



Modern civil procedure in the United States has three distinguishing features. One, notice pleading (to the extent it survives *Iqbal*), allows plaintiffs to start lawsuits with less than complete information. The second, discovery, increases the factual depth of any given lawsuit. The third, broad joinder of claims and parties, increases the breadth of a suit. To achieve this breadth, modern process turned from the single-mindedness of common law procedure to focus on the transaction rather than on the writ or legal theory. This focus permits parties to combine various claims. A larger litigative package confers advantages: It allows a court in a single suit to adjudicate multiple claims against multiple parties and for litigation to reflect some of life's complexity. Disadvantages can also flow from this freedom: Litigation can become intricate, and considerable procedural skirmishing can occur long before the merits come into view, as parties dispute whether a particular party or claim is properly joined.

### **A. JOINDER OF CLAIMS**

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In our exploration of procedure up to this point, we have for the most part assumed a simple case in which one plaintiff pleads a claim against one defendant, and the defendant does not assert a claim against the plaintiff. But, as you have already seen, many lawsuits are not that simple: A plaintiff often has more than one claim against a defendant, and a defendant may have multiple claims against the plaintiff. We first consider joinder issues in the context of a lawsuit between a single plaintiff and a single defendant. Then we examine the questions that arise when additional parties are joined, either in the initial pleadings or by a later amendment.

#### **1. Joinder of Claims by Plaintiff**

##### **a. Historical Background**

At common law the rules governing joinder of claims were simple: Plaintiff could join only claims using the same writ but could do so regardless of whether the claims were factually related. For example, plaintiff could join claims for assaults on two separate occasions or a slander on one day and an act of negligence months later (because both used the same writ), but could not join a claim for assault with a claim for slander, even if both arose from the same incident, because slander and assault required different writs. Plaintiff also could join alternative versions of the same grievance by alleging each in a separate count, as if each count referred to a separate occurrence. But, again, each version had to be within the same form of action; plaintiff could not set forth one count in *assumpsit* and another in *trover*, even if both arose from the same allegedly wrongful taking. This principle becomes more understandable if one remembers that different writs used different forms of pretrial and trial processes and that the goal of much common law procedure was to frame a single, straightforward question for the jury. Also bear in mind that the scope of former adjudication was correspondingly narrow (see *supra* [page 716](#)).

At common law, a mistake in joinder had severe consequences. Misjoinder could lead to dismissal or even the upsetting of a verdict; the defect was not waived by failure to make an early objection. One can still find cases from the early twentieth century throwing out verdicts because of misjoinder.

As noted in Chapters [5](#) and [6](#), as England emerged into the modern era there were separate courts for law and equity. Each operated its own system: If, for example, one wanted specific performance of a contract, one went to Chancery, the court system that administered equitable remedies, such as injunctions. If one wanted instead damages as a remedy for breach of contract, one went to the courts of common law—King’s (or Queen’s) Bench and Common Pleas, as they were known. For present purposes, the critical point is that courts of equity were more relaxed than courts of law regarding joinder; indeed, its broader scope was one reason for parties’ resort to claims for relief that brought claims into courts of equity. Although standards for joinder in equity were never made completely clear, joinder was generally permitted when claims shared a transactional relationship and raised common issues. There were limits, however, and a bill in equity could be found objectionable for *multifariousness*, meaning that it combined too many claims.

### **b. The Federal Rules**

The Rules changed all this: They eliminated all barriers to joinder of claims by a plaintiff. Read Rule 18. A single plaintiff can join any and all claims he has against a single defendant. This freedom can create trial management problems. If one imagines a case between Amazon or Microsoft and one of its major business partners, the possibilities are mind-boggling. The Rules solve this problem by permitting the judge, under Rule 42(b), to sever claims for trial convenience. Such severed claims may be as distinct for pretrial and trial purposes as if the plaintiff had brought entirely separate suits.

Although Rule 18 permits joinder, it does not compel it. So far as the *Rules* are concerned, there is no compulsory joinder of claims. The Rules do not, however, tell the whole story. The principles of claim preclusion, explored in [Chapter 11](#), force a plaintiff to join related claims: If the plaintiff fails to join a claim, and a later court finds it is related to one adjudicated, it will be barred. Moreover, plaintiff will often want to join all claims, or at least all related claims, he has against a defendant for efficiency’s sake. The combination of these two factors creates a powerful incentive for plaintiffs to join claims, even in the absence of a Rule requiring that they do so.

### **c. Joinder and Jurisdiction**

Although preclusion and strategy encourage broad joinder, jurisdiction sometimes presents an obstacle. Review of a few fundamental propositions may be helpful in setting the stage.

Assume Ann, a citizen of Illinois, sues Barbara, also a citizen of Illinois, on a federal claim. Can *A* join a state claim against *B*? That question poses two sub-questions: (1) Do the Rules permit combining these claims?; and (2) Assuming the Rules allow joinder, does the federal court have jurisdiction over the state claim thus joined?

Rule 18 creates no joinder problem in this situation because it permits a plaintiff to join as many claims as she wishes, whether related or unrelated. The problem is jurisdictional: The court may lack subject matter jurisdiction over Ann’s state law claim.

Recall that federal courts have limited jurisdiction: They do not have jurisdiction unless a provision of the Constitution and a statute grant it to them. In the example above, the basis for jurisdiction over the plaintiff’s original claim is straightforward: It arises under federal law, over which Article III and 28 U.S.C. §1331 confer jurisdiction.

Jurisdiction over the state law claim is more difficult. There is no diversity of citizenship between plaintiff and defendant. The claim arises under state rather than federal law, so there is no federal question jurisdiction. If there is jurisdiction, it exists only by virtue of the supplemental jurisdiction conferred by 28 U.S.C. §1367. Read that statute and consider what question would have to be answered to resolve the jurisdictional issue here.

Section 1367 has a particularly important feature for our exploration of joinder. Its grant of supplemental

jurisdiction depends on four variables: (1) the relationship between the original claim and the claim to be joined; (2) the basis of the original jurisdiction over the case; (3) the identity of the party—plaintiff or defendant—seeking to invoke supplemental jurisdiction; and (4) the Rule authorizing the joinder of the party or claim over whom supplemental jurisdiction is sought. In the sections below, we will have repeated occasion to explore these variables; in order to gain a basic orientation, consider some elementary problems. In answering each, be prepared to explain which provision of §1367 governs and how you believe that section resolves the question.

