dissent appear to agree that if the allegations that the majority classifies as "conclusory" are ignored then the remaining "factual" allegations pleaded in the complaint do not state a plausible claim for relief. Do you agree? Is the dissent correct that the allegations of the complaint, if read to include the portions the majority dismisses as "conclusory," do state a plausible claim?

The majority says that "determining whether a complaint states a plausible claim for relief will * * * be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Does context-specificity mean that the lower courts will have to develop "plausibility" standards for each area of substantive law? How reliable are "judicial experience and common sense" as a guide to the likelihood that plaintiff, if allowed discovery, will find sufficient information supporting her claim to prevail at trial? Consider a judge in his first day on the job. Does the majority provide a sufficient analysis of plausibility to allow lower court judges to make such determinations consistently and reliably?

5. The benefits and costs of screening. *Twombly* and *Iqbal* together create the potential for dismissal at the pleading stage of many claims that cannot be pleaded in terms that are both non-conclusory and plausible. Some of those claims will be ones that would ultimately fail after discovery, either at summary judgment or at a trial. But what is the potential for this stronger screening rule to burden claims that would be winners after discovery, either by barring them altogether or by increasing litigation costs? Did the *Twombly* or *Iqbal* courts give sufficient consideration to those potential costs? Recall the statement in *Swierkiewicz* that "a requirement of greater specificity" for particular claims "must be obtained" by formal amendment, rather than judicial interpretation, of the federal Rules. Would the formal rulemaking process have been a better way to judge the benefits and costs of the Court's procedural innovation?

6. The role of the Supreme Court in interpreting federal Rules. As a matter of separation of powers, was it appropriate for the Court to change the interpretation of Rule 8 in such a significant way? Professors Burbank and Farhang suggest not: "The Court's recent pleading decisions were certainly bold. . . . *Twombly*, and *Iqbal* are a few recent examples of the Court using its Article III judicial power to achieve results that would have been very difficult or impossible to achieve through the exercise of delegated legislative lawmaking power under the Enabling Act." Burbank & Farhang, Litigation Reform: An Institutional Approach, 162 U. Pa. L. Rev. 1543 (2014); see also Marcus, Institutions and an Interpretive Methodology for the Federal Rules of Civil Procedure, 2011 Utah L. Rev. 927.

Professor Redish disagrees. He argues that,

> [T]he language of Rule 8(a) is no way inconsistent with a plausibility standard. . . . Although the drafters of the Federal Rules in most cases sought to break away from the unduly high barriers to suit set by the code pleading standard for required factual detail, it is difficult to believe that they intended to allow the pleading of vague and conclusory allegations to enable the plaintiff to invoke the costly and burdensome discovery process absent some showing that the case was more than fanciful.

Redish, Pleading, Discovery, and the Federal Rules: Exploring the Foundations of Modern Procedure, 64 Fla. L. Rev. 845 (2012). Do you think the Court acted appropriately in reinterpreting the meaning of Rule 8(a) in *Twombly* and *Iqbal*?

7. *Iqbal* and the use of trans-substantive rules. One of the significant developments of modern procedural reform has been the advent of so-called "trans-substantive" procedural rules, that is, procedural rules that apply to nearly all civil cases, regardless of the substantive law to be applied. With limited exceptions, such as Rule 9(b)'s requirement of pleading with particularity in cases of fraud or mistake, the federal Rules apply to all cases in federal court. Trans-substantivity was a central component of reformers' goal of simplifying procedure and shedding the technicality of common law pleading. Hence the requirement of only a "short and plain statement" in federal Rule 8(a). Unless the rulemakers or the Congress legislated otherwise, this standard was to apply in all civil cases in federal court. Recall the Court's statement in *Swierkiewicz* that, "A requirement of greater specificity for particular claims is a result that 'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation." Supra, p. 468.

After *Twombly*, it was thought that the Supreme Court might be venturing down the path of creating heightened pleading burdens for different kinds of cases, particularly cases in which the costs of discovery were thought to be high, as in antitrust cases. *Iqbal* made clear that this was not the case. As Justice Kennedy explains, "Our decision in *Twombly* expounded the pleading standard for 'all civil actions,' and it applies to antitrust and discrimination suits alike."

Is the Court's commitment to trans-substantivity misplaced? Should we more commonly have different pleading standards for different types of cases? If so, in what kinds of claims should pleading standards be heightened? For discussion of this issue, see Bone, *Twombly*, Pleading Rules, and the Regulation of Court Access, 94 Iowa L. Rev. 873 (2009); Effron, The

Plaintiff Neutrality Principle: Pleading Complex Litigation in the Era of *Twombly* and *Iqbal*, 51 Wm. & Mary L. Rev. 1997 (2010).

And, despite the Court's statement that *Iqbal* provides the pleading standard for all civil cases in federal court, does its instruction that judges draw on their "judicial experience and common sense" invite individual judges to apply different standards to different kinds of cases? See Spencer, Pleading and Access to Civil Justice: A Response to *Twiqbal* Apologists, 60 U.C.L.A. L. Rev. 1710 (2013); Burbank, Pleading and the Dilemma of "General Rules," 2009 Wisc. L. Rev. 535.

8. Does *Iqbal* go further than *Twombly*? In *Iqbal*, Justice Kennedy explains that the decision extends the *Twombly* plausibility standard to all federal civil cases. But does *Iqbal* raise pleading standards even higher than *Twombly*? Consider *Iqbal*'s treatment of "legal conclusions." Is it consistent with Justice Souter's majority opinion in *Twombly*? Note that Justice Souter sides with the dissenters in *Iqbal*. Are you persuaded by his explanation why?

9. Reactions to *Twombly* and *Iqbal*. In the aftermath of *Iqbal* legislation was introduced in both houses of Congress seeking to overturn the result in *Twombly* and *Iqbal* and restore a full notice pleading regime. For example, House Bill 4115, the Open Access to Courts Act of 2009, would have prohibited dismissal of a complaint "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief." The bill further provided that "[a] court shall not dismiss a complaint * * * on the basis of a determination by the judge that the factual contents of the complaint do not show the plaintiff's claim to be plausible or are insufficient to warrant a reasonable inference that the defendant is liable for the misconduct alleged." Hearings were held on the bill, but it never made it out of Committee.

10. The impact of *Twombly* and *Iqbal*. Since the *Twombly* and *Iqbal* decisions, professional researchers and scholars have spent much energy on assessing their impact. Typical of the reaction among scholars is the statement by Professors Clermont and Yeazell that "[b]y inventing a new and foggy test for the threshold stage of every lawsuit, [the Supreme Court has] destabilized the entire system of civil litigation." Clermont & Yeazell, Inventing Tests, Destabilizing Systems, 95 Iowa L. Rev. 821 (2010). Their observation is undoubtedly correct, but the question observers have hoped to answer since *Twombly* and *Iqbal* is whether the decisions have made a real difference in federal civil litigation.

Researchers at the Federal Judicial Center (FJC) in the Administrative Office of the U.S. Courts have amassed an enormous amount of data and continue to examine the effects of *Iqbal*. Their initial study concluded that "there was no increase from 2006 to 2010 in the rate at which a grant of a motion to dismiss terminated the case." Joe Cecil et al., Federal Judicial Center, Motions to Dismiss for Failure to State a Claim After *Iqbal* (2011). Although the study found that the rate of filing of motions to dismiss increased, the rate at which those motions were granted had not significantly increased (aside from an increase in cases challenging financial instruments, which had increased significantly in the wake of the mortgage crisis in the mid-2000s). Id. at 23. The FJC study acknowledged its limitations and was an admittedly early attempt to study the problem, but it came in for significant scholarly criticism of both its methods and conclusions. See

Hoffman, *Twombly* and *Iqbal*'s Measure: An Assessment of the Federal Judicial Center's Study of Motions to Dismiss, 6 Fed. Cts. L. Rev. 1 (2011).

Professor Gelbach has provided one of the most trenchant critiques. Gelbach argues that it is misleading to assess the impact of *Twombly* and *Iqbal* by looking exclusively at whether the rate at which motions to dismiss are granted has gone up. Such an analysis ignores potential effects of *Twombly* and *Iqbal* that are not reflected in the grant rate. For instance, raised pleading standards may (1) reduce the number of cases actually brought by plaintiffs, (2) increase the likelihood that defendants will file a motion to dismiss, which may at best be successful and at least very costly to respond to, and (3) may reduce the likelihood that defendants will settle. As a result, Professor Gelbach concludes that the FJC Study seriously understates the number of cases that are "negatively affected" by *Twombly* and *Iqbal*. Using a sophisticated statistical analysis, he concludes that, "For employment discrimination and civil rights cases, switching from *Conley* to *Twombly/Iqbal* negatively affected plaintiffs in at least 15.4% and at least 18.4%, respectively, of the cases that faced [motions to dismiss] in the *Iqbal* period." Gelbach, Locking the Doors to Discovery? Assessing the Effects of *Twombly* and *Iqbal* on Access to Discovery, 121 Yale L.J. 2270 (2012).

In another illuminating study, Professor Dodson has examined the reasoning courts have given for granting motions to dismiss before and after *Twombly*. He reports:

> These data show that courts are using factual insufficiency more often as a justification for dismissals than before *Twombly*. The increases in the proportion of factual-insufficiency dismissals is fairly stark, highly significant, and in double digits for most categories [of cases]. The fairly uncontroversial conclusion is that courts are taking *Twombly* and *Iqbal* to heart.

Dodson, New Pleading in the 21st Century 97 (2013).

Massive resources continue to be devoted to the empirical puzzle of the impact of *Twombly* and *Iqbal*. It remains to be seen whether this analysis will reveal a definitive answer. A useful and penetrating analysis of empirical pleading scholarship, and empirical scholarship in civil procedure generally, can be found in Engstrom, The *Twiqbal* Puzzle and Empirical Study of Civil Procedure, 65 Stan. L. Rev. 1203 (2013).

11. Further reading. *Twombly* and *Iqbal* have prompted a deluge of scholarship. In addition to the articles noted above, other illuminating pieces include: Miller, Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure, 88 N.Y.U. L. Rev. 439 (2012); Hartnett, Taming *Twombly*, Even After *Iqbal*, 158 U. Pa. L. Rev. 473 (2010); Spencer, Understanding Pleading Doctrine, 108 Mich. L. Rev. 1 (2009); Steinman, The Pleading Problem, 62 Stan. L. Rev. 1293 (2010).

2. HEIGHTENED PLEADING REQUIREMENTS AND DISFAVORED CLAIMS

INTRODUCTORY NOTE ON HEIGHTENED PLEADING REQUIREMENTS

1. Rule 8(a) is the usual pleading standard. In general, the pleading standard in the federal courts is provided by Rule 8(a), unless another federal Rule or statute provides otherwise. In Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993), the Supreme Court reviewed a lower court opinion that had imposed a "heightened" pleading standard for federal civil rights actions alleging municipal liability under 42 U.S.C. § 1983. The Supreme Court reversed. The Court held that there is no "heightened pleading standard" for a complaint in a § 1983 civil rights case brought against a municipality. The Court based its holding on Rule 8(a), which requires only a "short and plain statement of the claim." It compared Rule 8(a) to Rule 9(b), which requires particularized pleading when "fraud" or "mistake" are alleged. The Court reasoned that the fact that the only express exceptions to the notice pleading rules spelled out in the rules were the particularity requirements for fraud and mistake in Rule 9 indicated that no other exceptions were contemplated or permitted. The Court stated:

> Perhaps if Rules 8 and 9 were rewritten today, claims against municipalities under § 1983 might be subjected to the added specificity requirement of Rule 9(b). But that is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation. In the absence of such an amendment, federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later.

507 U.S. at 168–69. The Court unanimously reaffirmed this holding in *Swierkiewicz v. Sorema, N.A.*, discussed supra at p. 465.

2. Pleading fraud and mistake. The federal Rules originally contemplated requiring more specific pleading in two limited classes of cases: those involving averments of fraud or mistake. Fed. R. Civ. P. 9(b). The requirement of specificity in pleading fraud is a carry-over from the common law and code systems of pleading. Allegations of fraud appear to have been disfavored, because of their potential for damage to reputation and their consequent tendency to increase the contentiousness of any suit in which they were made. The aim of the rule is "prevent plaintiffs from stating a claim just by adding the word 'fraudulently' to a description of a financial transaction." James, Hazard & Leubsdorf, Civil Procedure § 2.19, at 222 (5th ed. 2001). To avoid that result, plaintiff is required to plead the content of the statement claimed to be false, either verbatim or in substance, and the falsity of the statement. In addition, the complaint must plead the circumstances in sufficient detail to make clear that the statement was one of material fact "rather than the kind of opinion or prophecy on which people are not entitled to rely." Id. at 222–23. See Richman et al., The Pleading of Fraud: Rhymes Without Reason, 60 S. Cal. L. Rev. 959 (1987).

3. Other claims requiring more specific pleading. Several other Rules also require particularized pleading. Under Rule 9(g), claims for

"special damage" must be "specifically stated." Under Rule 23.1, a plaintiff in a shareholder derivative suit must "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."

4. The effect of a failure to plead with particularity. The requirement of particularity under Rule 9(b) applies to all allegations of fraud. In cases where fraud is an essential element of the claim, failure to plead fraud with specificity is equivalent to not having pleaded the element of fraud at all. In effect, the motion to dismiss a claim "grounded in fraud under Rule 9(b) for failure to plead with particularity is the functional equivalent of a motion to dismiss under Rule 12(b)(6) for failure to state a claim." Vess v. Ciba-Geigy Corp., 317 F.3d 1097, 1107 (9th Cir. 2003). In other cases, however, the plaintiff may choose to "dress up" a claim that does not require proof of fraud by adding averments of fraudulent conduct. Because such averments, though inessential to the claim, nonetheless give rise to the possibility of reputational damage to the defendant, they are still required to be pleaded with particularity. But the failure to plead them is not necessarily fatal to the claim: instead, the insufficiently particular allegations of fraud are stripped from the claim, which is then evaluated for sufficiency without those allegations. Id.

5. Policies favoring greater specificity. A requirement that an element of a claim or defense be pleaded with greater specificity or particularity increases the burden of pleading with respect to that element. In principle, then, an increase in specificity or particularity should be justified on the basis of the same considerations that underlay the assignment of the burden to the pleader in the first instance. Recall the discussion in the Note on Allocating the Burden of Pleading, supra p. 458. In Professor Cleary's formulation, those considerations were fairness (or access to evidence), probability, and policy. In recent years, courts and legislatures have sought to impose additional requirements of specificity for several different types of claims. As you read the following materials, ask yourself how well these additional pleading burdens are justified by the considerations that Professor Cleary identifies as central.