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### *Notes and Problems*

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1. In this and the next four problems, assume the litigation occurs in federal district court. Ann, a citizen of Illinois, sues Barbara, also a citizen of Illinois, alleging that Barbara violated federal civil rights statutes in firing her. Ann seeks to add a state law claim alleging that her firing also violated a state wrongful discharge law. Is there supplemental jurisdiction?
2. Ann, a citizen of Illinois, sues Barbara, also a citizen of Illinois, alleging that Barbara violated federal civil rights statutes in firing her. Ann seeks to add a state law claim alleging that Barbara caused her injuries when Barbara negligently backed her car into Ann's in the company parking lot. Is there supplemental jurisdiction?
3. Ann, a citizen of Illinois, sues Barbara, also a citizen of Illinois, alleging that Barbara violated federal civil rights statutes by permitting co-workers to engage in sexual harassment. Ann seeks to join Charles, a co-worker, who is also a citizen of Illinois and actually engaged in the harassment. Because Charles is not Ann's employer, the claim against him does not arise under federal law, but state tort law supplies a basis for that claim. Assume that the claim against Charles presents sufficiently common issues to qualify for joinder under Rule 20. Is there supplemental jurisdiction over the claim against Charles?
4. Ann, a citizen of Illinois, sues Barbara, a citizen of Wisconsin, alleging breach of an employment contract and seeking a recovery in excess of \$75,000. Ann seeks to join Charles, a citizen of Illinois; Ann alleges that Charles conspired with Barbara to breach the employment contract. Assume that the claim against Charles presents sufficiently common issues to qualify for joinder under Rule 20. Is there supplemental jurisdiction over the claim against Charles?
5. State courts also see issues of subject matter jurisdiction arising as a result of joinder.
  - a. Suppose in a state court that has adopted the Federal Rules plaintiff sues a publisher for breach of contract, alleging defendant failed to publish her book as promised. After filing this claim, plaintiff proposes an amended complaint that includes a copyright infringement claim (for which there is exclusive federal jurisdiction). Does Rule 18 pose any problem? What is defendant's likely objection to this claim? See 28 U.S.C. §1338(a); cf. *Gargallo v. Merrill Lynch et al.*, supra [page 741](#).
  - b. Suppose Homeowner sues Neighbor for damages incurred when tree branches fell into Homeowner's yard, bringing the claim in a municipal court whose limited jurisdiction permits it to hear only money damage claims below a set amount. After filing, Homeowner seeks to add a claim for injunctive relief—an order that Neighbor trim similar trees. The new claim may be perfectly proper as a matter of pleading but may lie beyond the jurisdiction of the court.
6. So far we have focused on the interplay between joinder rules and subject matter jurisdiction. What about personal jurisdiction? Suppose that Doug, a citizen of California, wants to sue Edith, a citizen of Nevada, and Frank, a citizen of California, on a federal civil rights claim.
  - a. Joinder will present no problem if the claims against the two defendants arise from the same transaction and share common questions of law and fact. Nor will federal subject matter jurisdiction: The claim arises under federal law.
  - b. But if the suit is brought in California, there may be a question of whether the court has personal jurisdiction over Edith, the citizen of Nevada. Such problems of personal jurisdiction will affect the ability of both state and federal courts to hear joined claims. As a quick review of jurisdictional concepts, explain why §1367 will not help with such problems of personal jurisdiction. The litigants and the courts must apply the ordinary principles of personal jurisdiction: If Edith lacks sufficient contacts with California, she can't be joined to a suit brought in that state.
  - c. In a few instances, however, Rules and statutes offer a "boost" for the personal jurisdiction of the federal courts in a way somewhat analogous to the supplemental jurisdiction extended by §1367. Examine Rule 4(k)(1)(B) and 28 U.S.C. §2361; each will be discussed in connection with the specific joinder devices to which they apply—Rule 4(k)(1)(B) as it relates to impleader and necessary parties, and 28 U.S.C. §2361 as it

applies to interpleader.

#### WHAT'S NEW HERE?

- We're looking at how Parts [I](#) and [II](#) of this book interact: Chapters [2](#) through [4](#), describing constitutional limits on litigation; and the Rules and common law principles that shape the adjudication of contested issues (discussed in Chapters [5](#) through [11](#)).

## 2. Claims by the Defendant: Counterclaims

In examining pleading, we considered the responses that defendant might make to plaintiff's complaint, but we did not much explore the possibility that defendant might have claims against plaintiff. At common law, the rules governing defendant's claims were simple: They did not exist. The defendant who had a claim against plaintiff could bring a separate suit or, in a limited number of cases, "set off" her claim against the plaintiff's (that is, reduce the plaintiff's recovery) but could not herself recover in the original action. Today Rule 13 permits—and sometimes requires—defendants to assert such claims. Rule 13 divides counterclaims into two categories, *compulsory* and *permissive*. Read the rule and then read the next case. As you do, consider what it means for a counterclaim to be compulsory and why it matters.

#### WHAT'S NEW HERE?

- Counterclaims change the game. Plaintiffs thinking about a lawsuit have to realize that they cannot entirely define the terms of engagement. Defendants can fire back with claims that can exceed the value of plaintiffs' claims.
- As a result, any plaintiff contemplating a lawsuit has to consider not only the merits of her claim, but the likelihood that defendant may assert counterclaims. In fact, as you will see in the next case, sometimes the assertion of a claim will trigger a counterclaim that defendant was otherwise willing to ignore.

### **Plant v. Blazer Financial Services**

598 F.2d 1357 (5th Cir. 1979)

RONEY, J.

**In this truth-in-lending case, we resolve...important issues to this field of the law. First, we decide that an action on the underlying debt in default is a compulsory counterclaim that must be asserted in a suit by the debtor on a truth-in-lending cause of action....**

**On July 17, 1975 plaintiff Theresa Plant executed a note in favor of defendant Blazer Financial Services, Inc. for \$2,520.00 to be paid in monthly installments of \$105.00. No payments were made on the note. In March 1976 plaintiff commenced a civil action under §1640 of the Truth-in-Lending Act, 15 U.S.C.A. §1601 et seq., for failure to make disclosures required by the Act and by Regulation Z, 12 C.F.R. §226.1 et seq. (1978) promulgated thereunder. Defendant counterclaimed on the note for the unpaid balance. Based on defendant's failure to disclose a limitation on an after-acquired security interest, the trial court held the disclosure inadequate and awarded plaintiff the statutory penalty of \$944.76 and \$700.00 in attorney's fees.... [Defendant appealed this ruling.] The trial court, however, offset the plaintiff's award and the attorney's fee award against the judgment for defendant on the counterclaim. From this judgment and setoff, plaintiff appeals on three issues: (1) the jurisdiction of the court to entertain the counterclaim, (2) defenses to the counterclaim under Georgia law, and (3) the offset of attorney's fees.**

#### **I. Counterclaim**

Plaintiff challenges the trial court's ruling that defendant's counterclaim on the underlying debt was compulsory. The issue is jurisdictional. A permissive counterclaim must have an independent jurisdictional basis, while it is generally accepted that a compulsory counterclaim falls within the ancillary jurisdiction of the federal courts even if it would ordinarily be a matter for state court consideration. In the instant case there is no independent basis since neither federal question nor diversity jurisdiction is available for the counterclaim. Consequently, if the counterclaim were to be treated as permissive, defendant's action on the underlying debt would have to be pursued in the state court.

The issue of whether a state debt counterclaim in a truth-in-lending action is compulsory or permissive is one of first impression in this Circuit, has never, to our knowledge, been decided by a court of appeals, and has received diverse treatment from a great number of district courts....

Rule 13(a), Fed. R. Civ. P., provides that a counterclaim is compulsory if it "arises out of the transaction or occurrence" that is the subject matter of plaintiff's claim. Four tests have been suggested to further define when a claim and counterclaim arise from the same transaction:

- 1) Are the issues of fact and law raised by the claim and counterclaim largely the same?
- 2) Would res judicata bar a subsequent suit on defendant's claim absent the compulsory counterclaim rule?
- 3) Will substantially the same evidence support or refute plaintiff's claim as well as defendant's counterclaim?
- 4) Is there any logical relation between the claim and the counterclaim?

6 Wright & Miller, Federal Practice and Procedure §1410, at 42 (1971). An affirmative answer to any of the four questions indicates the counterclaim is compulsory.

The test which has commended itself to most courts, including our own, is the logical relation test. *Revere Copper & Brass, Inc. v. Aetna Casualty & Surety Co.*, 426 F.2d at 714; 6 Wright & Miller at 48. The logical relation test is a loose standard which permits "a broad realistic interpretation in the interest of avoiding a multiplicity of suits." "The hallmark of this approach is its flexibility." In *Revere Copper & Brass* this Court added a third tier to the counterclaim analysis by further defining "logical relationship" to exist when the counterclaim arises from the same "aggregate of operative facts" in that the same operative facts serve as the basis of both claims or the aggregate core of facts upon which the claim rests activates additional legal rights, otherwise dormant, in the defendant.

Applying the logical relationship test literally to the counterclaim in this case clearly suggests its compulsory character because a single aggregate of operative facts, the loan transaction, gave rise to both plaintiff's and defendant's claims. Because a tallying of the results from the district courts which have decided this question, however, shows that a greater number have found such a counterclaim merely permissive, we subject the relationship between the claims to further analysis.

The split of opinion on the nature of debt counterclaims in truth-in-lending actions appears to be, in large part, the product of competing policy considerations between the objectives of Rule 13(a) and the policies of the Truth-in-Lending Act, and disagreement over the extent to which federal courts should be involved in state causes of action for debt. While Rule 13(a) is intended to avoid multiple litigation by consolidating all controversies between the parties, several courts and commentators have observed that accepting creditors' debt counter-claims may obstruct achievement of the goals of the Truth-in-Lending Act. Various arguments are made compositely as follows: The purpose of the Act is

to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit.

15 U.S.C.A. §1601. This purpose is effectuated by debtors' standing in the role of private attorneys general not merely to redress individual injuries but to enforce federal policy. The success of this private enforcement scheme would be undermined if debtors were faced with counterclaims on debts often exceeding the limits of their potential recovery under the Act. The purpose of the Act would suffer further frustration if federal courts were entangled in the myriad factual and legal questions essential to a decision on the debt claims but unrelated to the truth-in-lending violation. In *Roberts v. National School of Radio & Television Broadcasting*, the court also noted the incongruity of enlisting the federal court's resources to assist in debt collection by the very target of the legislation which gives the plaintiff its cause of action.

Several other factors have been cited to offset the attractiveness of treating all related disputes in a single action under Rule 13. For example, courts have predicted a flood of debt counterclaims, greatly increasing the federal court workload. Furthermore, permitting debt counterclaims might destroy truth-in-lending class actions by interjecting vast numbers of individual questions. The judicial economy of consolidated litigation might be countered by the delay of having to provide a jury trial for the debt claim though none is available to the truth-in-lending plaintiff. Other courts have suggested that regarding such debt counterclaims as compulsory would infringe on the power of states to adjudicate disputes grounded in state law.

Courts which have concluded debt counterclaims to be permissive have found the nexus between the truth-in-lending violation and debt obligation too abstract or tenuous to regard the claims as logically related. One claim, they reason, involves the violation of federal law designed to deter lender nondisclosure and facilitate credit shopping and the other concerns merely a default on a private duty.

After careful consideration of the factors relied upon in these cases to find counterclaims permissive, we opt for the analysis applied by district courts in Louisiana, Alabama, Texas and Georgia in determining debt counterclaims to be compulsory....

The results reached in *Carter* [v. Public Finance Corp.] were found “inescapable” in *George v. Beneficial Finance Co. of Dallas*. Emphasizing the goal of judicial economy furthered by a single presentation of facts, the court observed that “suits on notes will inevitably deal with the circumstance of the execution of the notes and any representation made to ‘induce’ the borrowing.”...

We add to these arguments the observation that one of the purposes of the compulsory counterclaim rule is to provide complete relief to the defendant who has been brought involuntarily into the federal court. Absent the opportunity to bring a counterclaim, this party could be forced to satisfy the debtor’s truth-in-lending claim without any assurance that his claims against the defaulting debtor arising from the same transaction will be taken into account or even that the funds he has been required to pay will still be available should he obtain a state court judgment in excess of the judgment on the truth-in-lending claim. In addition, a determination that the underlying debt was invalid may have a material effect on the amount of damages a debtor could recover on a truth-in-lending claim.

To permit the debtor to recover from the creditor without taking the original loan into account would be a serious departure from the evenhanded treatment afforded both parties under the Act. Truth-in-lending claims can be brought in either state or federal court. To the extent this dual jurisdiction was intended to permit litigation of truth-in-lending claims in actions on the debt, it reflects a purpose that the debt claim and the truth-in-lending claims be handled together. To the extent it was intended to relieve federal courts of any of this litigation, the purpose would be frustrated by providing a sanctuary from the creditor’s claims in one jurisdiction but not in the other. State courts would always have jurisdiction of a creditor’s counterclaim. Had Congress intended to insulate recovery in truth-in-lending actions in federal court from the counterclaims of creditors, of which it surely was aware, it could have easily done so.

We conclude that the obvious interrelationship of the claims and rights of the parties, coupled with the common factual basis of the claims, demonstrates a logical relationship between the claim and counterclaim under the test of *Revere Copper & Brass*.<sup>13</sup> We affirm the trial court’s determination that the debt counterclaim is compulsory....

[The opinion additionally affirms the trial court’s judgment in favor of the defendant on the counterclaim, and concludes that it was inappropriate for the trial court to order the attorney’s fees awarded be used to set off the amount owed to the defendant. “[A]n award of attorney’s fees under [the Truth-in-Lending Act] is not subject to setoff against the debtor’s outstanding debts to the creditor.”]

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### *Notes and Problems*

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1. What is the practical significance of this decision?
  - a. If Plant had not paid the loan, why hadn’t Blazer already sued her?
  - b. Suppose the court had decided that the counterclaim was not compulsory. So what? Rule 13(b) permits a defendant to bring as a permissive counterclaim any claim, related or unrelated, against a plaintiff. What difference would it have made to Blazer if the court had called the debt a permissive rather than a compulsory counterclaim?
  - c. What practical difference would it have made to permit Plant to maintain her action without Blazer’s counterclaim rather than require her to defend against the counterclaim?
2. The opinion refers to “competing policy considerations between the objectives of Rule 13(a) and the Truth-in-Lending Act.”
  - a. In simple terms, explain what this means.
  - b. As a sample of the reasoning that led one court to reach a conclusion opposite that of *Plant*, consider *Whigham v. Beneficial Finance Co. of Fayetteville*, 599 F.2d 1322, 1323-1324 (4th Cir. 1979):

We conclude that a lender’s claim for debt against a borrower who sues for violation of the Truth-in-Lending Act has none of the characteristics associated with a compulsory counterclaim. First, the lender’s counterclaim raises issues of fact and law significantly different from those presented by the borrower’s claim. The only question in the borrower’s suit is whether the lender made disclosures required by the federal statute and its implementing regulations. The lender’s counterclaim, on the

other hand, requires the court to determine the contractual rights of the parties in accordance with state law.

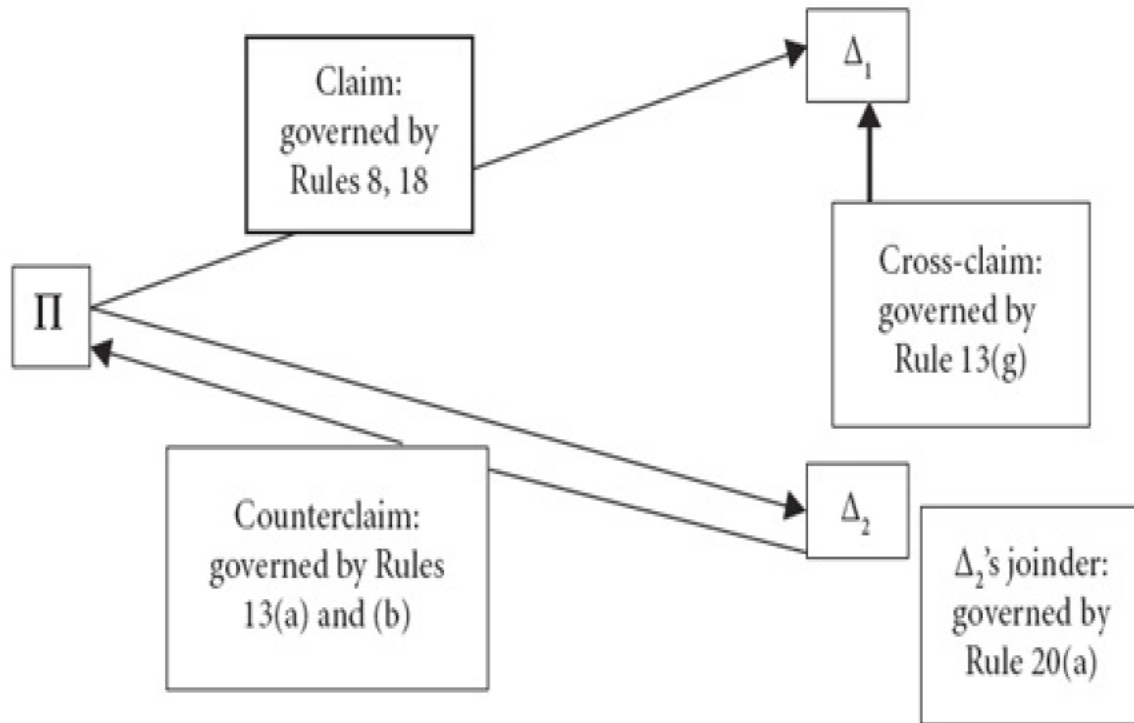
Second, the evidence needed to support each claim differs. The borrower need produce only the loan documents for consideration in light of the federal requirements. The lender, however, must verify the obligation and prove a default on loan payments.

Third, the claim and the counterclaim are not logically related. The lender's counterclaim alleges simply that the borrower has defaulted on a private loan contract governed by state law. The borrower's federal claim involves the same loan, but it does not arise from the obligations created by the contractual transaction. Instead, the claim invokes a statutory penalty designed to enforce federal policy against inadequate disclosure by lenders. To let the lender use the federal proceedings as an opportunity to pursue private claims against the borrower would impede expeditious enforcement of the federal penalty and involve the district courts in debt collection matters having no federal significance.