Tellabs, Inc. v. Makor Issues & Rights, Ltd.

Supreme Court of the United States, 2007.
551 U.S. 308, 127 S.Ct. 2499, 168 L.Ed.2d 179.

■ JUSTICE GINSBURG delivered the opinion of the Court.

This Court has long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange Commission (SEC). Private securities fraud actions, however, if not adequately contained, can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law. As a check against abusive litigation by private parties, Congress enacted the Private Securities Litigation Reform Act of 1995 (PSLRA), 109 Stat. 737.

Exacting pleading requirements are among the control measures Congress included in the PSLRA. The Act requires plaintiffs to state with particularity both the facts constituting the alleged violation, and the facts evidencing scienter, *i.e.,* the defendant's intention "to deceive, manipulate, or defraud." This case concerns the latter requirement. As set out in § 21D(b)(2) of the PSLRA, plaintiffs must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u–4(b)(2).

Congress left the key term "strong inference" undefined, and Courts of Appeals have divided on its meaning. In the case before us, the Court of Appeals for the Seventh Circuit held that the "strong inference" standard would be met if the complaint "allege[d] facts from which, if true, a reasonable person could infer that the defendant acted with the required intent." That formulation, we conclude, does not capture the stricter demand Congress sought to convey in § 21D(b)(2). It does not suffice that a reasonable factfinder plausibly could infer from the complaint's allegations the requisite state of mind. Rather, to determine whether a complaint's scienter allegations can survive threshold inspection for sufficiency, a court governed by § 21D(b)(2) must engage in a comparative evaluation; it must consider, not only inferences urged by the plaintiff, as the Seventh Circuit did, but also competing inferences rationally drawn from the facts alleged. An inference of fraudulent intent may be plausible, yet less cogent than other, nonculpable explanations for the defendant's conduct. To qualify as "strong" within the intendment of § 21D(b)(2), we hold, an inference of scienter must be more than merely plausible or reasonable-it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent.

I

Petitioner Tellabs, Inc., manufactures specialized equipment used in fiber optic networks. During the time period relevant to this case, petitioner Richard Notebaert was Tellabs' chief executive officer and president. Respondents (Shareholders) are persons who purchased Tellabs stock between December 11, 2000, and June 19, 2001. They accuse Tellabs and Notebaert (as well as several other Tellabs executives) of engaging in a scheme to deceive the investing public about the true value of Tellabs' stock.

Beginning on December 11, 2000, the Shareholders allege, Notebaert (and by imputation Tellabs) "falsely reassured public investors, in a series of statements . . . that Tellabs was continuing to enjoy strong demand for its products and earning record revenues," when, in fact, Notebaert knew the opposite was true. From December 2000 until the spring of 2001, the Shareholders claim, Notebaert knowingly misled the public in four ways. First, he made statements indicating that demand for Tellabs' flagship networking device, the TITAN 5500, was continuing to grow, when in fact demand for that product was waning. Second, Notebaert made statements indicating that the TITAN 6500, Tellabs' next-generation networking device, was available for delivery, and that demand for that product was strong and growing, when in truth the product was not ready for delivery and demand was weak. Third, he falsely represented Tellabs' financial results for the fourth quarter of 2000 (and, in connection with those results, condoned the practice of "channel stuffing," under which Tellabs flooded its customers with

unwanted products). Fourth, Notebaert made a series of overstated revenue projections, when demand for the TITAN 5500 was drying up and production of the TITAN 6500 was behind schedule. Based on Notebaert's sunny assessments, the Shareholders contend, market analysts recommended that investors buy Tellabs' stock.

The first public glimmer that business was not so healthy came in March 2001 when Tellabs modestly reduced its first quarter sales projections. In the next months, Tellabs made progressively more cautious statements about its projected sales. On June 19, 2001, the last day of the class period, Tellabs disclosed that demand for the TITAN 5500 had significantly dropped. Simultaneously, the company substantially lowered its revenue projections for the second quarter of 2001. The next day, the price of Tellabs stock, which had reached a high of $67 during the period, plunged to a low of $15.87.

On December 3, 2002, the Shareholders filed a class action in the District Court for the Northern District of Illinois. Their complaint stated, *inter alia,* that Tellabs and Notebaert had engaged in securities fraud in violation of § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and SEC Rule 10b–5, 17 CFR § 240.10b–5 (2006), also that Notebaert was a "controlling person" under § 20(a) of the 1934 Act, 15 U.S.C. § 78t(a), and therefore derivatively liable for the company's fraudulent acts. Tellabs moved to dismiss the complaint on the ground that the Shareholders had failed to plead their case with the particularity the PSLRA requires. The District Court agreed, and therefore dismissed the complaint without prejudice.

The Shareholders then amended their complaint, adding references to 27 confidential sources and making further, more specific, allegations concerning Notebaert's mental state. The District Court again dismissed, this time with prejudice. The Shareholders had sufficiently pleaded that Notebaert's statements were misleading, the court determined, but they had insufficiently alleged that he acted with scienter.

The Court of Appeals for the Seventh Circuit reversed in relevant part. * * *

We granted certiorari to resolve the disagreement among the Circuits on whether, and to what extent, a court must consider competing inferences in determining whether a securities fraud complaint gives rise to a "strong inference" of scienter.

II

Section 10(b) of the Securities Exchange Act of 1934 forbids the "use or employ, in connection with the purchase or sale of any security . . . , [of] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe as necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. § 78j(b). SEC Rule 10b–5 implements § 10(b) by declaring it unlawful:

> "(a) To employ any device, scheme, or artifice to defraud,
>
> "(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made . . . not misleading, or

> "(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security." 17 CFR § 240.10b–5.

Section 10(b), this Court has implied from the statute's text and purpose, affords a right of action to purchasers or sellers of securities injured by its violation. To establish liability under § 10(b) and Rule 10b–5, a private plaintiff must prove that the defendant acted with scienter, "a mental state embracing intent to deceive, manipulate, or defraud."

In an ordinary civil action, the Federal Rules of Civil Procedure require only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. Rule Civ. Proc. 8(a)(2). Although the rule encourages brevity, the complaint must say enough to give the defendant "fair notice of what the plaintiff's claim is and the grounds upon which it rests." Prior to the enactment of the PSLRA, the sufficiency of a complaint for securities fraud was governed not by Rule 8, but by the heightened pleading standard set forth in Rule 9(b). Rule 9(b) applies to "all averments of fraud or mistake"; it requires that "the circumstances constituting fraud . . . be stated with particularity" but provides that "[m]alice, intent, knowledge, and other condition of mind of a person, may be averred generally."

Courts of Appeals diverged on the character of the Rule 9(b) inquiry in § 10(b) cases: Could securities fraud plaintiffs allege the requisite mental state "simply by stating that scienter existed," or were they required to allege with particularity facts giving rise to an inference of scienter? Circuits requiring plaintiffs to allege specific facts indicating scienter expressed that requirement variously. The Second Circuit's formulation was the most stringent. Securities fraud plaintiffs in that Circuit were required to "specifically plead those [facts] which they assert give rise to a *strong inference* that the defendants had" the requisite state of mind. The "strong inference" formulation was appropriate, the Second Circuit said, to ward off allegations of "fraud by hindsight."

Setting a uniform pleading standard for § 10(b) actions was among Congress' objectives when it enacted the PSLRA. Designed to curb perceived abuses of the § 10(b) private action—"nuisance filings, targeting of deep-pocket defendants, vexatious discovery requests and manipulation by class action lawyers," [Merrill Lynch Pierce, Fenner & Smith] v. Dabit, 547 U.S. [71], at 81, 126 S.Ct. 1503 (quoting H.R. Conf. Rep. No. 104–369, p. 31 (1995), U.S.Code Cong. & Admin.News 1995, p. 730 (hereinafter H.R. Conf. Rep.))—the PSLRA installed both substantive and procedural controls. * * * [I]n § 21D(b) of the PSLRA, Congress "impose[d] heightened pleading requirements in actions brought pursuant to § 10(b) and Rule 10b–5."

Under the PSLRA's heightened pleading instructions, any private securities complaint alleging that the defendant made a false or misleading statement must: (1) "specify each statement alleged to have been misleading [and] the reason or reasons why the statement is misleading," 15 U.S.C. § 78u–4(b)(1); and (2) "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind," § 78u–4(b)(2). In the instant case, as earlier stated, the District Court and the Seventh Circuit agreed that the

Shareholders met the first of the two requirements: The complaint sufficiently specified Notebaert's alleged misleading statements and the reasons why the statements were misleading. But those courts disagreed on whether the Shareholders, as required by § 21D(b)(2), "state[d] with particularity facts giving rise to a strong inference that [Notebaert] acted with [scienter]," § 78u–4(b)(2).

The "strong inference" standard "unequivocally raise[d] the bar for pleading scienter," and signaled Congress' purpose to promote greater uniformity among the Circuits, see H.R. Conf. Rep., p. 41. But "Congress did not . . . throw much light on what facts . . . suffice to create [a strong] inference," or on what "degree of imagination courts can use in divining whether" the requisite inference exists. While adopting the Second Circuit's "strong inference" standard, Congress did not codify that Circuit's case law interpreting the standard. See § 78u–4(b)(2). With no clear guide from Congress other than its "inten[tion] to strengthen existing pleading requirements," H.R. Conf. Rep., p. 41, Courts of Appeals have diverged again, this time in construing the term "strong inference." Among the uncertainties, should courts consider competing inferences in determining whether an inference of scienter is "strong"? Our task is to prescribe a workable construction of the "strong inference" standard, a reading geared to the PSLRA's twin goals: to curb frivolous, lawyer-driven litigation, while preserving investors' ability to recover on meritorious claims.

III

A

We establish the following prescriptions: *First,* faced with a Rule 12(b)(6) motion to dismiss a § 10(b) action, courts must, as with any motion to dismiss for failure to plead a claim on which relief can be granted, accept all factual allegations in the complaint as true. See Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 164, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993). On this point, the parties agree.

Second, courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice. The inquiry, as several Courts of Appeals have recognized, is whether *all* of the facts alleged, taken collectively, give rise to a strong inference of scienter, not whether any individual allegation, scrutinized in isolation, meets that standard.

Third, in determining whether the pleaded facts give rise to a "strong" inference of scienter, the court must take into account plausible opposing inferences. The Seventh Circuit expressly declined to engage in such a comparative inquiry. A complaint could survive, that court said, as long as it "alleges facts from which, if true, a reasonable person could infer that the defendant acted with the required intent"; in other words, only "[i]f a reasonable person could not draw such an inference from the alleged facts" would the defendant prevail on a motion to dismiss. But in § 21D(b)(2), Congress did not merely require plaintiffs to "provide a factual basis for [their] scienter allegations," *i.e.,* to allege facts from which an inference of scienter rationally *could* be drawn. Instead,

Congress required plaintiffs to plead with particularity facts that give rise to a "strong"-*i.e.,* a powerful or cogent-inference. See American Heritage Dictionary 1717 (4th ed. 2000) (defining "strong" as "[p]ersuasive, effective, and cogent"); 16 Oxford English Dictionary 949 (2d ed.1989) (defining "strong" as "[p]owerful to demonstrate or convince" (definition 16b)); cf. 7 *id.,* at 924 (defining "inference" as "a conclusion [drawn] from known or assumed facts or statements"; "reasoning from something known or assumed to something else which follows from it").

The strength of an inference cannot be decided in a vacuum. The inquiry is inherently comparative: How likely is it that one conclusion, as compared to others, follows from the underlying facts? To determine whether the plaintiff has alleged facts that give rise to the requisite "strong inference" of scienter, a court must consider plausible nonculpable explanations for the defendant's conduct, as well as inferences favoring the plaintiff. The inference that the defendant acted with scienter need not be irrefutable, *i.e.,* of the "smoking-gun" genre, or even the "most plausible of competing inferences." Recall in this regard that § 21D(b)'s pleading requirements are but one constraint among many the PSLRA installed to screen out frivolous suits, while allowing meritorious actions to move forward. Yet the inference of scienter must be more than merely "reasonable" or "permissible"—it must be cogent and compelling, thus strong in light of other explanations. A complaint will survive, we hold, only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged.

B

Tellabs contends that when competing inferences are considered, Notebaert's evident lack of pecuniary motive will be dispositive. The Shareholders, Tellabs stresses, did not allege that Notebaert sold any shares during the class period. While it is true that motive can be a relevant consideration, and personal financial gain may weigh heavily in favor of a scienter inference, we agree with the Seventh Circuit that the absence of a motive allegation is not fatal. As earlier stated, allegations must be considered collectively; the significance that can be ascribed to an allegation of motive, or lack thereof, depends on the entirety of the complaint.

Tellabs also maintains that several of the Shareholders' allegations are too vague or ambiguous to contribute to a strong inference of scienter. For example, the Shareholders alleged that Tellabs flooded its customers with unwanted products, a practice known as "channel stuffing." But they failed, Tellabs argues, to specify whether the channel stuffing allegedly known to Notebaert was the illegitimate kind (*e.g.,* writing orders for products customers had not requested) or the legitimate kind (*e.g.,* offering customers discounts as an incentive to buy). We agree that omissions and ambiguities count against inferring scienter, for plaintiffs must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind."§ 78u–4(b)(2). We reiterate, however, that the court's job is not to scrutinize each allegation in isolation but to assess all the allegations holistically. In sum, the reviewing court must ask: When the allegations are accepted as true and taken collectively, would a reasonable person deem the inference of scienter at least as strong as any opposing inference?

IV

* * * In the instant case, provided that the Shareholders have satisfied the congressionally "prescribe[d] . . . means of making an issue," the case will fall within the jury's authority to assess the credibility of witnesses, resolve any genuine issues of fact, and make the ultimate determination whether Notebaert and, by imputation, Tellabs acted with scienter. We emphasize, as well, that under our construction of the "strong inference" standard, a plaintiff is not forced to plead more than she would be required to prove at trial. A plaintiff alleging fraud in a § 10(b) action, we hold today, must plead facts rendering an inference of scienter *at least as likely as* any plausible opposing inference. At trial, she must then prove her case by a "preponderance of the evidence." Stated otherwise, she must demonstrate that it is *more likely* than not that the defendant acted with scienter.

* * *

While we reject the Seventh Circuit's approach to § 21D(b)(2), we do not decide whether, under the standard we have described, the Shareholders' allegations warrant "a strong inference that [Notebaert and Tellabs] acted with the required state of mind,"15 U.S.C. § 78u–4(b)(2). Neither the District Court nor the Court of Appeals had the opportunity to consider the matter in light of the prescriptions we announce today. We therefore vacate the Seventh Circuit's judgment so that the case may be reexamined in accord with our construction of § 21D(b)(2).

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

■ JUSTICE SCALIA, concurring in the judgment.

I fail to see how an inference that is merely "at least as compelling as any opposing inference," can conceivably be called what the statute here at issue requires: a "strong inference," 15 U.S.C. § 78u–4(b)(2). If a jade falcon were stolen from a room to which only A and B had access, could it *possibly* be said there was a "strong inference" that B was the thief? I think not, and I therefore think that the Court's test must fail. In my view, the test should be whether the inference of scienter (if any) is *more plausible* than the inference of innocence.

* * * *

■ JUSTICE ALITO, concurring in the judgment.

I agree with the Court that the Seventh Circuit used an erroneously low standard for determining whether the plaintiffs in this case satisfied their burden of pleading "with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u–4(b)(2). I further agree that the case should be remanded to allow the lower courts to decide in the first instance whether the allegations survive under the correct standard. In two respects, however, I disagree with the opinion of the Court. First, the best interpretation of the statute is that only those facts that are alleged "with particularity" may properly be considered in determining whether the allegations of scienter are sufficient. Second, I agree with Justice SCALIA that a "strong inference" of scienter, in the present context, means an inference that is more likely than not correct.

■ JUSTICE STEVENS, dissenting.

As the Court explains, when Congress enacted a heightened pleading requirement for private actions to enforce the federal securities laws, it "left the key term 'strong inference' undefined." It thus implicitly delegated significant lawmaking authority to the Judiciary in determining how that standard should operate in practice. Today the majority crafts a perfectly workable definition of the term, but I am persuaded that a different interpretation would be both easier to apply and more consistent with the statute.

The basic purpose of the heightened pleading requirement in the context of securities fraud litigation is to protect defendants from the costs of discovery and trial in unmeritorious cases. Because of its intrusive nature, discovery may also invade the privacy interests of the defendants and their executives. Like citizens suspected of having engaged in criminal activity, those defendants should not be required to produce their private effects unless there is probable cause to believe them guilty of misconduct. Admittedly, the probable-cause standard is not capable of precise measurement, but it is a concept that is familiar to judges. As a matter of normal English usage, its meaning is roughly the same as "strong inference." Moreover, it is most unlikely that Congress intended us to adopt a standard that makes it more difficult to commence a civil case than a criminal case.

In addition to the benefit of its grounding in an already familiar legal concept, using a probable-cause standard would avoid the unnecessary conclusion that "in determining whether the pleaded facts give rise to a 'strong' inference of scienter, the court *must* take into account plausible opposing inferences." There are times when an inference can easily be deemed strong without any need to weigh competing inferences. For example, if a known drug dealer exits a building immediately after a confirmed drug transaction, carrying a suspicious looking package, a judge could draw a strong inference that the individual was involved in the aforementioned drug transaction without debating whether the suspect might have been leaving the building at that exact time for another unrelated reason.

If, using that same methodology, we assume (as we must) the truth of the detailed factual allegations attributed to 27 different confidential informants described in the complaint, and view those allegations collectively, I think it clear that they establish probable cause to believe that Tellabs' chief executive officer "acted with the required intent," as the Seventh Circuit held.[2]

[2] The "channel stuffing" allegations in ¶¶ 62–72 of the amended complaint are particularly persuasive. Contrary to petitioners' arguments that respondents' allegations of channel stuffing "are too vague or ambiguous to contribute to a strong inference of scienter," this portion of the complaint clearly alleges that Notebaert himself had specific knowledge of illegitimate channel stuffing during the relevant time period. ("Defendant Notebaert worked directly with Tellabs' sales personnel to channel stuff SBC"); (alleging, in describing such channel stuffing, that Tellabs took "extraordinary" steps that amounted to "an abnormal practice in the industry"; that "distributors were upset and later returned the inventory" (and, in the case of Verizon's Chairman, called Tellabs to complain); that customers "did not want" products that Tellabs sent and that Tellabs employees wrote purchase orders for; that "returns were so heavy during January and February 2001 that Tellabs had to lease extra storage space to accommodate all the returns"; and that Tellabs "backdat[ed] sales" that actually took place in 2001 to appear as having occurred in 2000). If these allegations are actually taken as true

NOTE ON LEGISLATIVE APPROACHES TO SPECIFICITY

1. Congressional control of pleading: The Private Securities Litigation Reform Act of 1995. In general, the Supreme Court has held that the pleading standard of Rule 8(a) applies to all cases, unless there is a specific rule or statute mandating otherwise. See Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993). Sometimes substantive legislation clearly and expressly overrides the normal pleading requirements of the federal Rules. Concerned over the amount and type of securities fraud litigation brought against publicly traded corporations, Congress passed, over President Clinton's veto, the Private Securities Litigation Reform Act of 1995. According to the Conference Committee Report:

> Congress has been prompted by significant evidence of abuse in private securities lawsuits to enact reforms to protect investors and maintain confidence in our capital markets. The House and Senate Committees heard evidence that abusive practices committed in private securities litigation include: (1) the routine filing of lawsuits against issuers of securities and others whenever there is a significant change in an issuer's stock price, without regard to any underlying culpability of the issuer, and with only faint hope that the discovery process might lead eventually to some plausible cause of action; (2) the targeting of deep pocket defendants * * *; (3) the abuse of the discovery process to impose costs so burdensome that it is often economical for the victimized party to settle; and (4) the manipulation by class action lawyers of the clients whom they purportedly represent.

H. R. Conf. Rep. No. 104–369, at 31 (1995); 1995 U.S. C.C.A.N. 730.

2. Pleading under the Act. Among other things, the Act requires more specific pleading by the plaintiff in claims brought under the federal securities laws. A plaintiff alleging misleading statements "shall specify each statement alleged to have been misleading, * * * and, if an allegation * * * is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed." 15 U.S.C. § 78u–4(b)(1). An allegation of fraudulent intent "shall * * * state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u–4(b)(2). The origins and controversy over the meaning of the "strong inference" standard are well described in *Tellabs*.

3. Discovery under the Act. The Act provides that discovery shall be stayed during the pendency of any motion to dismiss for failure to meet the pleading requirements. 15 U.S.C. § 78u–4(b)(3). The Conference Committee Report explained its desire to eliminate "fishing expeditions": "The cost of discovery often forces innocent parties to settle frivolous securities class actions. According to the general counsel of an investment bank, 'discovery costs account for roughly 80% of total litigation costs in securities fraud cases.' " 1995 U.S.C.C.A.N. at 736.

4. Interpreting and applying the standard set in *Tellabs*. How does the "strong inference" standard of *Tellabs* compare with the

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and viewed in the collective, it is hard to imagine what competing inference could effectively counteract the inference that Notebaert and Tellabs " 'acted with the required state of mind.' "

"plausibility" standard of *Twombly* and *Iqbal*? How should the standard set out in *Tellabs* be applied? On remand, the court of appeals described the allegations of the complaint in more detail:

> The complaint alleges the following: The corporate defendant, Tellabs, manufactures equipment used in fiber optic cable networks; its principal customers are telephone companies. In December 2000, the beginning of the period of alleged violations of Rule 10b–5, Tellabs's principal product, accounting for more than half its sales, was a switching system called TITAN 5500. The product was almost 10 years old when on December 11 Tellabs announced that the 5500's successor product, TITAN 6500, was "available now" and that Sprint had signed a multiyear, $100 million contract to buy the 6500, though in fact no sales pursuant to the contract closed until after the period covered by the complaint. The same announcement added that despite the advent of the 6500, sales of the 5500 would continue to grow. (Most of these and other announcements quoted in the complaint were made by Richard Notebaert, who was Tellabs's chief executive officer and, along with Tellabs, is the principal defendant.)
>
> The following month, Tellabs announced that "customers are buying more and more Tellabs equipment" and that Tellabs had "set the stage for sustained growth" with the successful launch of several products. In February, the company told its stockholders that its growth was "robust" and that "customers are embracing" the 6500. In response to a question frequently asked by investors—whether sales of the 5500 had peaked—the company declared that "although we introduced this product nearly 10 years ago, it's still going strong." In March the company reduced its sales estimates slightly but said it was doing so because of lower than expected growth in a part of its business unrelated to the 5500 and 6500 systems, and that "interest in and demand for the 6500 continues to grow" and "we are satisfying very strong demand and growing customer demand [for the 6500, and] we are as confident as ever—that may be an understatement—about the 6500." And in response to a securities analyst's question whether Tellabs was experiencing "any weakness at all" in demand for the 5500, Notebaert responded: "No, we're not. . . . We're still seeing that product continue to maintain its growth rate; it's still experiencing strong acceptance." Yet from the outset of the period covered by the complaint Tellabs had been flooding its customers with tens of millions of dollars worth of 5500s that the customers had not requested, in order to create an illusion of demand. The company had to lease extra storage space in January and February to accommodate the large number of returns.
>
> Just weeks after these statements Tellabs reduced its sales projections significantly because its customers were "exercising a high degree of prudence over every dollar spent." But it reiterated that the demand for the 6500 was "very strong." In April it said "we should hit our full manufacturing capacity [for the 6500] in May or June to accommodate the demand we are seeing. Everything we

> can build, we are building and shipping. The demand is very strong."
>
> In June, however, at the end of the period covered by the complaint, Tellabs announced a major drop in revenues, and its share price, which at its peak during the period had been $67 and in the middle of the period had varied between $30 and $38, fell to just under $16. (It currently is below $7.00.) But the deterioration had been well under way by December as a result of the bursting of the fiber-optics bubble in the middle of the year. The market for the 5500 was evaporating; the next month (January 2001), Tellabs's largest customer, Verizon, reduced its orders for the 5500 by 50 percent—having already, the previous June, reduced them by 25 percent. And not a single 6500 system was shipped during the complaint period.
>
> Tellabs's revenues in 2001 were 35 percent lower than the year before and its profits 125 percent lower. The drop in the second quarter (most of which was within the period covered by the complaint) over the year before was even steeper; revenues dropped 43 percent and profits 211 percent.

Makor Issues & Rights, Ltd. v. Tellabs, Inc., 513 F.3d 702, 706–07 (7th Cir. 2008). The court held that these allegations supported a sufficiently strong inference of scienter to meet the standard set by the Supreme Court. Was it right to do so?

5. Confidential sources. Since the Court decided *Tellabs*, one issue that has split the lower courts is the effect of allegations of information from confidential sources in determining scienter. The Fifth Circuit has held that, "[f]ollowing *Tellabs*, courts must discount allegations from confidential sources." Indiana Electrical Pension Workers Trust Fund v. Shaw Group, Inc., 537 F.3d 527 (5th Cir. 2008); see also Higginbotham v. Baxter, Int'l, 495 F.3d 753 (7th Cir. 2007). Most other courts, however, have preferred a case-by-case approach, assessing in context the weight to give claims from confidential informants. See New Jersey Carpenters Pension & Annuity Funds, 537 F.3d 35 (1st Cir. 2008). Given *Tellabs'* mandate to consider plausible opposing inferences, what is the proper weight to be given allegations from confidential informants in deciding a motion to dismiss?

6. Effects of the Act. The Act's insistence on more specific pleadings in securities class actions, its stay of discovery, and its other provisions would appear to increase costs of suit for plaintiffs' attorneys. In addition, the Act would appear to make it more difficult, or at least riskier, to file a fraud claim in the absence of "hard" public evidence that a company has engaged in fraud, such as a government investigation or a public restatement of the company's accounting results. Cases in which the details of the fraud had not drawn the government's attention or been highlighted by a corporate admission would be harder to bring, since they will depend increasingly on the cooperation of whistleblowing insiders. These effects will be beneficial if they generally tend to deter meritless lawsuits, but more disturbing if they also prevent the filing of a significant number of lawsuits that are potentially meritorious.

The empirical evidence suggests that the Act has had mixed effects. There is evidence suggesting that the Act has caused plaintiffs' lawyers to

focus more directly on cases where the company has made a public admission of problems in its accounting, and those reporting such evidence argue that it reflects a desirable shift in emphasis toward cases where the likelihood of fraud is high. Marilyn F. Johnson, Karen K. Nelson, and A. C. Pritchard, Do the Merits Matter More: Class Actions Under the Private Securities Litigation Reform Act, 23 Journal of Law, Economics and Organization 627 (2007).

Other research suggests, however, that the Act is also deterring significant amounts of meritorious litigation. It appears that higher costs of litigation under the Act have shifted plaintiffs' attorneys toward suits against larger firms and have sharply reduced the incidence of class actions against smaller companies (where smaller financial losses are involved), apparently without regard to the merit or lack of merit of the claims against those companies. Choi, Do the Merits Matter Less After the Private Securities Litigation Reform Act?, 23 J.L.Econ. & Org. 598, 622 (1998). Professor Choi also finds that the Act has deterred the prosecution of a significant fraction of non-frivolous "soft evidence" claims, that is, of non-frivolous claims based on fraud whose details are not yet publicly known. These of course are the cases whose prosecution is most severely complicated by the Act's pleading requirements and restrictions on discovery.

7. Further reading. *Tellabs* has spawned an extensive literature from both scholars of civil procedure and securities law. See Miller, A Modest Proposal for Securities Law Pleadings After *Tellabs*, 75 Law & Contemp. Probs. 93 (2012); Steinberg & Gomez-Cornejo, Blurring the Lines Between Pleading Doctrines, 30 Rev. Litig. 1 (2010); Cox, Thomas & Bai, Do Differences in Pleading Standards Cause Forum Shopping in Securities Class Actions?: Doctrinal and Empirical Analyses, 2009 Wis. L. Rev. 421; Miller, Pleading After *Tellabs*, 2009 Wis. L. Rev. 507.

E. ETHICAL CONSTRAINTS ON PLEADING

1. INCONSISTENT THEORIES AND THE PROFESSIONAL OBLIGATION TO PLEAD A DOUBTFUL CASE

McCormick v. Kopmann

Illinois Court of Appeals, Third District, 1959.
23 Ill.App.2d 189, 161 N.E.2d 720.

■ PRESIDING JUSTICE REYNOLDS delivered the opinion of the court.

On the evening of November 21, 1956, Lewis McCormick was killed on Main Street in Gifford, Illinois, when a truck being operated by defendant Lorence Kopmann collided with the automobile which McCormick was driving.

This action was brought by McCormick's widow in the Circuit Court of Champaign County against Kopmann and Anna, John and Mary Huls. The complaint contains four counts; the issues raised on this appeal concern only the first and fourth counts.

Count I is brought by plaintiff as Administratrix of McCormick's Estate, against Kopmann, under the Illinois Wrongful Death Act. Plaintiff sues for the benefit of herself and her eight children, to recover

for the pecuniary injury suffered by them as a result of McCormick's death. It is charged that Kopmann negligently drove his truck across the center line of Main Street and collided with McCormick's automobile. In paragraph 3 of Count I, plaintiff alleges

> "That at the time of the occurrence herein described, and for a reasonable period of time preceding it, the said decedent was in the exercise of ordinary care for his own safety and that of his property."