3. Notice that *Whigham* and *Plant* reach opposite conclusions while quoting the same “test”—whether a counterclaim arises out of the same transaction or occurrence and is therefore compulsory. *Plant* sets forth four such tests—all standard in discussions of this issue. Consider the possibility that none of the tests sheds much light on the problem.
  - a. Aren't the first and the third tests mirror images of each other? That is, if there is significant overlap of law and fact (test 1), doesn't it follow that the same evidence would be relevant (test 3)?
  - b. Isn't the second test just a restatement of the question? That is, if both claims arise out of the same transaction or occurrence, they will involve the same claim and therefore will be subsequently barred.
  - c. Isn't the fourth test essentially meaningless as interpreted by the court? There is no logical relationship between a Truth-in-Lending claim and one for an unpaid debt, if “logical” refers to an analytically strict set of relationships like those of formal logic. If “logical” instead means “sensibly related,” then this test, like the second, becomes a restatement of the question: Just what claims are “sensibly related” to each other?
4. *Plant* posits that two consequences flow from deciding a counterclaim is compulsory.
  - a. First, it must be brought at the risk of losing it. This is an implication of calling a counterclaim compulsory. Some say that an unbrought counterclaim later held to be compulsory is precluded by doctrines of former adjudication. Others, believing that a Rule that specified claim preclusion principles would violate the Rules' Enabling Act ban on altering substantive rights, reach the same conclusion by arguing that a defendant who fails to assert a compulsory counterclaim has thereby waived it.
  - b. Second, if it is brought, supplemental jurisdiction extends to cover it.
  - c. Under those circumstances, there is a penalty for omitting a counterclaim that is later held to be compulsory, but no penalty for including a counterclaim that is found not to be compulsory.
  - d. As a result of this asymmetrical penalty, defense counsel are likely to hedge their bets and include all possible counterclaims, with the result that most cases presenting the issue whether a counterclaim is compulsory or permissive do not arise when defendant has omitted the counterclaim in one action and attempted to assert it in a later action. Instead, most cases are like *Plant*: plaintiff asserts a federal claim; defendant interposes a counterclaim under state law for which there is no independent federal jurisdiction; plaintiff moves to dismiss the counterclaim for lack of subject matter jurisdiction; and defendant argues that the counterclaim is a compulsory one within the supplemental jurisdiction of the federal court.
5. *Plant* treats supplemental jurisdiction, which it refers to as “ancillary,” as a matter of constitutional common law—which it was at the time the opinion was written. Supplemental jurisdiction today is codified in 28 U.S.C. §1367. That statute speaks of extending supplemental jurisdiction to any claims that “form part of the same case or controversy under Article III.” Rule 13 (and several other joinder rules) refer to claims that arise from “the same transaction or occurrence.” What is the relationship of these two phrases?
  - a. Everyone agrees that “case or controversy” is at least as broad as “same transaction or occurrence.” Explain why that means there will never be a compulsory counterclaim over which supplemental jurisdiction is lacking.
  - b. The two phrases might be congruent, in which case there will always be supplemental jurisdiction over compulsory counterclaims and never over permissive counterclaims. That appears to be the view of most courts; one can see such an assumption in *Plant v. Blazer*.
  - c. Or “case or controversy” might be broader than “same transaction or occurrence.” In that case there will be some (small) subset of permissive counterclaims that fall within supplemental jurisdiction. Some scholars and an occasional judge have so argued. When would it matter? Suppose one had a court like that in *Whigham* (Note 2b, supra), which held that the unpaid loan was only a permissive counterclaim. The defendant in such a case could still argue that it fell under the umbrella of supplemental jurisdiction. And a court that accepted such a “permissive but supplemental jurisdiction” claim might feel freer to sever the loan claim for a separate trial, or to decline supplemental jurisdiction under one of the provisions of §1367(c).
  - d. Section 1367(b) proposes a narrower role for supplemental jurisdiction in cases based solely on diversity jurisdiction. But this narrowing does not apply to counterclaims by defendants. Why might the drafters have

wanted a broader supplemental jurisdiction for counterclaims?

6. *Plant* represents a straightforward, if subtle, counterclaim problem. To expand your understanding of the doctrine, consider a wonderful dance around the doctrine found in *Great Lakes Rubber Corp. v. Herbert Cooper Co.*, 286 F.2d 631 (3d Cir. 1961). This case arose when two key employees of Great Lakes left to form Herbert Cooper, a competing business. An active competition between the two firms followed. In the first phase of the case, Great Lakes sued Herbert Cooper for (1) unfair competition in stealing trade secrets and customers, (2) unfair competition in bidding for contracts on the basis of prices that would involve infringing patents, and (3) disparagement of Great Lakes's products. Plaintiff's claims were based on state law and there was no diversity. Cooper then filed a federal antitrust counterclaim alleging that Great Lakes was trying to monopolize the relevant market by (1) making false statements to Cooper's suppliers that the suppliers were contributory infringers and (2) bringing a series of unjustified lawsuits to harass Cooper.
  - a. Great Lakes's claims were dismissed for lack of federal subject matter jurisdiction, but the antitrust counterclaim, with an independent basis for federal jurisdiction, remained. As a review of federal subject matter jurisdiction, explain why both actions were unsurprising.
  - b. In the second phase of the federal suit (with just Herbert Cooper's federal antitrust claims pending), Great Lakes then refiled essentially the same allegations of unfair competition and business torts, now in the form of *counterclaims* to the antitrust claim. And the court that had just dismissed these claims for want of jurisdiction now found them to be compulsory counterclaims, over which there was supplemental jurisdiction!
7. The material so far has suggested great breadth for compulsory counterclaims. But there are limits.
  - a. In 2015, *B* purchased a house from *S* and gave a promissory note for \$100,000, payable on January 2, 2016, for the unpaid balance of the purchase price. In 2015, alleging numerous defects in the house, *B* sued *S* for breach of contract and breach of warranty. Reread Rule 13(a) and explain why *S*'s claim on the unpaid promissory note is not a compulsory counterclaim.
  - b. Same facts as in 7a, except that Buyer brought his breach of contract and warranty case on February 1, 2016. On February 15, 2016, Seller then sued on the unpaid note. Explain why Seller can bring this claim. Rule 12(a)(1) and Rule 13(a)(1).
8. Assume Passenger is injured in a collision between Driver One and Driver Two and brings suit against both. Driver One may have no counterclaim against Passenger but may have a claim against Driver Two.
  - a. The Rules refer to Driver One's claim against Driver Two as a *cross-claim*. See Rule 13(g).
  - b. Note that an initial cross-claim under Rule 13(g) can only be brought if it concerns the same transaction or occurrence as the original claim, or if it concerns property that is the subject matter of the original action. But note also that once Driver One has brought a cross-claim against Driver Two, Rule 18 allows Drivers One and Two to assert any claims they have against each other.
  - c. Some states do not make such fine distinctions in their joinder terminology. California, for example, uses "cross-claim" to refer both to what a federal court would call a "counterclaim" and to what a federal court would call a "cross-claim."



9. Counter- and cross-claims are an important point of modern joinder, but don't assume they apply to all situations. They function as a way of *asserting* liability, not as a way of avoiding it; they are a way of bringing a claim against another, not defending against one. So if one wants simply to avoid liability, denial and affirmative defenses are the routes to take. Counter- and cross-claims are the tools to use when one wants to obtain some affirmative relief from another party. Consider the following problems. Plaintiff files a complaint against an automobile Dealer and automobile Manufacturer. The complaint, which is properly before the court under diversity jurisdiction, alleges that Plaintiff was injured in an accident caused by a defect in the vehicle's steering mechanism.
- Manufacturer wants to assert that the vehicle was not defective when delivered to Dealer and that any defect must have been introduced by Dealer when the vehicle was being prepared for delivery to customer. What pleading, if any, should Manufacturer file?
  - Manufacturer wants to assert that Dealer has failed to pay for several vehicles that Manufacturer delivered to Dealer (not including the vehicle at issue in the action). Can it bring a claim against Dealer in this case?
  - Dealer wants to assert that Plaintiff owes Dealer money for a breach of contract that has no relationship whatsoever to the vehicle or accident at issue in Plaintiff's complaint (perhaps a repair to another vehicle owned by Plaintiff). Can Dealer do so? What pleading, if any, should it use?
  - Dealer and Manufacturer both want to assert that there was no defect in the vehicle and that the accident was solely the result of Plaintiff's negligence. What pleading, if any, should Dealer and Manufacturer use?