Count IV is brought by plaintiff as Administratrix of McCormick's Estate, against the Huls, under the Illinois Dram Shop Act. Plaintiff avers that Count IV is brought "in the alternative to Count I." She sues for the benefit of herself and her four minor children, to recover for the injury to their means of support suffered as a result of McCormick's death. It is alleged that Anna Huls operated a dramshop in Penfield, Illinois; that John and Mary Huls operated a dramshop in Gifford; that on November 21, 1956, the Huls sold alcoholic beverages to McCormick which he consumed and which rendered him intoxicated; and that "as a result of such intoxication" McCormick drove his automobile "in such a manner as to cause a collision with a truck" being driven by Kopmann on Main Street in Gifford.

Kopmann, defendant under Count I, moved to dismiss the complaint on the theory that the allegations of that Count I and Count IV were fatally repugnant and could not stand together, because McCormick could not be free from contributory negligence as alleged in Count I, if his intoxication caused the accident as alleged in Count IV. Kopmann also urged that the allegation in Count IV that McCormick's intoxication was the proximate cause of his death, is a binding judicial admission which precludes an action under the Wrongful Death Act. Kopmann's motion was denied. He raised the same defenses in his answer.

The Huls, defendants under Count IV, answered. They did not file a motion directed against Count IV.

Neither defendant sought a severance and both counts came on for trial at the same time.

Plaintiff introduced proof that at the time of the collision, McCormick was proceeding North in the northbound traffic lane, and that Kopmann's truck, traveling South, crossed the center line and struck McCormick's car. Plaintiff also introduced testimony that prior to the accident McCormick drank a bottle of beer in Anna Huls' tavern in Penfield and one or two bottles of beer in John and Mary Huls' tavern in Gifford. Plaintiff's witness Roy Lowe, who was with McCormick during the afternoon and evening of November 21, and who was seated in the front seat of McCormick's car when the collision occurred, testified on cross examination that in his opinion McCormick was sober at the time of the accident.

At the close of plaintiff's evidence, all defendants moved for directed verdicts. The motions were denied.

Kopmann, the defendant under the Wrongful Death count, introduced testimony that at the time of the collision, his truck was in the proper lane; that McCormick's automobile was backed across the center line of Main Street, thus encroaching on the southbound lane, and

blocking it; that the parking lights on McCormick's automobile were turned on, but not the headlights; that Kopmann tried to swerve to avoid hitting McCormick's car; and that there was an odor of alcohol on McCormick's breath immediately after the accident. Over plaintiff's objection, the trial court permitted Kopmann's counsel to read to the jury the allegations of Count IV relating to McCormick's intoxication, as an admission.

The Huls, defendants under the Dram Shop count, introduced opinion testimony of a number of witnesses that McCormick was not intoxicated at the time of the accident. Anna Huls testified that McCormick drank one bottle of beer in her tavern. Several witnesses testified that McCormick had no alcoholic beverages in John and Mary Huls' tavern.

All defendants moved for directed verdicts at the close of all the proof. The motions were denied. The jury was instructed that Count IV was an alternative to Count I; that Illinois law permits a party who is uncertain as to which state of facts is true to plead in the alternative, and that it is for the jury to determine the facts. At Kopmann's request, the court instructed the jury on the law of contributory negligence, and further:

> ". . . if you find from all of the evidence in the case that (McCormick) was operating his automobile while intoxicated and that such intoxication, if any, contributed proximately to cause the collision in question, then in that case . . . you should find the defendant, Lorence Kopmann, not guilty."

The jury returned a verdict against Kopmann for $15,500 under Count I. The jury found the Huls not guilty under Count IV. Kopmann's motions for judgment notwithstanding the verdict, and in the alternative for a new trial, were denied.

Kopmann has appealed. His first contention is that the trial court erred in denying his pre-trial motion to dismiss the complaint. Kopmann is correct in asserting that the complaint contains inconsistent allegations. The allegation of Count I that McCormick was free from contributory negligence, cannot be reconciled with the allegation of Count IV that McCormick's intoxication was the proximate cause of his death. Freedom from contributory negligence is a prerequisite to recovery under the Wrongful Death Act. If the jury had found that McCormick was intoxicated and that his intoxication caused the accident, it could not at the same time have found that McCormick was not contributorily negligent. The Illinois Supreme Court has held that "voluntary intoxication will not excuse a person from exercising such care as may reasonably be expected from one who is sober." Keeshan v. Elgin, A. & S. Traction Co., 229 Ill. 533, 537.

In addition to this factual inconsistency, it has been held that compensation awarded under the Wrongful Death Act includes reparation for the loss of support compensable under the Dram Shop Act.

Counts I and IV, therefore, are mutually exclusive; plaintiff may not recover upon both counts. It does not follow, however, that these counts may not be pleaded together. Section 24(1) of the Illinois Civil Practice Act (Ill. Rev. Stat. Ch. 110, Sec. 24) authorizes joinder of defendants

against whom a liability is asserted in the alternative arising out of the same transaction. Section 24(3) of the Act provides:

> "If the plaintiff is in doubt as to the person from whom he is entitled to redress, he may join two or more defendants, and state his claim against them in the alternative in the same count or plead separate counts in the alternative against different defendants, to the intent that the question which, if any, of the defendants is liable, and to what extent, may be determined as between the parties."

Section 34 of the Act states in part that "Relief, whether based on one or more counts, may be asked in the alternative."

Section 43(2) of the Act provides:

> "When a party is in doubt as to which of two or more statements of fact is true, he may, regardless of consistency, state them in the alternative or hypothetically in the same or different counts or defenses, whether legal or equitable. A bad alternative does not affect a good one."

Thus, the Civil Practice Act expressly permits a plaintiff to plead inconsistent counts in the alternative, where he is genuinely in doubt as to what the facts are and what the evidence will show. The legal sufficiency of each count presents a separate question. It is not ground for dismissal that allegations in one count contradict those in an alternative count. These principles have been applied recently in cases similar to that at bar.* * *

* * *

The 1955 revision of Section 43(2) of the Civil Practice Act * * * was modeled after Rule 8(e)(2) of the Federal Rules of Civil Procedure. * * * *

Sound policy weighs in favor of alternative pleading, so that controversies may be settled and complete justice accomplished in a single action. If the right is abused, as where the pleader has knowledge of the true facts (viz, he knows that the facts belie the alternative) pleading in the alternative is not justified.

* * * *

There is nothing in the record before us to indicate that plaintiff knew in advance of the trial, that the averments of Count I, and not Count IV, were true. In fact, at the trial, Kopmann attempted to establish the truth of the allegations of Count IV that McCormick was intoxicated at the time of the collision and that his intoxication caused his death. He can hardly be heard now to say that before the trial, plaintiff should have known that these were not the facts. Where * * * the injured party is still living and able to recollect the events surrounding the accident, pleading in the alternative may not be justified, but where, as in the case at bar, the key witness is deceased, pleading alternative sets of facts is often the only feasible way to proceed. * * *

We hold that, in the absence of a severance, plaintiff had the right to go to trial on both Counts I and IV, and to adduce all the proof she had under both Count I and Count IV.

Kopmann's next argument is that the allegations of Count IV regarding McCormick's intoxication constitute binding judicial

admissions. He contends that plaintiff's action against him should have been dismissed on the basis of the allegations in Count IV regarding McCormick's intoxication.

* * * *

Alternative fact allegations made in good faith and based on genuine doubt are not admissions against interest so as to be admissible in evidence against the pleader. The pleader states the facts in the alternative because he is uncertain as to the true facts. Therefore, he is not "admitting" anything other than his uncertainty. An essential objective of alternative pleading is to relieve the pleader of the necessity and therefore the risk of making a binding choice, which is no more than to say that he is relieved of making an admission.

Kopmann next contends that the trial judge erred in denying his motion for directed verdict at the close of plaintiff's proof. Kopmann's theory is that if, as the trial judge ruled, plaintiff made out a *prima facie* case under Count IV, she necessarily negatived Kopmann's liability under Count I by proving McCormick was guilty of contributory negligence. He also urges that plaintiff is entitled to have but one of the two counts submitted to the jury, and that the trial judge should have required plaintiff to elect between Counts I and IV at the close of the evidence, and before the case was submitted to the jury.

There are several reasons why we believe Kopmann's position is unsound. First, we are of the opinion that plaintiff's evidence did not contradict the position she took in Count I, viz., that McCormick exercised due care for his own safety. Plaintiff proved only that McCormick drank two or three bottles of beer prior to the accident. Yet Lowe, who was with McCormick during the entire time from late afternoon until his death, testified during plaintiff's case in chief that McCormick was sober at the time of the accident. * * *

Moreover, even if plaintiff made out a prima facie case of McCormick's intoxication for purposes of the Dram Shop Act, she made no showing of a causal connection between the intoxication and the accident. This is a necessary element of plaintiff's case under Count IV. All of the witnesses for plaintiff who testified on the question agreed that at the time of the collision McCormick's car was facing North in the northbound traffic lane, and that Kopmann's truck swerved over the center line and struck McCormick's car. Hence, whether or not McCormick was intoxicated at the time of the collision is immaterial, because there was a complete absence of proof that the fatal collision happened "in consequence of (McCormick's) intoxication" as required by the Dram Shop Act.

The trial judge should have directed a verdict for the Huls, as to Count IV because there was no evidence of causal connection between the intoxication, if any, and death, but the error is moot on this appeal by Kopmann, the defendant under Count I, since there was a verdict of not guilty as to Count IV.

Our second reason for rejecting Kopmann's contention is more basic. Plaintiff pleaded alternative counts because she was uncertain as to what the true facts were. Even assuming she introduced proof to support all essential allegations of both Count I and Count IV, she was entitled to have all the evidence submitted to the trier of fact, and to have the jury

decide where the truth lay. She was not foreclosed *ipso facto* from going to the jury under Count I, merely because she submitted proof, under Count IV, tending to prove that McCormick's intoxication proximately caused his death. If this were the rule, one who in good faith tried his case on alternative theories, pursuant to the authorization, if not the encouragement of Section 43, would run the risk of having his entire case dismissed. The provisions of the Civil Practice Act authorizing alternative pleading, necessarily contemplate that the pleader adduce proof in support of both sets of allegations or legal theories, leaving to the jury the determination of the facts.

Furthermore, in testing the sufficiency of the proof as against a motion for directed verdict, the sufficiency of the proof to support each count is to be judged separately as to each count, just as the legal sufficiency of each count is separately judged at the pleading stage. As to each count, the court will look only to the proof and inferences therefrom favorable to the plaintiff; the court cannot weigh conflicting evidence. Proof unfavorable to the plaintiff, even though the plaintiff herself introduced that proof, cannot be considered. The determination to be made is whether there is any evidence (all unfavorable evidence excluded) upon which the jury could base a verdict for the plaintiff under the count in question, and if there is, the motion as to that count must be denied and the issues submitted to the jury. Judged by these well-settled tests, it is clear that plaintiff's proof under Count I was sufficient to require the case to be submitted to the jury.

What we have said is not to say that a plaintiff assumes no risks in adducing proof to support inconsistent counts. The proof in support of one inconsistent count necessarily tends to negate the proof under the other count and to have its effect upon the jury. While the fact alone of inconsistent evidence will not bar submission of the case to the jury, it may very well affect the matter of the weight of the evidence and warrant the granting of a new trial, even though, as we have held, it does not warrant *ipso facto* a directed verdict or judgment notwithstanding the verdict.

Kopmann argues that plaintiff should have been required to elect between her alternative counts before going to the jury. The doctrine known as "election of remedies" has no application to the case at bar. Here, either of two defendants may be liable to plaintiff, depending upon what the jury finds the facts to be. It has been aptly said that "truth cannot be stated until known, and, for purposes of judicial administration, cannot be known until the trier of facts decides the fact issues." McCaskill, Illinois Civil Practice Act Annotated (1933), p. 103. Plaintiff need not choose between the alternative counts. Such a requirement would, to a large extent, nullify the salutary purposes of alternative pleading. Since she could bring actions against the defendants seriatim, or at the same time in separate suits, she is entitled to join them in a single action, introduce all her proof, and submit the entire case to the jury under appropriate instructions.

* * *

We conclude that the verdict and judgment below are correct and the judgment is affirmed.

NOTE ON PLEADING INCONSISTENT THEORIES, THE NATURE OF AN AVERMENT OR ALLEGATION, AND THE PROFESSIONAL OBLIGATION TO PLEAD A DOUBTFUL CLAIM

1. The common law approach. The common law pleading rules required that a pleader's allegations be consistent. Consistency was required even where the allegations referred to an out-of-court event which under the substantive law was difficult to classify, or where the pleader knew too little about the facts, at the time of pleading, to settle conclusively on a single consistent narrative.

A case illustrating the early approach is Wigton v. McKinley, 122 Colo. 14, 221 P.2d 383 (1950), a quiet-title suit in which plaintiff claimed title to real estate, first, as owner under an unrecorded deed from his wife delivered to him prior to her death and, second, as devisee under his wife's will. The court pointed out that if the deed was valid and delivered, the wife would have had nothing to devise, while the devise was valid only if the deed was not. The court held, "A party to an action may not base his cause upon inconsistent and self-destructive grounds." 221 P.2d at 385.

The common law requirement of consistency put a plaintiff in a very difficult situation. As Professor, later-Judge, Charles E. Clark explained:

> Now the difficulty is that the pleader often cannot know, and cannot reasonably be expected to know, which of two or more alternatives is the correct one. This is particularly true as to the details of the injury or breach, which often are known only to the defendant in advance of trial. * * * To enforce the rule [requiring consistency] as harshly as at common law is unfairly to trap the pleader beyond any requirement of fair notice to the defendant.

Clark, Code Pleading § 42 (2d ed. 1947). For example, if the plaintiff's pre-filing investigation and legal research disclosed two plausible alternative scenarios, and plaintiff elected scenario A, defendant could defend on the ground that the truth was actually scenario B. If plaintiff elected scenario B, defendant could rely on scenario A.

A possible solution under common law pleading was for plaintiff to sue first under scenario A, and if unsuccessful to sue again under scenario B. But this solution raised a number of difficulties, including the possibility that defendant would succeed on the basis of inconsistent defenses in the two proceedings; the certainty that plaintiff would incur additional costs in a second proceeding; and the possibility that the doctrine of res judicata would preclude plaintiff from bringing a second proceeding at all.