## B. JOINDER OF PARTIES

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### 1. By Plaintiffs

#### **Mosley v. General Motors Corp.**

497 F.2d 1330 (8th Cir. 1974)

ROSS, J.

Nathaniel Mosley and nine other persons joined in bringing this action individually and as class representatives alleging that their rights guaranteed under 42 U.S.C. §2000e et seq. and 42 U.S.C. §1981 were denied by General Motors and Local 25, United Automobile, Aerospace and Agriculture Implement Workers

of America [Union] by reason of their color and race.... Each of the ten named plaintiffs had, prior to the filing of the complaint, filed a charge with the Equal Employment Opportunity Commission [EEOC] asserting the facts underlying these claims. Pursuant thereto, the EEOC made a reasonable cause finding that General Motors, Fisher Body Division and Chevrolet Division, and the Union had engaged in unlawful employment practices in violation of Title VII of the Civil Rights Act of 1964. Accordingly, the charging parties were notified by EEOC of their right to institute a civil action in the appropriate federal district court.

...

In each of the first eight counts of the twelve-count complaint, eight of the ten plaintiffs alleged that General Motors, Chevrolet Division, had engaged in unlawful employment practices by: “discriminating against Negroes as regards promotions, terms and conditions of employment”; “retaliating against Negro employees who protested actions made unlawful by Title VII of the Act and by discharging some because they protested said unlawful acts”; “failing to hire Negro employees as a class on the basis of race”; “failing to hire females as a class on the basis of sex”; “discharging Negro employees on the basis of race”; and “discriminating against Negroes and females in the granting of relief time.” Each additionally charged that the defendant Union had engaged in unlawful employment practices “with respect to the granting of relief time to Negro and female employees” and “by failing to pursue...grievances.” The remaining two plaintiffs made similar allegations against General Motors, Fisher Body Division. All of the individual plaintiffs requested injunctive relief, back pay, attorneys’ fees and costs. Counts XI and XII of the complaint were class action counts against the two individual divisions of General Motors. They also sought declaratory and injunctive relief, back pay, attorneys’ fees and costs....

The district court ordered that “insofar as the first ten counts are concerned, those ten counts shall be severed into ten separate causes of action,” and each plaintiff was directed to bring a separate action based upon his complaint, duly and separately filed. The court also ordered that the class action would not be dismissed, but rather would be left open “to each of the plaintiffs herein, individually or collectively...to allege a separate cause of action on behalf of any class of persons which such plaintiff or plaintiffs may separately or individually represent.”

In reaching this conclusion on joinder, the district court followed the reasoning of *Smith v. North American Rockwell Corp.* which, in a somewhat analogous situation, found there was no right to relief arising out of the same transaction, occurrence or series of transactions or occurrences, and that there was no question of law or fact common to all plaintiffs sufficient to sustain joinder under Federal Rule of Civil Procedure 20(a). Similarly, the district court here felt that the plaintiffs’ joint actions against General Motors and the Union presented a variety of issues having little relationship to one another; that they had only one common problem, i.e., the defendant; and that as pleaded the joint actions were completely unmanageable. Upon entering the order, and upon application of the plaintiffs, the district court found that its decision involved a controlling question of law as to which there is a substantial ground for difference of opinion and that any of the parties might make application for appeal under 28 U.S.C. §1292(b). We granted the application to permit this interlocutory appeal and for the following reasons we affirm in part and reverse in part.

Rule 20(a) of the Federal Rules of Civil Procedure provides:

(1) *Plaintiffs.* Persons may join in one action as plaintiffs if:

(A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and

(B) any question of law or fact common to all plaintiffs will arise in the action.\*]

Additionally, Rule 20(b) and Rule 42(b) vest in the district court the discretion to order separate trials or make such other orders as will prevent delay or prejudice. In this manner, the scope of the civil action is made a matter for the discretion of the district court, and a determination on the question of joinder of parties will be reversed on appeal only upon a showing of abuse of that discretion. To determine whether the district court’s order was proper herein, we must look to the policy and law that have developed around the operation of Rule 20.

The purpose of the rule is to promote trial convenience and expedite the final determination of disputes, thereby preventing multiple lawsuits. 7 C. Wright, *Federal Practice and Procedure* §1652, at 265 (1972). Single trials generally tend to lessen the delay, expense and inconvenience to all concerned. Reflecting this policy, the Supreme Court has said: “Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged.” *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966).

Permissive joinder is not, however, applicable in all cases. The rule imposes two specific requisites to the joinder of parties: (1) a right to relief must be asserted by, or against, each plaintiff or defendant relating to

or arising out of the *same transaction or occurrence, or series of transactions or occurrences*; and (2) *some question of law or fact common* to all the parties must arise in the action.

In ascertaining whether a particular factual situation constitutes a single transaction or occurrence for purposes of Rule 20, a case by case approach is generally pursued. 7 C. Wright, Federal Practice and Procedure §1653, at 270 (1972). No hard and fast rules have been established under the rule. However, construction of the terms “transaction or occurrence” as used in the context of Rule 13(a) counterclaims offers some guide to the application of this test. For the purposes of the latter rule, “‘Transaction’ is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship.” *Moore v. New York Cotton Exchange*, 270 U.S. 593 (1926). Accordingly, all “logically related” events entitling a person to institute a legal action against another generally are regarded as comprising a transaction or occurrence. 7 C. Wright, Federal Practice and Procedure §1653, at 270 (1972). The analogous interpretation of the terms as used in Rule 20 would permit all reasonably related claims for relief by or against different parties to be tried in a single proceeding. Absolute identity of all events is unnecessary.

This construction accords with the result reached in *United States v. Mississippi*, 380 U.S. 128 (1965), a suit brought by the United States against the State of Mississippi, the election commissioners, and six voting registrars of the State, charging them with engaging in acts and practices hampering and destroying the right of black citizens of Mississippi to vote. The district court concluded that the complaint improperly attempted to hold the six county registrars jointly liable for what amounted to nothing more than individual torts committed by them separately against separate applicants. In reversing, the Supreme Court said:

But the complaint charged that the registrars had acted and were continuing to act as part of a state-wide system designed to enforce the registration laws in a way that would inevitably deprive colored people of the right to vote solely because of their color. On such an allegation the joinder of all the registrars as defendants in a single suit is authorized by Rule 20(a) of the Federal Rules of Civil Procedure....These registrars were alleged to be carrying on activities which were part of a series of transactions or occurrences the validity of which depended to a large extent upon “question[s] of law or fact common to all of them.”

Here too, then, the plaintiffs have asserted a right to relief arising out of the same transactions or occurrences. Each of the ten plaintiffs alleged that he had been injured by the same general policy of discrimination on the part of General Motors and the Union. Since a “state-wide system designed to enforce the registration laws in a way that would inevitably deprive colored people of the right to vote” was determined to arise out of the same series of transactions or occurrences, we conclude that a company-wide policy purportedly designed to discriminate against blacks in employment similarly arises out of the same series of transactions or occurrences. Thus the plaintiffs meet the first requisite for joinder under Rule 20(a).

The second requisite necessary to sustain a permissive joinder under the rule is that a question of law or fact common to all the parties will arise in the action. The rule does not require that *all* questions of law and fact raised by the dispute be common. Yet, neither does it establish any qualitative or quantitative test of commonality. For this reason, cases construing the parallel requirement under Federal Rule of Civil Procedure 23(a) provide a helpful framework for construction of the commonality required by Rule 20. In general, those cases that have focused on Rule 23(a)(2) have given it a permissive application so that common questions have been found to exist in a wide range of contexts. 7 C. Wright, Federal Practice and Procedure §1763 at 604 (1972). Specifically, with respect to employment discrimination cases under Title VII, courts have found that the discriminatory character of a defendant’s conduct is basic to the class, and the fact that the individual class members may have suffered different effects from the alleged discrimination is immaterial for the purposes of the prerequisite. *Hicks v. Crown Zellerbach Corp.* In this vein, one court has said:

[A]lthough the actual effects of a discriminatory policy may thus vary throughout the class, the existence of the discriminatory policy threatens the entire class. And whether the Damoclean threat of a racially discriminatory policy hangs over the racial class is a question of fact common to all the members of the class.