To eliminate the dilemma posed by the common law requirement of consistency, modern procedural regimes generally permit pleading of inconsistent or alternative allegations, so long as the pleading satisfies the basic ethical requirements of federal Rule 11 or comparable state rules. See Fed. R. Civ. P. 8(d)(2), (3). The principle is applied to cases of both factual and legal inconsistency. *McCormick v. Kopmann* is a classic application of the doctrine.

2. Alternative pleading, party knowledge, and alternative proof. The *McCormick* court holds explicitly that allegations in a complaint are not only not *conclusive* admissions of the matters pleaded, they are not admissions at all. If this is correct, what is the status of an allegation in a complaint? Does it do anything more than state a hypothesis concerning

what the tribunal *may* later conclude to be proven under the applicable burden of persuasion? Does the pleading say anything more than that the hypothesis can't responsibly be ruled out on the basis of pre-filing investigation?

The court in *McCormick* stresses the importance of the fact that plaintiff, the administratrix of the deceased's estate, was not present and hence not certain which version of the accident occurred. What if Mr. McCormick had survived the accident but had vehemently denied being intoxicated at the time of the accident? In Chirelstein v. Chirelstein, 8 N.J.Super. 504, 73 A.2d 628 (1950), aff'd, 79 A.2d 884 (N.J. Super. Ct. App. Div. 1951), plaintiff had earlier sued defendant for divorce in a Florida court, where a divorce decree had been entered. In the present suit, plaintiff alleged, first, that the Florida decree was valid and that pursuant to the decree she was therefore entitled to alimony as a divorcee; and, second, that the Florida decree was invalid because it had been procured through a fraud (in which she necessarily would have participated), and that she was entitled to a divorce and alimony in the present proceeding. The court held that plaintiff could take these inconsistent positions:

> I see no basis for requiring an election. Where the interplay of the facts and the law is such that the legal soundness of the respective legal positions is debatable, alternative or hypothetical claims should be permitted. I can perceive no reason for requiring a litigant in these circumstances to make a conclusive anticipation of the views of the court. * * * Where the judicial treatment of the facts is in doubt, justice demands that the litigant be permitted to assert alternative positions which depend upon the successive determinations of the issues raised by the facts.

73 A.2d at 632. See also Rader Co. v. Stone, 178 Cal.App.3d 10, 223 Cal. Rptr. 806 (1986). Does *Chirelstein v. Chirelstein* suggest that had Mr. McCormick survived the accident, he could have filed the same pleading as his wife, even if he was sure what he thought had happened, so long as his lawyer was unsure of whether the jury would view his conduct as negligent?

3. The professional obligation to assert a doubtful claim. Did the lawyer for Ms. McCormick have a professional obligation to advise the filing of the claims against both Kopmann and the Huls, assuming that both claims were non-frivolous? The issue is one of professional competence. The disciplinary ethical rules of the profession require a lawyer to "provide competent representation to a client." ABA, Model Rules of Professional Conduct, 1.1 (2007). Competence is typically defined to include reasonable inquiry into the underlying facts and law and adequate preparation. In practice, the obligation of competence is enforced through the process of professional discipline only in rare and egregious cases. Far more important to most lawyers are their own pride, the good opinion of their clients, and the threat of civil liability for professional malpractice.

To establish a claim for malpractice, a client or former client must show that he was injured by his lawyer's failure to exercise due care, defined as "the competence and diligence normally exercised by lawyers in similar circumstances." Restatement (Third) of the Law Governing Lawyers § 52 (2000). Because the judgments made by lawyers usually involve "situations and requirements of legal practice unknown to most jurors and often not familiar in detail to most judges * * * a plaintiff ordinarily must introduce

expert testimony concerning the care reasonably required in the circumstances of the case and the lawyer's failure to exercise such care." Id., comment g. In Aloy v. Mash, 38 Cal.3d 413, 212 Cal.Rptr. 162, 696 P.2d 656 (1985), the plaintiff claimed that defendant had "negligently failed to assert her community property interest in [her ex-husband's] military retirement pension, which failure prevented her from receiving any share of his gross military retirement pension benefits." 38 Cal.3d at 416. Though the defendant argued that he had relied upon an older case holding that the plaintiff had no right to a share of her husband's pension, the plaintiff responded with expert testimony to the effect that (1) reasonable research would have showed that the question was unsettled and (2) family lawyers at the relevant time and place routinely claimed such benefits. The court held that plaintiff was entitled to a trial on the issue of negligence. *Id.* at 415–22. In a jurisdiction that followed the rule of *Aloy*, would you feel confident that a lawyer's decision, at the outset of the action, to decline to assert claims similar to those asserted against Kopmann and Huls would meet the applicable standard of care?

4. Do *Twombly* and *Iqbal* affect alternative pleading? In the wake of the Supreme Court's recent decisions in *Twombly* and *Iqbal*, supra p. 471–496, one open question is whether the new rule of "plausibility pleading" affects the ability to plead in the alternative. Recall that *Twombly* instructs judges to consider an "obvious alternative explanation" for a defendant's conduct. If the plaintiff presents multiple theories against different defendants, does each theory potentially serve as a defense for one defendant against the other, as it might have in the days of common law pleading? In *McCormick*, does the plaintiff's theory of liability against Kopmann undermine the theory of liability against Huls? In the years following the *Twombly* and *Iqbal* decisions, the few courts to consider the question have held that plaintiffs may plead alternative theories so long as each is "plausible." See, e.g., Koch v. I-Flow Corp., 715 F. Supp. 2d 297 (D.R.I. 2010). Is the court's analysis in *McCormick* outdated in a world of plausibility pleading?

5. What about the Huls? Kopmann's appeal is disadvantaged by the fact that the jury found against him. The Huls, who won at trial, did not appeal. But according to the opinion of the court, they should have had a directed verdict—that is, their case should never have reached the jury—because the record disclosed no evidence of any causal connection between their alcohol and Mr. McCormick's death. Does this wholesale failure of proof against them mean that the lawyer for Mrs. McCormick acted improperly in pleading a claim against them and taking it to trial?

2. FRIVOLOUS CLAIMS AND CONTENTIONS

NOTE ON ENSURING THE SUBSTANTIALITY OF CLAIMS AND DEFENSES

Lawyers sometimes file pleadings that have little basis in fact or law. The lawyer may be pressed for time and unable to investigate properly, or the lawyer may be careless. The client may not have been sufficiently forthcoming about the facts as the complaint was being drawn up. The client and the lawyer may be seeking unfair strategic advantage (and settlement

leverage) by filing a largely unfounded lawsuit that will cost the defendant a disproportionate amount of time and money to defend.

Verification of pleadings is a traditional device designed to preclude or discourage erroneous factual allegations. Many jurisdictions permit, and in some circumstances require, verified pleadings. Normally, a party verifies a pleading by attaching an affidavit stating under oath or under "penalty of perjury" that the allegations in the complaint are true, or that he believes them to be true. In certain circumstances, the attorney or a non-party may verify a pleading. If the plaintiff verifies his complaint, the defendant must verify his answer. Calif. C. Civ. P. § 446(a). A further, and generally more important, practical consequence of verification is that a defendant may answer an unverified complaint by general denial, but must answer a verified complaint specifically, "positively or according to the information and belief of the defendant." § 431.30(d).

The verification requirement has generally had little effect on truthfulness in pleadings, although from time to time a litigant has been seriously embarrassed on the witness stand by a discrepancy between his testimony and the allegations in his complaint. Further, courts tend to be somewhat more stringent about inconsistency between allegations in a verified complaint, or between allegations in successive verified complaints. See, e.g., Payne v. Bennion, 178 Cal.App.2d 595, 3 Cal.Rptr. 14 (1960) (verified complaint contained factually inconsistent allegations; court refused to allow amendment to cure the inconsistency without "proper explanation" by the pleader); but see Premier Elec. Constr. Co. v. La Salle Nat'l Bank, 132 Ill.App.3d 485, 87 Ill.Dec. 721, 477 N.E.2d 1249 (1984) (verified complaint alleged "legal conclusions" rather than facts and was therefore not binding on plaintiff). A verified pleading is very difficult to challenge on the ground that the verifying party had no basis for knowing the truth or falsehood of the factual allegations contained in her pleading. See, e.g., Surowitz v. Hilton Hotels Corp., 383 U.S. 363, 370–71, 86 S.Ct. 845, 15 L.Ed.2d 807 (1966) (allowing a verified complaint by an unsophisticated plaintiff with a limited knowledge of English in a shareholder derivative suit under Fed. R. Civ. P. 23.1: "Mrs. Surowitz verified the complaint, not on the basis of her own knowledge and understanding, but in the faith that her son-in-law had correctly advised her either that the statements in the complaint were true or to the best of his knowledge he believed them to be true.").

The common law also provided remedies for meritless or abusive litigation in the form of the civil torts of malicious prosecution and abuse of process. Both types of claims are difficult to win. To win a malicious prosecution claim, the plaintiff must establish (1) that the defendant instituted a proceeding against the plaintiff; (2) that the proceeding was terminated in favor of the plaintiff (by an outright win for the plaintiff); (3) that the claim was brought without probable cause; (4) that the defendant acted with malice or improper purpose; and, in a minority of jurisdictions, (5) that the plaintiff suffered "special damage" of the type required. Hazard et al., The Law and Ethics of Lawyering 690 (4th ed. 2005). The definition of probable cause varies from jurisdiction to jurisdiction. A standard formulation states that probable cause exists when, on the basis of facts which the lawyer reasonably believes to be true, the client's claim is "objectively tenable" or "may have merit." Compare Sheldon Appel Co. v. Albert & Oliker, 47 Cal.3d 863, 254 Cal.Rptr. 336, 765 P.2d 498, 499 (1989) ("objectively tenable") with Friedman v. Dozorc, 412 Mich. 1, 312 N.W.2d

585, 606 (1981) ("claim *may* be valid under the applicable law") (emphasis in original).

Abuse of process claims aim at actions taken in litigation that are technically justified under the applicable law, but undertaken with an improper motivation. The plaintiff must ordinarily show that the litigation (or procedural step within the litigation) that is complained of was undertaken primarily with a purpose for which it was not designed or, as some courts have put it, "outside the normal contemplation of private litigation." Mozzochi v. Beck, 204 Conn. 490, 529 A.2d 171, 174 (1987). If the infliction of delay, cost, or emotional distress, however deliberate, is simply the natural consequence of the "normal contemplation of private litigation," it is not actionable. Id. See Hazard et al., The Law and Ethics of Lawyering 690 (4th ed. 2005).

There are several modern devices to encourage attorneys and their clients to make only claims with a substantial basis in fact and law: Rule 11 in the federal system (and comparable rules in state systems); 28 U.S.C. § 1927, forbidding unreasonable and vexatious multiplication of proceedings; and the "inherent power" of the courts to prevent abusive litigation tactics. Unlike the traditional verification requirement, which addresses only the truthfulness of factual allegations, these devices require substantiality both in factual allegations and legal contentions.

Zuk v. Eastern Pennsylvania Psychiatric Institute of the Medical College of Pennsylvania

United States Court of Appeals, Third Circuit, 1996.
103 F.3d 294.

■ ROSENN, CIRCUIT JUDGE.

This appeal brings into focus difficult questions relating to the evolving uses and purposes of Federal Rules of Civil Procedure (Fed. R. Civ. P.) Rule 11 sanctions, the more narrow statutory function of sanctions permitted under 28 U.S.C. § 1927, and differences between the two. The sanctions here stem from a suit filed in the United States District Court for the Eastern District of Pennsylvania by Benjamin Lipman, the appellant, in behalf of Dr. Gerald Zuk for copyright infringement against the Eastern Pennsylvania Psychiatric Institute (EPPI). The district court dismissed the action on a Rule 12(b)(6) motion filed by the defendant, and appellant and his client thereafter were subjected to joint and several liability in the sum of $15,000 for sanctions and defendant's counsel fees. Dr. Zuk settled his liability and Lipman appealed. We affirm in part and vacate in part.

I.

Dr. Zuk, a psychologist on the faculty of EPPI, early in the 1970s had an EPPI technician film two of Dr. Zuk's family therapy sessions. As academic demand for the films developed, Zuk had EPPI duplicate the films and make them available for rental through their library. Zuk subsequently wrote a book which, among other things, contained transcripts of the therapy sessions. He registered the book in 1975 with the United States Copyright Office.

In 1980, upon a change in its ownership, EPPI furloughed Zuk. He thereupon requested that all copies of the films be returned to him; EPPI ignored the request. It would appear that EPPI continued to rent out the films for at least some time thereafter. For reasons which have not been made clear, after a long hiatus, Zuk renewed his attempts to recover the films in 1994. In 1995, appellant filed the suit in Zuk's behalf, alleging that EPPI was renting out the films and thereby infringed his copyright.

On June 19, 1995, EPPI moved for dismissal under Rule 12(b), and appellant filed a memorandum in opposition. While the motion was pending, EPPI mailed to Lipman a notice of its intention to move for sanctions under Rule 11(c)(1)(A) on the grounds essentially that appellant had failed to conduct an inquiry into the facts reasonable under the circumstances and into the law. The district court entered an order granting the motion to dismiss. The court found that the copyright of the book afforded no protection to the films, that EPPI owned the copies of the films in its possession and that their use was not an infringement, and that in any event, Zuk's claims were barred by the statute of limitations.

On August 16, EPPI filed a motion for attorney's fees pursuant to 17 U.S.C. § 505 which appellant opposed by a memorandum in opposition on August 31. On September 15, EPPI also filed a Rule 11 motion for sanctions, and appellant filed a memorandum in opposition. On November 1, the court entered an order to "show cause why Rule 11 sanctions should not be imposed for (a) filing the complaint, and failing to withdraw it; and (b) signing and filing each and every document presented." Appellant responded on December 1 with a declaration reiterating the facts of the case as he viewed them.

On February 1, 1996, the court, upon consideration of defendant's motion for attorney's fees and sanctions, ordered: "That plaintiff, Gerald Zuk, Ph.D., and plaintiff's counsel, Benjamin G. Lipman, Esq. are jointly and severally liable to the defendant for counsel fees in the sum of $15,000." We must ascertain the underpinnings for the Order. It appears that Dr. Zuk subsequently settled his liability with EPPI in the amount of $6,250, leaving appellant liable for $8,750. Appellant timely appealed.

II.

We turn first to the Copyright Act which provides in relevant part: "In any civil action under this title [Copyrights], the court in its discretion may allow the recovery of full costs by or against any party. . . . The court may also award a reasonable attorney's fee to the prevailing party as part of the costs." 17 U.S.C. § 505.

Under this Act, a reasonable attorney's fees may be awarded in the court's discretion to the prevailing party against the other party as costs. This court has in the past recognized that the statutory authorization is broad, does not require bad faith on the part of the adversaries, and reveals an intent to rely on the sound judgment of the district court. Lieb v. Topstone Industries, Inc. 788 F.2d 151, 155 (3rd Cir. 1986). In the instant case, the trial judge aptly recognized that fees were not automatically awarded to the prevailing party, but believed that this was the kind of case in which an award was clearly justified. He therefore concluded that reasonable compensation for all the time spent in this litigation, including the fees and sanctions issues, was to enter a total

award of $15,000. Therefore the district court committed no error in making an award under this Act. However, under the statutory directive, the attorney's fee is considered an element of costs and therefore liability attached only to Dr. Zuk and not his attorney, Benjamin G. Lipman. Dr. Zuk has settled his liability, and the appellant's liability under the Copyright Act should not detain us. There is none. We therefore turn to the other statute that figures in this appeal, 28 U.S.C. § 1927.

A.

The short memorandum of the district court accompanying its Order of February 1, 1996 also shows that the district court concluded that "joint and several liability should be imposed under both Fed. R. Civ. P. 11 and 28 U.S.C. § 1927 upon plaintiff's counsel, as well as plaintiff, for the $15,000 counsel fee award." D.C. Memo at 2.

We turn first to the propriety of the district court's imposition of sanctions under 28 U.S.C. § 1927. We review a district court's decision to impose sanctions for abuse of discretion. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 385, 110 L.Ed.2d 359, 110 S.Ct. 2447 (1990); Jones v. Pittsburgh Nat'l Corp., 899 F.2d 1350, 1357 (3rd Cir. 1990).

Section 1927 provides in pertinent part: "Any attorney or person admitted to conduct cases who so multiplies the proceeding in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses and attorney's fees reasonably incurred because of such conduct." Although a trial court has broad discretion in managing litigation before it, the principal purpose of imposing sanctions under 28 U.S.C. § 1927 is "the deterrence of intentional and unnecessary delay in the proceedings." Beatrice Foods v. New England Printing, 899 F.2d 1171, 1177 (Fed. Cir. 1990). In this case, the trial court imposed sanctions on plaintiff and his counsel, not because of any multiplicity of the proceedings or delaying tactics, but for failure to make a reasonably adequate inquiry into the facts and law before filing the lawsuit. Thus, the statute does not apply to the set of facts before us. Furthermore, the statute is designed to discipline counsel only and does not authorize imposition of sanctions on the attorney's client.

Finally, this court has stated that "before a court can order the imposition of attorneys' fees under § 1927, it must find wilful bad faith on the part of the offending attorney." Williams v. Giant Eagle Markets, Inc., 883 F.2d 1184, 1191 (3d Cir. 1989). Although the court need not "make an express finding of bad faith in so many words," Baker Industries, Inc. v. Cerberus Ltd., 764 F.2d 204, 209 (3d Cir. 1985), there must at least be statements on the record which this court can construe as an implicit finding of bad faith. Id.

At oral argument before us, counsel for EPPI conceded that the district court had made no express finding of bad faith. Our review of the record, which in relevant part consists only of a two-page Memorandum and Order, reveals no statements which we can interpret as an implicit finding of wilful bad faith. At most, the court's statements might be interpreted to indicate a finding of negligence on appellant's part.[2]

[2] For example, the court stated: "I find it impossible to avoid the conclusion that plaintiff's counsel failed to conduct an adequate investigation . . ." and "If a tolerably adequate inquiry had preceded the filing of the [sic] this lawsuit, no lawsuit would have been filed."

We have also interpreted § 1927 as requiring specific notice and the opportunity to be heard before sanctions are imposed. In Jones v. Pittsburgh Nat'l Corp., we confronted a situation very much like the current one; the appellant had been sanctioned under both Rule 11 and § 1927, but had received notice only in regard to Rule 11. In vacating the order imposing sanctions, we noted that "particularized notice is required to comport with due process," and that "the mere existence of . . . § 1927 does not constitute sufficient notice in our view." 899 F.2d 1350 at 1357.

We therefore hold that because the court had made no finding of wilful bad faith, and because it failed to give appellant notice and an opportunity to defend, it was an abuse of discretion to award sanctions against plaintiff's counsel under 28 U.S.C. § 1927.

III.

In imposing joint and several liability upon appellant, the district court stated only that it was acting pursuant to Fed. R. Civ. P. 11 and 28 U.S.C. § 1927. It did not set forth the portion of the sanctions imposed as a result of the perceived § 1927 violation, as opposed to the portion to be allocated pursuant to Rule 11. Thus, we are denied meaningful review.

This court confronted a similar situation in *Jones*, supra. In that case, we concluded that "the court did not identify and relate the violations to each source of authority in a way that would permit meaningful appellate review. . . . In consequence, the entire order imposing sanctions on appellant must be vacated." 899 F.2d 1350 at 1358. We believe that we are constrained to apply the same rationale in this case as well. We therefore will vacate the Order imposing sanctions and remand for further appropriate proceedings in accordance with this opinion.

IV.

Because the order imposing sanctions on appellant must be vacated and the matter remanded, we conclude that certain issues will probably arise on the remand and should, in the interest of justice, be addressed. We refer here specifically to the question of the proper type and amount of sanctions to be imposed pursuant to Rule 11 under the particular circumstances of this case.

A.

We note at the outset that we find no error in the district court's decision to impose sanctions pursuant to Fed. R. Civ. P. 11.[3] As noted above, we review a district court's decision to impose sanctions for abuse of discretion. Cooter & Gell, 496 U.S. at 385. An abuse of discretion in this context would occur if the court "based its ruling on an erroneous

[3] Appellant contended that he was not given the benefit of Rule 11's 21-day safe harbor, because the court dismissed the action before he had had the full opportunity to withdraw it. He thus claimed that sanctions were improper under Rule 11(c)(1)(A) (upon motion by other party). EPPI maintained that the sanctions actually were imposed under Rule 11(c)(1)(B) (on the court's initiative), which has no safe harbor provision. The court issued an order to show cause, which is required only under 11(c)(1)(B), but stated that it was "in consideration of defendant's motion for sanctions." In its accompanying memorandum, the district court did not address this apparent inconsistency. At oral argument before this court, appellant acknowledged that he would not have withdrawn the complaint even if he had been given the full 21-day safe harbor. Thus, we need not address this contention.

view of the law or a clearly erroneous assessment of the evidence." Rogal v. American Broadcasting Companies, Inc., 74 F.3d 40, 44 (3d Cir. 1996).

Prior to a significant amendment in 1983, Rule 11 stated that an attorney might be subjected to disciplinary action only for a "wilful" violation of the rule. The Advisory Committee Notes to the 1983 amendment make clear that the wilfulness prerequisite has been deleted. Rather, the amended rule imposes a duty on counsel to make an inquiry into both the facts and the law which is "reasonable under the circumstances." This is a more stringent standard than the original good-faith formula, and it was expected that a greater range of circumstances would trigger its violation. The district court did not abuse its discretion in determining that appellant had not sufficiently investigated the facts of the case nor had he educated himself well enough as to copyright law. We therefore see no error in the court's decision to impose sanctions.

1. The Inquiry into The Facts

In dismissing the complaint, the court found that "it . . . seems highly probable that plaintiff's claims are barred by the three-year statute of limitations." Later, in the Memorandum and Order imposing sanctions, the court noted that the "obvious" statute of limitations issue would have been resolved and no lawsuit filed, had appellant conducted an adequate investigation. D.C. Memo at 2.

Dr. Zuk left EPPI in 1980, and it is undisputed that EPPI continued to rent out the films in question for some time thereafter. Appellant, however, had no evidence whatsoever, other than conjecture, to prove that the films were being rented in the three years preceding the commencement of this action. The Advisory Committee Notes to the 1993 amendments to Rule 11 explain:

> Tolerance of factual contentions in initial pleadings . . . when specifically identified as made on information and belief does not relieve litigants from the obligation to conduct an appropriate investigation into the facts that is reasonable under the circumstances; it is not a license to . . . make claims . . . without any factual basis or justification."

Appellant's assertions in ¶¶ 36 and 37 of the complaint (in regard to EPPI's ongoing use of the films) are based purely upon Dr. Zuk's beliefs.[4] What little investigation appellant actually conducted did not reveal any information that the films were being rented out during the relevant period. Indeed, certain pre-filing correspondence with EPPI indicated that, pursuant to Dr. Zuk's earlier instructions, the library staff was cautioned not to rent any of Dr. Zuk's films. Nor are we persuaded by appellant's contention that further information would have been obtained during discovery. The Note cited above observes that discovery is not intended as a fishing expedition permitting the speculative pleading of a case first and then pursuing discovery to support it; the plaintiff must have some basis in fact for the action. The need for a reasonable investigation with respect to distribution of the film during

[4] EPPI emphasizes that while ¶¶ 36 and 37 should have been pleaded on information and belief, they were instead phrased as "Dr. Zuk believes, and therefore avers,. . . ." In light of liberal federal pleading practice, we do not find this to be an important distinction.

the three-year period prior to the filing of the lawsuit is evident because of the long period allegedly spanned by the distribution.

2. The Inquiry into The Law

Rule 11(b)(2) requires that all "claims, defenses, and other legal contentions [be] warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." Appellant does not contend that any of the latter justifications apply, and so we must ascertain whether his legal arguments are "warranted by existing law." For reasons that follow, we conclude that they are not, and that sanctions therefore were within the sound discretion of the district court.

Appellant's legal research was faulty primarily in two particular areas: copyright law (pertaining to what the parties call the "registration issue") and the law of personal property (the "ownership issue"). Turning to the registration issue, appellant states that this was the first copyright case which he had handled, and points out that a practitioner has to begin somewhere. While we are sympathetic to this argument, its thrust is more toward the nature of the sanctions to be imposed rather than to the initial decision whether sanctions should be imposed. Regrettably, the reality of appellant's weak grasp of copyright law is that it caused him to pursue a course of conduct which was not warranted by existing law and compelled the defendant to expend time and money in needless litigation.

Appellant's primary contention is that by registering a copyright in his book, Dr. Zuk had somehow also protected the films reproduced in them. The logical progression is that because the book contained transcripts of the films, the words spoken in the films were protected, and thus so were the films. Although perhaps logical, this argument runs contrary to copyright law. "The copyright in [a derivative] work . . . does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material." 17 U.S.C. § 103(b).

In all fairness to appellant, we should note that the cases and commentary interpreting this provision focus on derivative works which incorporate the preexisting work of a different author. Had appellant presented his argument as a matter of first impression, and argued for a new interpretation of the statute where the same individual authored both works, he might have stood upon a more solid footing. Instead, appellant's brief evidences what strikes us as a cursory reading of the copyright laws, and a strained analysis of what appears to be an inapposite case (Gamma Audio & Video, Inc. v. Ean-Chea, 11 F.3d 1106, 1257 (1st Cir. 1993)).

We now focus on the ownership issue. The parties agree that if EPPI owns the copies of the film in its possession, then 17 U.S.C. § 109[5] permits EPPI to rent out the films. Appellant maintains, however, that EPPI does not own the copies, because they were made specifically for Dr. Zuk at his behest, and as a perquisite of his faculty position at EPPI. This question raises reasonable issues as to the rights of an employer in the

[5] This section states in pertinent part that a nonprofit library (such as that operated by EPPI) is free to rent, lease, or lend copywritten material without authority of the copyright owner, so long as the library owns a lawfully made copy of such material.

work product of an employee, and its resolution is not so clear as to itself warrant the sanctioning of appellant for advancing this claim.

EPPI contends, however, that it is too late in the day to raise this argument. The Pennsylvania statute of limitations on replevin is two years. Dr. Zuk demanded the return of the copies in 1980, and EPPI refused to comply, based upon a claim of ownership. EPPI's possession thereafter was open, notorious, and under claim of right, and yet Dr. Zuk did not institute an action to replevy. It would therefore appear that EPPI now holds superior title, see, e.g., Priester v. Milleman, 161 Pa. Super. 507, 55 A.2d 540 (Pa. Super. 1947), and that an inquiry into Pennsylvania personal property law would have revealed that appellant's claim was far too stale. However, EPPI raises its argument too late in this proceeding. It did not rely upon, or even mention, the adverse possession theory before the district court. Because the court could not have relied upon this aspect of the ownership issue in imposing sanctions, it is inappropriate for us to consider it at this time.

B.

Having concluded that there is no error in the district court's decision to impose sanctions upon appellant under Rule 11, we turn now to the type and amount of sanctions imposed. We review the appropriateness of the sanctions imposed for abuse of discretion. Snow Machines, Inc. v. Hedco, Inc., 838 F.2d 718, 724 (3d Cir. 1988). As the courts have undergone experience with the application of Rule 11 sanctions, its scope has broadened and the emphasis of the Rule has changed.

According to Wright & Miller:

> The 1993 revision . . . makes clear that the main purpose of Rule 11 is to deter, not to compensate. Accordingly, it changes the emphasis in the types of sanctions to be ordered. It envisions as the norm public interest remedies such as fines and reprimands, as opposed to the prior emphasis on private interest remedies. Thus, the Advisory Committee Notes state that any monetary penalty "should ordinarily be paid into the court" except "under unusual circumstances" when they should be given to the opposing party. Any sanction imposed should be calibrated to the least severe level necessary to serve the deterrent purpose of the Rule. In addition, the new Rule 11 contemplates greater use of nonmonetary sanctions, including reprimands, orders to undergo continuing education, and referrals to disciplinary authorities.

5A Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1336 (2d ed. Supp. 1996).

This court has instructed the district courts that "fee-shifting is but one of several methods of achieving the various goals of Rule 11," that they should "consider a wide range of alternative possible sanctions for violation of the rule," and that the "district court's choice of deterrent is appropriate when it is the minimum that will serve to adequately deter the undesirable behavior." Doering v. Union County Bd. of Chosen Freeholders, 857 F.2d 191, 194 (3d Cir. 1988).

Thus, the district courts have been encouraged to consider mitigating factors in fashioning sanctions, most particularly the sanctioned party's ability to pay. Id. at 195. Courts were also given examples of other factors they might consider, including whether the attorney has a history of this sort of behavior, the defendant's need for compensation, the degree of frivolousness, and the "willfulness" of the violation. Id. at 197 n.6.

In *Doering*, a $25,000 sanction was imposed on a sole practitioner with less than $40,000 gross income per annum. We affirmed the district court's decision to impose sanctions, but vacated and remanded as to the amount. We noted that "in order for the district court to exercise properly its discretion in setting the amount of fees to be assessed against counsel, further evidence must be developed upon the issue of his ability to pay." Id. at 196.