The right to relief here depends on the ability to demonstrate that each of the plaintiffs was wronged by racially discriminatory policies on the part of the defendants General Motors and the Union. The discriminatory character of the defendants’ conduct is thus basic to each plaintiff’s recovery. The fact that each plaintiff may have suffered different effects from the alleged discrimination is immaterial for the purposes of determining the common question of law or fact. Thus, we conclude that the second requisite for joinder under Rule 20(a) is also met by the complaint.

For the reasons set forth above, we conclude that the district court abused its discretion in severing the joined actions. The difficulties in ultimately adjudicating damages to the various plaintiffs are not so overwhelming as to require such severance. If appropriate, separate trials may be granted as to any

particular issue after the determination of common questions.

The judgment of the district court disallowing joinder of the plaintiffs' individual actions is reversed and remanded with directions to permit the plaintiffs to proceed jointly....

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### Notes and Problems

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1. Why did the litigants think the joinder question so important? If you were the plaintiffs' lawyer, would you rather try these cases together or separately? If you were General Motors's lawyer, which would you prefer? It may be helpful to consider whether *Mosley* involves the same strategic considerations at play in *Fisher v. Ciba Specialty Chemicals Corp.*, [Chapter 1](#), *supra* [page 29](#).
2. Note the unusual procedural posture in *Mosley*: The district court's ruling on joinder did not produce an appealable final judgment, but the district and appellate courts thought the issue of joinder important enough to certify an interlocutory appeal, something that at present happens only about 100 times each year among the 250,000 civil suits filed annually in the federal system.
3. The court says that "[e]ach of the ten plaintiffs alleged that he had been injured by the same general policy of discrimination on the part of General Motors and the Union."
  - a. Consider who the plaintiffs are:
    - African Americans employed by GM alleging they had not been promoted;
    - African Americans employed by GM alleging they had been punished for protesting GM's unlawful actions;
    - African Americans who had applied for but not been hired by GM;
    - Women (presumably both African-American and white) who had applied for jobs but not been hired by GM;
    - African-American employees who had been fired;
    - African-American male and female employees and white female employees who alleged they had not been granted "relief time" on the same terms as white males.
  - b. What "question of law or fact common to all plaintiffs will arise in the action"? Rule 20(a)(1). Although joinder here seems like a victory for the plaintiffs, it can also limit their rights going forward. Suppose the case proceeds, with discovery focusing on the defendants' alleged refusal to hire or promote African Americans and women. Imagine the ten plaintiffs prevail after trial (or, more likely, there is a settlement that is embodied in a consent decree, which has the same preclusive effect as a judgment). Thereafter, one of the ten female plaintiffs brings a second suit alleging that GM's maternity leave policies during the period at issue in the first lawsuit constituted a violation of Title VII, the same statute invoked in the first suit. Couldn't GM argue that the breadth of joinder in the first suit meant that it precluded relitigation of any claim involving prohibited race- or gender-based discrimination?
  - c. What would have happened in *Mosley* if the court had found joinder improper? See Rule 21.
4. Courts are not always as flexible as *Mosley* in finding common links among plaintiffs:

The Plaintiffs in this case, all female, are employed by or were formerly employed by AT&T as sales persons in a small, distinct business organization within AT&T known as the Profile Initiative Program (PIP). The Plaintiffs are residents of five different cities and four different states who worked in four separate AT&T offices located in three states. While the Plaintiffs were directly supervised by different managers in each office, it appears they were indirectly supervised by the same centralized PIP upper management group. The Plaintiffs contend the PIP management systematically discriminated against them because of their sex and allege discriminatory actions by some of the same individuals in PIP management. However, the Plaintiffs identify no specific discriminatory policy or practice to which they were all subjected. In addition to the claims of sex discrimination, Plaintiff Harryman asserts claims of race, age, and national origin discrimination, while Plaintiff Bryan asserts a claim of age discrimination. All the Plaintiffs also assert various state law claims against the Defendants. Thus, AT&T is faced with five individual Plaintiffs asserting a total of more than twenty claims against it...

AT&T contends the Plaintiffs are misjoined and request that this Court sever the claims of each Plaintiff and proceed with five separate trials.... AT&T argues the jury may improperly conclude that it is guilty of wrongdoing simply because so many Plaintiffs will complain of discrimination and so many different witnesses will testify in support of the Plaintiffs' claims. AT&T further contends that in a single trial, the jury will hear evidence that may be relevant to the claims of one Plaintiff, but that is completely irrelevant and prejudicial to the claims of the remaining Plaintiffs. According to AT&T, a single trial will unnecessarily complicate evidentiary rulings and will deprive this Court of its discretion to rule on the admissibility of marginally relevant but highly prejudicial evidence.

Henderson v. AT&T Corp., 918 F. Supp. 1059, 1061 (S.D. Tex. 1996).

Recognizing that *Mosley* was the leading case on joinder of plaintiffs in employment discrimination cases,

the court allowed the joinder under Rule 20 but went on to sever three of the five cases for pretrial and trial.

5. *Henderson* (supra) reminds us that joinder is a game that three can play.
  - a. Initially, plaintiff has the choice, subject to the constraints of Rule 20(a)(1).
  - b. As in *Mosley* and *Henderson*, defendant can challenge joinder of parties, with the result, under Rule 21, that the parties found to be improperly joined will have their cases severed.
  - c. The third player is the judge, who rules on any challenges to joinder under Rule 20, but also exercises independent power to consolidate and sever claims under Rule 42. Suppose that the *Mosley* plaintiffs had filed ten separate lawsuits and the trial judge had concluded that they were in fact closely related and should be consolidated. Under Rule 42(a), the judge can “join for hearing or trial any or all matters at issue in the actions.”
  - d. Conversely, even if the parties are content with the party structure as it stands, a court acting under the authority of Rule 42(b) may sever claims.
  - e. Finally, in many federal districts there are local rules that require parties to identify a case that is factually related to any other case currently pending in the district. The purpose of this identification is to allow consolidation of related claims—and to prevent judge-shopping by filing several similar claims and then dismissing all but the one that draws the friendliest judge. Note, though, that this rule can also have the opposite effect. If a case is pending before a friendly judge, an attorney with a similar case can try to get his case before that same judge by arguing that it is related.
6. Given broad judicial discretion to consolidate and hold separate trials, one might ask whether Rules 20 and 21 are necessary. In other words, there could be unlimited joinder of parties—just as there is of claims—with the question of joinder treated, through Rule 42, as one of trial convenience. Assume *A* has similar claims against *B* and *C*. What is the practical difference between one action by *A* against *B* and *C* and consolidation of separate actions by *A* vs. *B* and *A* vs. *C* under Rule 42(a)? Some possible differences include requirements of serving papers, Rules 5(a), 30(b)(1); right to cross-examine at depositions, cf. Rule 30(c); and right of discovery by *B* against *C* and vice versa, Rules 33, 34, 35. In practice, the court consolidating the two cases may order that *B* and *C* be treated as coparties for such matters, thus minimizing these differences.

## 2. By Defendants: Third-Party Claims

Modern economic life is full of contingent liabilities: If John has an auto accident, his insurers will indemnify him; if Jane overdraws her checking account her bank will cover the overdraft (up to a stated amount); if a roof collapses because Supplier sold Builder defective materials, the Supplier must pay for the damages. But notice that in each of these cases the immediate defendant may be John, Jane, or Builder. The next case illustrates a party’s ability to defend itself by passing on liability—and the joinder device that permits it.