Although money sanctions are not encouraged under Rule 11, they are not forbidden. Under the circumstances of this case, we see no error in the district court's imposition of fee sanctions upon the appellant, although the amount may be contrary to the current spirit of Rule 11. The present case differs from *Doering* in that appellant did not request that the district court mitigate the sanctions. Appellant also faces a lesser financial burden in that he is liable for only $8,750, his client having paid the difference. Nonetheless, when we look to the list of mitigating factors, and consider the non-punitive purpose of Rule 11, we conclude that it was error to invoke without comment a very severe penalty. On remand, the district court should apply the principles announced by this court in *Doering*.

V.

To summarize, to the extent the Order of the district court dated February 1, 1996 imposed sanctions upon appellant pursuant to Fed. R. Civ. P. 11, it will be affirmed only as to the actual imposition of such sanctions. The Order will be vacated as to the type and amount of sanctions imposed under Rule 11 and as to any sanctions imposed under 28 U.S.C. § 1927. The case will be remanded for further proceedings consistent with this opinion.

Each side to bear its own costs.

NOTE ON FEDERAL RULE 11 AND OTHER DEVICES DESIGNED TO DETER FRIVOLOUS OR ABUSIVE LITIGATION

1. What constitutes a frivolous claim under Rule 11? Rule 11 has four elements: (a) a requirement that every pleading, motion or other paper be signed; (b) a declaration that the signature shall be treated as a certification that the document has certain attributes; (c) a description of the required attributes—that the document has been prepared after reasonable investigation and that to the best of the signer's knowledge, information, and belief the document meets minimum standards of factual merit, legal merit, and lack of improper purpose; and (d) a description of the standards and process for the award of sanctions when a certification is found to violate the rule.

a. Reasonable investigation and evidentiary support. In signing a complaint or other pleading, the lawyer or unrepresented party

certifies that she has made a reasonable investigation. What does a reasonable investigation consist of when your opponent controls the evidence? The court in *Zuk* writes that "pre-filing correspondence with EPPI indicated that, pursuant to Dr. Zuk's earlier instructions, the library staff was cautioned not to rent any of Dr. Zuk's films." Was Dr. Zuk required to take the statements in the correspondence at face value? If not, would it have been ethically proper for Dr. Zuk to run a sting directed to the lending counter at the library? Could Dr. Zuk's lawyer have complied with Rule 11 without conducting such a sting?

The requirement that factual claims have "evidentiary support" or, if so identified, "will likely have evidentiary support after a reasonable opportunity for further investigation or discovery" clearly permits the pleader to advance a contention without sufficient evidence in hand to permit a finding in her favor at trial, provided that there is a reasonable likelihood of such information emerging in discovery. The problem arises when, after discovery, there is a failure of proof and the party's claim or defense is dismissed. How does a court go about determining, after the fact, whether at the time of filing there was a "reasonable likelihood" that such evidence would emerge? Consider, for example, the situation of a lawyer for the plaintiff in a case alleging intentional racial discrimination in employment under Title VII of the Civil Rights Act of 1964. Suppose that the lawyer, after pre-filing investigation, has only his client's strong belief that he was discriminated against and the company's written denial that discrimination occurred. Isn't the lawyer in such a case in many ways like the lawyer in *McCormick v. Kopmann*? How does the lawyer decide whether a court will later agree that it was "reasonably likely" that such evidence would emerge from discovery if in fact such proof fails to emerge? Put another way, what is the status under Rule 11 of a claim that is not indisputably without factual merit but that is nonetheless a long shot? Is there some risk that judges will differ in their assessment of the probability of discrimination emerging after full discovery, perhaps even along political, racial or gender lines? See Uy v. Bronx Municipal Hosp. Ctr., 182 F.3d 152 (2d Cir. 1999) (Rule 11 sanctions denied because prior to discovery plaintiff's lawyer could not have known that all adverse witnesses would contradict his client's story); Yablon, The Good, the Bad, and the Frivolous Case: An Essay on Probability and Rule 11, 44 U.C.L.A. L. Rev. 65 (1996).

The statute of limitations is an affirmative defense. Fed. R. Civ. P. 8(c)(1). For that reason, Dr. Zuk did not have to plead compliance with the statute in order to survive a motion to dismiss for failure to state a claim. It was enough for him to plead the elements of a claim under the copyright laws, and it was then the defendant's option to plead or waive the affirmative defense of the statute of limitations. That does not mean that Dr. Zuk's lawyer was entitled to proceed in ignorance of the statute of limitations issue. His obligation to represent Dr. Zuk competently almost certainly required him to assess both the strength of the limitations defense and the likelihood that it would be asserted. But is it consistent with Rule 11, which governs the making of contentions, to sanction a lawyer for contending something that his complaint was not required to and did not explicitly contend? Is it consistent with the assumptions of an adversary system?

A litigant has a continuing duty to ensure that his representations to the court meet the standards of the rule. For example, if a factual allegation in the complaint is made after reasonable investigation (thus complying with

the rule at the time it is made), but is later learned to be without foundation, a litigant may not continue to "present" it to court by "later advocating" it. Prohibited "presentations" to the court include oral advocacy based on written material that violates the rule. Fed. R. Civ. P. 11(b).

b. Warranted by existing law or a non-frivolous argument for the extension, modification, or reversal of existing law, or the creation of new law. There are obviously a number of objective indicia of whether a legal argument is frivolous: the text of any relevant statute, rule, or regulation; the prominence, number, and date of decisions in the controlling jurisdiction accepting or rejecting the argument; the level of support for the argument in decisions rejecting it (for example, dissenting opinions); the treatment of the argument in cases from other jurisdictions; the power of analogous arguments drawn from the controlling jurisdiction or others; the content of academic commentary, etc. Often these sources will clearly establish the respectability of an argument. But only rarely will they conclusively establish its complete lack of merit.

Important issues of indeterminacy arise in determining when a legal argument is so clearly improper that a lawyer should be sanctioned for filing it. Although judges are fond of saying that arguments are obviously wrong or even wacky, legal frivolity turns out to be like obscenity: judges "know it when they see it." There are a significant number of cases in which arguments sanctioned as frivolous in the district court have been held to be winning arguments in the court of appeals. Meyer, When Reasonable Minds Differ, 71 N.Y.U. L. Rev. 1467, 1484 & n. 47 (1996) (cataloguing cases). There are also cases in which arguments that were accepted as winners in the district court have been held frivolous and sanctionable in the court of appeals. Professor Levinson describes one such case:

> A Texas case in which an oil company argued that a statutory requirement of a bid for an oil lease was that the royalty offer be written as a percentage. The company therefore argued that its competitor, who had offered a royalty of .82165 had not complied with the statute, which purportedly required an offer of 82.165 percent. The Fifth Circuit pronounced this argument "quite incredible," and its opinion quoted from some children's arithmetic books on how to convert decimals into percentages and vice versa. But the most notable point is that the district judge below had apparently accepted this argument, and the Fifth Circuit had to reverse him.

Levinson, Frivolous Cases: Do Lawyers Really Know Anything at All?, 24 Osgoode Hall L.J. 353, 370–71 (1986) (footnotes omitted) (citing Oil & Gas Futures, Inc. v. Andrus, 610 F.2d 287, 288 (5th Cir. 1980)). For a vivid list of apparently "odd-ball" claims that succeeded on the merits, see Rhode, Access to Justice 24–25 (2004).

Perhaps because of courts' discomfort with the lack of standards for determining legal frivolousness, many decisions sanctioning legal arguments are written in terms that avoid the force of the argument itself and instead attack the lawyer's research or the failure to identify the legal argument as novel in the papers filed with the court. Did the court in *Zuk* pursue such a strategy here? Recall Judge Rosenn's suggestion: "Had appellant presented his argument as a matter of first impression, and argued for a new interpretation of the statute where the same individual authored both works,

he might have stood upon a more solid footing. Instead, appellant's brief evidences what strikes us as a cursory reading of the copyright laws, and a strained analysis of what appears to be an inapposite case." Is the court saying that a district court can sometimes decide whether an argument is frivolous based upon whether the lawyer admits its weaknesses? The Advisory Committee Notes state that although "arguments for a change of law are not required to be specifically so identified, a contention that is so identified should be viewed with greater tolerance under the rule." Is that approach consistent with encouraging vigorous advocacy for legal change? Cf. Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531 (9th Cir. 1986) (arguing against requiring lawyers to explicitly identify novel arguments).

c. Not being presented for an improper purpose. Most reported cases imposing sanctions under Rule 11 do so on the ground of lack of merit of the substantive claim or failure to perform a proper investigation. Sanctions for improper purpose are much less frequent. The courts have had difficulty with cases where the claim is not frivolous on the merits, but the party or lawyer's underlying purpose goes beyond simply winning on the merits, whether by getting revenge, dramatizing a political cause, or causing embarrassment to an opponent. The literal text of the rule indicates that presenting a minimally meritorious contention with an improper purpose constitutes a violation, but the courts have often hesitated to impose sanctions in such cases for fear of deterring meritorious claims.

Some courts hold that when a pleading or contention is neither legally nor factually frivolous, sanctions are unavailable regardless of the underlying purpose. Sussman v. Bank of Israel, 56 F.3d 450 (2d Cir. 1995) (no violation of Rule 11 when a complaint adequately grounded in law and fact is filed "with a view to exerting pressure on defendants through the generation of adverse and economically disadvantageous publicity."). Others argue that the inquiry should be whether the illicit purpose dominates over a legitimate purpose "to vindicate rights in court," In re Kunstler, 914 F.2d 505 (4th Cir. 1990), or whether the case is an "exceptional" one "where the improper purpose is objectively ascertainable." Whitehead v. Food Max of Miss., Inc., 332 F.3d 796, 805 (5th Cir. 2003). In *Whitehead*, the court affirmed an award of sanctions against a lawyer who had won a $3.2 million judgment against Kmart. The plaintiffs were a mother and child who had been kidnapped from a Kmart parking lot. The mother was then raped while the daughter was held at knife point. Three days after judgment, the lawyer for the plaintiffs obtained a writ of execution and accompanied two U.S. Marshals to the Kmart store where the kidnapping had occurred. He invited three TV stations to cover the event. At the store, the lawyer initially attempted to seize currency in the cash registers and vault, though ultimately no money was seized. The lawyer also gave interviews to the TV reporters, which were widely broadcast. The lawyer "asserted Kmart 'wo[uld no]t pay' the judgment; claimed Kmart had been 'warned' before the abduction that 'an event like [that] was going to happen' but 'didn't care'; charged his clients had been twice 'victimized' by Kmart, once by being abducted there and once by Kmart's 'not paying . . . a just debt'; and proclaimed he was there to ensure Kmart did what it was supposed to do." 332 F.2d at 800. The court of appeals, sitting en banc, affirmed the imposition of sanctions. The court found it unnecessary to decide whether the service of the writ was adequately supported in fact or law. Ordinarily, the court suggested, the district court should not "read an ulterior motive" into a

document "well grounded in fact and law," but this case demonstrated "exceptional circumstances." 332 F.3d at 805. There was little evidence of a legitimate purpose, since the lawyer had no reason to think that Kmart would not pay the judgment and no hope of finding anything close to $3.2 million on the premises of a single store. The district court therefore did not abuse its discretion in finding that the lawyer had acted with two improper purposes: to embarrass Kmart and to promote himself. For a discussion of the improper purpose issue and an argument that some politically motivated suits ought to be entitled to First Amendment protection see Andrews, *Jones v. Clinton*: A Study in Politically Motivated Suits, Rule 11, and the First Amendment, 2001 B.Y.U. L. Rev. 1 (2001).

2. Previous versions of Rule 11. Federal Rule 11 is now in its third principal incarnation. The original version of Rule 11 permitted sanctions only for pleadings filed in bad faith. In consequence, sanctions were rarely awarded. In 1983 the rule was amended in two critical respects. First, the standard for liability under the amended rule was changed from subjective to objective. Second, the trial court was obliged to impose sanctions whenever it found that the rule had been violated.

The 1983 amendments produced a radical change in practice under the Rule. While litigation during the first 45 years of the rule's existence had produced nine reported judicial opinions, in the 10 years following the adoption of the amended Rule 11 there were thousands of reported opinions under the rule and many more unreported opinions.

Rule 11 was substantially amended in 1993. The amendment was the product of dissatisfaction among a number of people, including some plaintiffs' groups and many members of the bar. A study of the operation of the 1983 version of the Rule in the Fifth, Seventh, and Ninth Circuits found that civil rights cases made up 11.4 percent of federal cases filed, but 22.7 percent of the cases in which Rule 11 sanctions were applied. Among civil rights plaintiffs' lawyers, 31 percent reported not pursuing a claim or defense they thought had potential merit because of Rule 11; only 17.9 percent of civil rights defendants' lawyers reported being similarly deterred. Marshall et al., The Use and Impact of Rule 11, 86 Nw. U. L. Rev. 943 (1992).

3. The 1993 changes in sanctioning policy and the current rule. The concerns outlined by the Advisory Committee led to several major changes in the operation of the sanctions provisions of the rule:

a. "Safe harbor." A litigant can escape sanctions by withdrawing an offending pleading or representation within 21 days of being served with a motion by an opposing party. Fed. R. Civ. P. 11(c)(2). The motion may not be filed with the court until the 21-day clock has run, and if the court takes action on the challenged pleading before the expiration of the 21-day period, no sanctions may be awarded in response to the motion. Ridder v. City of Springfield, 109 F.3d 288 (6th Cir. 1997). The safe harbor rule was designed to reduce the volume of litigation under Rule 11 and to reduce its potential chilling effect on the assertion of doubtful factual and innovative legal claims. Doesn't it also reduce the Rule's deterrent effect?

A district court may impose Rule 11 sanctions on its own motion without having to observe the 21-day safe-harbor period. Fed. R. Civ. P. 11(c)(3). According to the Advisory Committee Notes, the rule contemplates that court-initiated sanctions will be issued in a narrower range of circumstances than party-initiated sanctions. Such sanctions will " 'ordinarily be issued

only in situations that are akin to a contempt of court.' " Barber v. Miller, 146 F.3d 707, 711 (9th Cir. 1998).

b. Standards for the award of sanctions. While the award of sanctions under the former rule was mandatory upon a finding that the rule had been violated, under the current Rule the district judge may choose not to impose sanctions. Fed. R. Civ. P. 11(c). Moreover, while under the former Rule an award of costs, including attorney's fees, to the other side was the standard sanction, the current Rule cautions that sanctions under the Rule "must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated." Fed. R. Civ. P. 11(c)(4). Available sanctions include "nonmonetary directives"; an order to pay money to the court; and an order to pay the expenses, including attorney's fees, to the other side but only "if imposed on motion and warranted for effective deterrence." Id.

c. Persons liable for sanctions. The current Rule 11 also provides that if a court determines that the duty set forth in subdivision (b) is violated, it may "impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation." Fed. R. Civ. P. 11(c)(1). Fed. R. Civ. P. 11(c)(5)(A) provides an exception to this general rule, stating that monetary sanctions cannot be awarded against a represented party for violation of the requirement of legal merit.

The Advisory Committee Notes state that "[t]he revision permits the court to consider whether other attorneys in the firm, co-counsel, other law firms, or the party itself should be held accountable for their part in causing a violation." In the context of this sentence, "the party itself" appears to mean a represented party. If this is so, then a represented party may be "responsible" for a violation by his attorney, and, subject to Rule 11(c)(1), therefore liable for sanctions for that violation.

But under the current rule only "an attorney or unrepresented party" is instructed to sign and certify submissions to the court, and thus, under a strict reading of the language, only an attorney or unrepresented party can violate the rule. Sanctions may be imposed on a represented party only for a violation by his attorney, and only if the party is "responsible" for his attorney's violation. Assume that the party is a convincing liar. The attorney discharges her duty of making "an inquiry reasonable under the circumstances," but since the client is such a good liar, the attorney believes the story and files a complaint. Since this is not a violation of the lawyer's duty, may the client avoid sanction, even though a flagrantly unfounded complaint has been filed based on lies propounded by the client?

The few lower federal courts that have addressed sanctions for represented parties have not spent much time agonizing. See, e.g., Union Planters Bank v. L & J Dev. Co., Inc., 115 F.3d 378, 384 (6th Cir. 1997) (upholding sanctions against represented defendants "for misrepresenting key facts during both depositions and trial testimony, and knowingly bringing and pursuing claims devoid of evidentiary support"); Binghamton Masonic Temple, Inc. v. Bares, 168 F.R.D. 121 (N.D.N.Y. 1996) (sanctioning a represented party for bringing a claim with an improper purpose and for misleading both its own attorney and the opposing party). Perhaps these results may be defended, even if not covered by the literal language of Rule 11, on the ground that the court has inherent power to sanction bad faith client conduct.

4. Other power to sanction. Rule 11 is not the only source of a federal district court's power to sanction frivolous litigation or abusive tactics.

a. 28 U.S.C. § 1927. Under 28 U.S.C. § 1927, discussed in *Zuk*, a federal district court may award costs, including attorneys' fees, against an attorney (though not a party) who "multiplies the proceedings in any case unreasonably and vexatiously." Prior to 1980, § 1927 allowed only an award of costs, and as a consequence was rarely invoked. Roadway Express, Inc. v. Piper, 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980). After § 1927 was amended in 1980 to include attorneys' fees, § 1927 was invoked more frequently. The Supreme Court has never articulated the standard for sanctions under § 1927, and the courts of appeals disagree. Some, like the Third Circuit in *Zuk*, require subjective bad faith. See Avirgan v. Hull, 932 F.2d 1572 (11th Cir. 1991); United States v. Int'l Bhd. of Teamsters, 948 F.2d 1338 (2d Cir. 1991). Other Circuits require only an objective standard. See Miera v. Dairyland Ins. Co., 143 F.3d 1337 (10th Cir. 1998). Before imposing sanctions under § 1927, a district court must give the party notice and opportunity to defend against the threatened sanctions. Ted Lapidus, S.A. v. Vann, 112 F.3d 91 (2d Cir. 1997).

b. Inherent power. Federal district courts also have "inherent power" to award sanctions. In Chambers v. NASCO, Inc., 501 U.S. 32, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991), the Supreme Court upheld an award of attorneys' fees and expenses totaling almost $1 million against a party for a sustained pattern of bad-faith litigating tactics. Sanctions were not available under 28 U.S.C. § 1927, which is limited to awards against attorneys, and only a portion of the conduct was covered under Rule 11. The Supreme Court sustained the entire award based on the district court's "inherent power" to sanction bad-faith litigation tactics. The Court wrote, "[Plaintiff Chambers'] entire course of conduct throughout the lawsuit evidenced bad faith and an attempt to perpetrate a fraud on the court, and the conduct sanctionable under the Rules was intertwined within conduct that only the inherent power could address. In circumstances such as these in which all of a litigant's conduct is deemed sanctionable, requiring a court first to apply Rules and statutes containing sanctioning provisions to discrete occurrences before invoking inherent power to address remaining instances of sanctionable conduct would serve only to foster extensive and needless satellite litigation, which is contrary to the aim of the Rules themselves." 501 U.S. at 51.

5. State law counterparts. Although relatively few states have adopted Fed. R. Civ. P. 11 precisely, many states have counterparts. California has oscillated between different statutory solutions. At some times, the statute has embodied a bad faith standard. The current version of the statute, Calif. C. Civ. P. § 128.7, is virtually identical to Fed. R. Civ. P. 11.

6. Additional reading. There is a vast literature on Rule 11. For a small sample, see Guthrie, Framing Frivolous Litigation: A Psychological Theory, 67 U. Chi. L. Rev. 163 (2000); Bone, Modeling Frivolous Suits, 145 U. Pa. L. Rev. 519 (1997); Schwarzer, Rule 11: Entering a New Era, 28 Loy. L.A. L. Rev. 7 (1994); Tobias, The 1993 Revision of Federal Rule 11, 70 Ind. L.J. 171 (1994).

F. RESPONDING TO THE COMPLAINT

1. MOTIONS AND DEFENSES UNDER RULE 12

NOTE ON MOTIONS RESPONDING TO THE COMPLAINT AND ON THE PRESENTATION AND PRESERVATION OF DEFENSES

1. Rule 12 motions to dismiss. The responsive pleading to a complaint is the "answer." In the answer, the defendant is required to "state in short and plain terms its defenses to each claim asserted," "admit or deny the allegations asserted against it by an opposing party," and "affirmatively state any avoidance or affirmative defense." Fed. R. Civ. P. 8(b)(1), (c). The answer must also typically state any available counterclaims the defendant intends to assert against the plaintiff. Fed. R. Civ. P. 13. As a result, preparing an answer is a rather complicated enterprise requiring a significant investment of time and resources. What if a defendant thinks that the plaintiff's case is fundamentally flawed for some reason, perhaps because it was filed in the wrong forum, or because it fails to state a legal claim? Must the defendant go to the trouble of preparing an answer if it believes that plaintiff's case should be cut off at the knees?

The answer is often, "no." Federal Rule 12 authorizes a number of *pre-answer* motions to dismiss that the defendant can make in lieu of an answer to the complaint. We have already examined two such motions: the motion to dismiss for failure to state a claim under Rule 12(b)(6) and the motion for more definite statement under Rule 12(e). In addition, Rule 12 authorizes the defendant to raise by motion several other defenses, listed in subsections (1)–(5) and (7) of Rule 12(b). These defenses are generally directed at where and how the plaintiff has asserted her claim, as opposed to the substantive merits of the claim. For instance, a Rule 12 motion may contend that the plaintiff has filed her case in a court without jurisdiction or in an improper venue. These defenses do not go to the merits of the litigation, but instead posit that the case must be dismissed and filed again in a proper forum. If a defendant believes that he can make a successful motion to dismiss on one of the grounds enumerated in Rule 12, then he may make that motion and delay filing an answer until the court has ruled. Fed. R. Civ. P. 12(a)(4).

2. Preserving defenses under Rule 12. Rule 12 is a minefield. That is because some Rule 12 defenses are waivable and a lawyer must be careful to assert them properly. If a lawyer fails to assert Rule 12 defenses in accordance with the rule, he may find himself, ahem, waving goodbye forever to those defenses. Read Rule 12 carefully, with special attention to Rule 12(g) and Rule 12(h). Why do you think the Rule requires that many of these defenses be raised either by pre-answer motion or in the answer?

To understand how Rule 12 works, the first thing to note is that a defendant may always elect to forgo filing a Rule 12 motion and simply file an answer including any of the Rule 12(b) defenses. If the defendant decides to take this route, she must include in the answer any of the defenses listed in Rule 12(b)(2)–(5), or she has waived them (unless she amends the answer to add such a defense pursuant to Rule 15(a)(1)). The defendant may wait to assert a defense under Rule 12(b)(6) or 12(b)(7) in a motion for judgment on the pleadings or at trial. The defendant may assert the defense of lack of

subject matter jurisdiction under Rule 12(b)(1) at any point in the litigation, even for the first time after trial or on appeal.

In essence, the relative waivability of these defenses is correlated to their relative importance. The defenses listed in Rule 12(b)(2)–(5) involve personal jurisdiction, venue, and service of process. While these defenses protect important interests, each may be waived and none goes to the merits of the plaintiff's claims. The defenses in Rule 12(b)(6) and (7) (failure to state a claim, and failure to join an indispensable party) are more central to the litigation because they go to the underlying merits of the case and the court's ability to effectively resolve the controversy. As a result, these defenses are available even after the pleadings are closed. Finally, the defense of lack of subject matter jurisdiction is deemed of paramount importance because it goes to the power available to the federal courts under the Constitution and federal statutes. As a result, that defense is *never* waivable and can be raised at any time. In fact, a court has a responsibility to raise a defect in subject matter jurisdiction on its own motion.

Once you have this scheme down, we can complicate matters by considering the impact of a pre-answer motion to dismiss. *If* a defendant chooses to make a pre-answer motion to dismiss, she must raise any defenses she has among those listed in 12(b)(2)–(5), or she has waived them. Fed. R. Civ. P. 12(g). The reason for this requirement is readily apparent: it prevents the defendant from unduly delaying the litigation by making a series of motions under Rule 12 one after the other. Even if a defendant has made a pre-answer motion to dismiss, she may later raise a defense under Rule 12(b)(6) and 12(b)(7) in the answer, a motion for judgment on the pleadings, or at trial. Fed. R. Civ. P. 12(h)(2). And, again, a defendant may raise a motion to dismiss for lack of subject matter jurisdiction at any time. Fed. R. Civ. P. 12(h)(3).

Although the Rules seem irritatingly technical at first, with some practice you will get the hang of them. To test your understanding, try answering the following questions:

a. Plaintiff files a complaint. Defendant files a motion under Rule 12(b)(6) to dismiss the complaint for failure to state a claim. The motion is denied. Defendant now files motions under Rule 12(b)(2) to dismiss for lack of jurisdiction over the person and under Rule 12(e) for a more definite statement. Plaintiff responds that the issues of lack of personal jurisdiction and indefiniteness have been waived. How should the court rule on the second set of motions and why?

b. Plaintiff files a complaint. Defendant files a motion under Rules 12(b)(2) and (b)(5) to dismiss for lack of jurisdiction over the person and insufficiency of service of process. The motions are denied. Defendant then files an answer asserting the defense of improper venue. Plaintiff moves to strike the defense of improper venue from Defendant's answer. How should the court rule on the motion and why?

c. Plaintiff files a complaint. Defendant files a motion under Rule 12(b)(2) to dismiss for lack of jurisdiction over the person. The court denies the motion. Defendant then files an answer raising the defense that the complaint failed to state a claim. Plaintiff moves to strike the defense of failure to state a claim from Defendant's answer. How should the court rule?

d. Plaintiff files a complaint. Defendant files an answer denying the principal allegations of the complaint. Later in the action, Defendant moves

to amend the answer to assert the defenses of lack of personal jurisdiction, failure to state a claim, and failure to join an indispensable party under Rule 19. Plaintiff objects that those defenses have been waived. How should the court rule on the motion to amend?

e. Plaintiff files a complaint. Defendant moves to dismiss under Rule 12(b)(6) for failure to state a claim. The court denies the motion. Defendant now files an answer asserting the defense of lack of subject matter jurisdiction, and, following the filing of the answer, moves to dismiss the action on that ground. If Plaintiff contends that the defense of subject matter jurisdiction is waived, how should the court rule and why? What if, instead of filing an answer and then moving to dismiss on grounds of lack of subject matter jurisdiction, Defendant had simply "suggested" that subject matter jurisdiction was lacking?

3. Motion for judgment on the pleadings. Federal Rule 12(c) provides that a party may move for judgment on the pleadings "[a]fter the pleadings have closed—but early enough not to delay trial." The Rule 12(c) motion creates an opportunity to resolve a case early on in the litigation process if it can be decided based on the pleadings alone. This can be the case if the parties agree on the relevant facts and the case can be resolved through simply applying the law to those facts. For instance, if the case turns on the interpretation of a relevant statute, or the pleadings disclose that a case falls outside the applicable statute of limitations, the court may resolve the case based on the pleadings alone. As noted above, a defendant may also raise a defense under Rule 12(b)(1), 12(b)(6), or 12(b)(7) in a motion for judgment on the pleadings. See Wright, Miller & Kane, Federal Practice & Procedure § 1367 (3d ed. 2005).

4. Presenting matters outside the pleadings. In theory, a court ought to be able to decide a motion under Rule 12(b)(6) or 12(c) by looking exclusively at the pleadings. Indeed, the whole point of offering such a motion is to provide an early opportunity to resolve litigation on the merits so the parties do not waste significant expense on discovery in a case whose result is foreordained. But sometimes such a motion demands assessment of material beyond the four corners of the pleadings and examination of factual material, such as affidavits or other documentary materials. If the court decides that proper resolution of the motion requires consideration of such materials, Rule 12(d) requires the court to convert the motion into one for summary judgment under Rule 56, which is discussed infra, Chapter 7.B. See, e.g., Perlman v. Fidelity Services, 932 F. Supp. 2d 397 (E.D.N.Y. 2013) (converting a motion for judgment on the pleadings into one for summary judgment when "the Court has relied, at least in part, on deposition excerpts and other exhibits submitted by the parties in conjunction with their moving papers").

2. THE ANSWER

Zielinski v. Philadelphia Piers, Inc.

United States District Court, Eastern District of Pennsylvania, 1956.
139 F. Supp. 408.

■ VAN DUSEN, DISTRICT JUDGE.

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

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

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

3. The 'First Defense' of the Answer stated 'Defendant * * * (c) denies the averments of paragraph 5 * * *.'

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

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

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

'Gentlemen:

'As per telephone conversation today with your office, we attach hereto 'Complaint in Trespass' as brought against Philadelphia Piers, Inc. by one Frank Zielinski for supposed injuries sustained by him on February 9, 1953.

'We find that a fork lift truck operated by an employee of Carload Contractors, Inc. also insured by yourselves was involved in an accident with another chisel truck, which, was alleged, did cause injury to Frank Zielinski, and same was reported to you by Carload Contractors, Inc. at the time, and you assigned Claim Number OL 0153–94 to this claim.

'Should not this Complaint in Trespass be issued against Carload Contractors, Inc. and not Philadelphia Piers, Inc.?