### **Price v. CTB, Inc.**

168 F. Supp. 2d 1299 (M.D. Ala. 2001)

**DE MENT, District Judge...**

[Price, a chicken farmer, hired Latco to build a new chicken house. Alleging that the structure was defective, Price sued multiple defendants, including] Latco...in the underlying action concerning the quality of its workmanship when it constructed chicken houses for various Alabama farmers. The causes of action against Latco include breach of the construction contract, fraudulent misrepresentation of the caliber of materials to be used, and negligence and wantonness in the construction. Latco moved to file a Third Party Complaint against, inter alios, ITW on February 21, 2001, approximately six months after the case had been removed to the Middle District of Alabama....In the Third Party Complaint, Latco alleges that ITW, a nail manufacturer, defectively designed the nails used in the construction of the chicken houses. The specific causes of action include breach of warranty, violation of the Alabama Extended Manufacturer’s Liability Doctrine, and common law indemnity. ITW argues that it was improperlyimpleaded under Rule 14 of the Federal Rules of Civil Procedure, or, alternatively, that the Third Party Complaint is barred by the equitable doctrine of laches.

Under Rule 14(a), a defendant may assert a claim against anyone not a party to the original action if that third party’s liability is in some way dependent upon the outcome of the original action. There is a limitation on this general statement, however. Even though it may arise out of the same general set of facts as the main claim, a third party claim will not be permitted when it is based upon a separate and independent claim. Rather, the third party liability must in some way be derivative of the original claim; a third party may be impleaded only when the original defendant is trying to pass all or part of the liability onto that third party.

Latco argues that ITW is the prototypical third party defendant under Rule 14. It asserts that ITW can

be found liable for the warranty surrounding its products if Latco is first found liable for faulty construction. Furthermore, insists Latco, this derivative liability merely involves a shift in the overall responsibility of the allegedly defective chicken houses. ITW contends, however, that because Rule 14 is merely a procedural rule, the propriety of its application depends upon the existence of a right to indemnity under the substantive law. ITW accurately states the law in this regard, but its conclusion that there is no viable substantive claim under Alabama law is incorrect.

Conceding that Alabama does not recognize a right to contribution among joint tortfeasors, Latco directs the court's attention to the concept of implied contractual indemnity. Under this doctrine, Alabama courts recognize that a manufacturer of a product has impliedly agreed to indemnify the seller when 1) the seller is without fault, 2) the manufacturer is responsible, and 3) the seller has been required to pay a monetary judgment. Under Latco's theory, should it be found liable for its construction of the chicken houses, it can demonstrate that the true fault lies with the nail guns and the nails manufactured by ITW.

Alabama case law, not to mention the parties' briefs, is especially sparse with respect to the contours of the doctrine of implied indemnity....[The opinion went on to find that Alabama's law resembled that of Illinois on the point in question and that Illinois would permit a claim for implied indemnity under the circumstances of the case.] The court finds that Alabama law provides Latco a cause of action under common law indemnity against ITW.

It must be noted, however, that, under Alabama law, the doctrine permits recovery only when the party to be indemnified is "without fault." Whether, in fact, such a factual scenario will be proven at trial is irrelevant for present purposes. The only issue before the court is whether there exists a legal basis to implead ITW, not whether ITW is, in fact, liable to Latco. Since Rule 14 permits Latco to implead any party who "may be liable," Fed. R. Civ. P. 14(a), it follows that the court must permit development of the factual record so the extent of that liability may be determined....

Furthermore, since Latco has established a basis upon which it may properly implead ITW, the court need not address the applicability of Rule 14 to the other claims in Latco's Third Party Complaint. It is well established that a properly impleaded claim may serve as an anchor for separate and independent claims under Rule 18(a).<sup>3</sup>...In short, the court finds that Latco has properly impleaded ITW under Rule 14(a). [The opinion went on to reject ITW's claim of laches, finding there had been no undue delay in filing the claim and no prejudice to ITW.]

Accordingly, it is **CONSIDERED** and **ORDERED** that ITW's Motion To Dismiss be and the same is hereby **DENIED**.

### WHAT'S NEW HERE?

- Impleader depends on an interesting defensive maneuver: The person sued (in addition to denying liability) can say that "if I am adjudged liable, there's someone else who has to pay all or part of the damages."
- That "derivative liability," as it's sometimes called, arises because of some relationship between the defendant and the impleaded party. That relation can be contractual (an insurance policy, for example) or imposed because of some relation between the parties (for example, joint tortfeasors).
- Impleader (exemplified in Rule 14) does not create the derivative liability; instead, it offers a procedural channel through which that liability can be asserted in the main lawsuit rather than in a separate action.

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### Notes and Problems

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1. To understand the possibilities and limits of impleader, consider a world in which it did not exist.
  - a. Mr. Price, a chicken farmer, sues Latco for damages suffered when the structures fell apart and the chickens died or fell ill. If Latco wins, there's no problem—at least no procedural problem (Mr. Price will be unhappy).
  - b. Suppose, however, Latco loses on a judgment that finds the houses defective and awards damages. In a world without impleader, Latco could still sue the nail manufacturer. But, because the nail manufacturer wasn't a party to the first suit, it would be able in the second suit to argue, for example, that the chicken houses

weren't defective at all, or that it was, for example, Mr. Price's poor maintenance that destroyed them. The two lawsuits could thus result in opposed findings—that the houses were defective and that they weren't—with Latco left holding the bag. Or the jury in the first case might find that Mr. Price suffered very substantial damages—when all his chickens died—while the jury in the second case might find that damages were limited to the cost of a new structure, because the chickens' death had been due to Mr. Price's failure to mitigate damages.

- c. Impleader provisions like those found in Rule 14 solve the problems just described. By bringing the nail manufacturer into the lawsuit, impleader assures that the manufacturer will be bound by a judgment in the original case.
2. With this understanding, refocus on what is at stake for ITW, the nail manufacturer, now that impleader has been held to be proper.
    - a. Obviously, it has to defend this case.
    - b. What do you imagine the stakes are for ITW in this case? Reread the last sentence of [footnote 3](#). How might a loss in this case implicate those 40 identical suits? How does ITW's problem present a situation that Mr. Price's lawyer might exploit?
    - c. With this new problem in mind, suppose that, as litigation proceeds, ITW's lawyer decides that things are not going well. The judge has made a number of interlocutory rulings that ITW thinks will make it hard to mount a really effective defense at trial; moreover, he is concerned about how a local jury might react to an out-of-state defendant (the *I* in ITW stands for Illinois). Can you recommend a course of action that might minimize ITW's litigation exposure in this and the 40 other cases?

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### *Procedure as Strategy*

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Rule 14 has two attractions for parties defending against claims. First, and obviously, it gives them a way of bringing into the suit anyone else who might help them foot all or part of the damage bill. Less obviously, it gives such defendants a way of delaying the case and making litigation more expensive for the plaintiff by adding another party. Inevitably, a three-party case will take longer than a two-party case: For the added party there will be a flurry of pleadings and related motions; there will be discovery to be done; scheduling three sets of lawyers' meetings increases time conflicts exponentially; and so on. Moreover, from the plaintiff's standpoint, this added delay and expense does nothing for her, so long as she has identified a solvent defendant and has a strong claim. Impleader is for defendant's benefit. Not surprisingly, then, plaintiffs are often unenthusiastic about defendant's impleading additional parties. ([Footnote 3](#) of *Price* exemplifies the concerns that plaintiffs may have.)

Like all tactics, impleader also has some drawbacks for defendants. Consider *Price*. Yes, the construction company now has someone who may pay all or part of the damages if the chicken houses are judged defective. But the construction company now has *two* parties who will bend their litigative efforts to showing that the construction was shoddy: In addition to the plaintiff, the nail manufacturer will want to show that it was poor construction practices, not bad nails, that caused the houses to fail.

3. To reinforce your understanding of the principle represented by impleader, imagine that when Mr. Price sued Latco for the collapsed chicken house, Latco investigated and found evidence that the house was in fact destroyed by Farmer Jones, a rival neighbor chicken raiser who sneaked onto Price's property at night and vandalized the house.
  - a. Latco could *not* implead Jones. This outcome looks at first surprising, but it is well established:

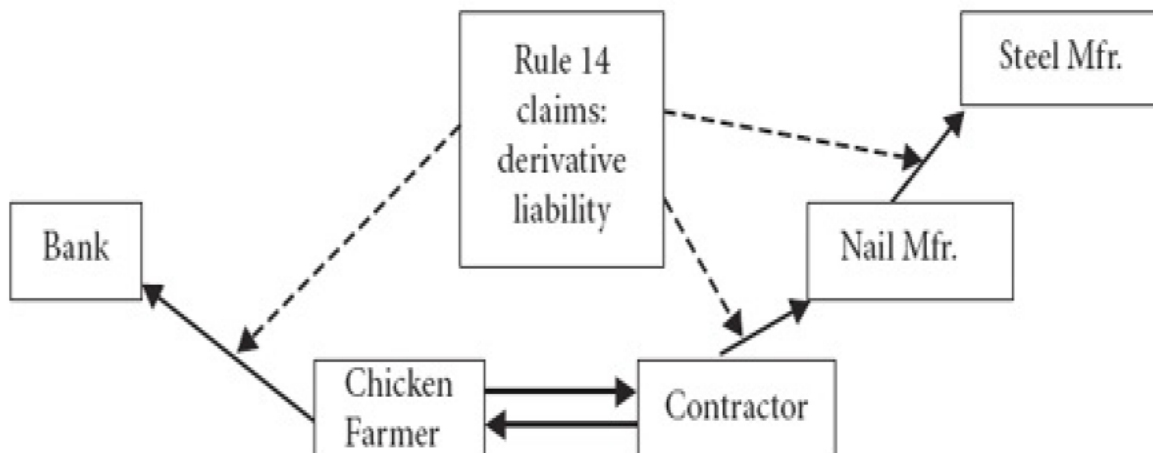
It is no longer possible...to implead a third party claimed to be solely liable to the plaintiff....A proposed third-party plaintiff must allege facts sufficient to establish the derivative or secondary liability of the proposed third-party defendant....Thus, under Rule 14(a), a third-party complaint is appropriate only in cases where the proposed third-party defendant would be secondarily liable to the original defendant in the event the latter is held to be liable to the plaintiff.

Barab v. Menford, 98 F.R.D. 455, 456 (E.D. Pa. 1983) (citations omitted).

Numerous courts have echoed this principle....Derivative liability is central to the operation of Rule 14. It cannot be used as a device to bring into a controversy matters which merely happen to have some relationship to the original action....In other words, a third party claim is not appropriate where the defendant and putative third party plaintiff says, in effect, "It was him, not me." [Impleader] is viable only where a proposed third party plaintiff says, in effect, "If I am liable to plaintiff, then my liability is only technical or secondary or partial, and the third party defendant is derivatively liable and must reimburse me for all or part of anything I must pay plaintiff."

Watergate Landmark Condominiums Unit Owners' Assoc. v. Wiss, Janey, Elstner Assoc., 117 F.R.D. 576, 578 (E.D. Va. 1987).

- b. How, then, can Latco raise and litigate the issue of Jones’s responsibility for the damage? (This question will take you back to [Chapter 6](#) and a consideration of the difference between a denial and an affirmative defense.)
4. Impleader typically has two substantive foundations, one in tort and the other in contract, both mentioned in the case.
- The tort doctrine is that of “contribution,” a claim that allows one tortfeasor to demand that another fellow wrongdoer “contribute” to the damages payable to the harmed plaintiff. Nineteenth-century law often limited or forbade entirely such contribution on the grounds that no one should be able to avoid the consequences of his own wrongdoing. Legislatures and courts in the twentieth and twenty-first centuries have often been more forgiving, permitting such actions for contribution among joint tortfeasors. But not always; notice that Alabama at the time of the case did not allow for such an action of contribution.
  - The contract doctrine is of indemnity. Suppose Mr. Price, the farmer who sued Latco, did not own the chicken houses but instead leased them from AgriBiz. The lease contains a provision that Price will indemnify and hold AgriBiz harmless from any claim arising out of Price’s use of the premises. Price’s employee, who works in the building in question, develops lung disease and sues AgriBiz, claiming that his injury is caused by the asbestos-lined ventilation system in the structures. Employee can’t bring that claim against his employer, Price, because workers’ compensation statutes block suits against the employer. But he can sue AgriBiz, a third party, claiming its installation and maintenance of the ventilation system caused his injuries. AgriBiz, when sued by Employee, can then implead Price, invoking his indemnity agreement.
5. Now consider who can file a third-party complaint, and when impleader can be challenged.
- Price sues Latco for defectively constructed chicken houses. Latco promptly impleads Nails, the manufacturer of the nails and nail guns used in constructing the houses, contending that Nails’s products were defective. The court permits the impleader of Nails. After a six-month investigation of the claims, Nails seeks leave to implead SteelCo, the manufacturer who supplied the metal used in making Latco’s nails; Nails’s third-party complaint alleges that the metal supplied during the time in question had impurities that caused the nails to corrode when exposed to the weather. Successive impleader of this nature is allowed by the Rules. On what grounds might a party object to Nails’s motion to implead SteelCo?
  - In the case described in 5a, when Price sues Latco, Latco counterclaims against Price for unpaid construction bills, alleging that Price failed to pay the agreed-upon contract price for the construction. In response to Latco’s counterclaim, Price seeks to implead Bank, which, Price alleges, failed to fund Price’s line of credit as it had agreed. Rule 14 permits a *plaintiff* to use impleader in this fashion: Any “defending party” may use impleader to pass on all or part of the liability.



### Chickens (and Impleader) Run Wild: Variation on *Price*

6. As we have just seen, parties already in the case may be able to object to a motion to implead either on the grounds that impleader doesn’t lie (because the substantive law doesn’t allow an action for indemnity or

contribution under the circumstances) or because allowing impleader will unjustifiably increase delay or expense. Parties can also object on jurisdictional grounds.

- a. Personal jurisdiction over an impleaded third-party defendant (like the nail manufacturer) will usually lie because in many circumstances the third-party defendant will have been involved in the occurrence or transaction that led to the original claim and thus subject to personal jurisdiction. If that isn't enough, Rule 4(k)(1)(B) gives an extra 100-mile boost to the court's jurisdiction. Read that provision and apply it to the following situation. Plaintiff sues Defendant, a Pennsylvania corporation, in federal court in Philadelphia, alleging a breach of contract, arising out of some work Defendant performed in Wilmington, Delaware, about 35 miles south of Philadelphia. Defendant wants to implead Employee, who lives and works in Wilmington, and has insufficient contacts with Pennsylvania to subject him to personal jurisdiction there. Employee does not have a jurisdictional objection to his joinder. Use Rule 4(k)(1)(B) to explain why.
- b. Joinder can also implicate questions of subject matter jurisdiction. If a claim carries with it an independent jurisdictional basis, that question is quickly resolved. For example, if a cross-claim arises under federal law, there will be no problem. Similarly, if a defendant/third-party plaintiff and a third-party defendant meet the requirements of diversity of citizenship, there will be no difficult jurisdictional issue. But what happens if the federal court would not otherwise have jurisdiction over a compulsory counterclaim, third-party claim, or cross-claim? Does supplemental jurisdiction extend to cover these essentially defensive claims? In many circumstances, the answer is yes. Section 1367 permits many, but not all, defensive claims to come in under the umbrella of supplemental jurisdiction. Reread that provision and explain why a federal district court will always have subject matter jurisdiction over Nails and SteelCo in the hypothetical in [Note 5](#).
- c. Supplemental jurisdiction over third-party claims can, however, get complicated. What if Price sues Latco, Latco impleads Nails, and then Price decides he wants to sue Nails as well. If Price's claim raises a federal question, there is independent subject matter jurisdiction over the claim. If Price and Nails are diverse parties with an amount in controversy over \$75,000, there is also independent subject matter jurisdiction. But what if Price and Nails are citizens of the same state? No supplemental jurisdiction. To understand why, look at §1367(b), which precludes supplemental jurisdiction in diversity-only cases "over claims by plaintiffs against persons made parties under Rule 14..." if doing so would defeat diversity. This restriction predated the statute; the Supreme Court made clear, in *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978), that allowing such a claim would "[d]estroy complete diversity just as surely as if [the plaintiff] had sued the [third-party defendant] initially." As the Court reasoned:

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 [if supplemental jurisdiction over such a claim were allowed], 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.

*Id.* at 374.

Congress's enactment of §1367 in 1990 codified the outcome in *Kroger* (thus making supplemental jurisdiction for a plaintiff's claim against a third-party defendant unavailable in a diversity case when the claim would defeat diversity); while it also instructed courts to reach the opposite result when the basis for jurisdiction over the original claim was a federal question.

- d. Consider the reach of supplemental jurisdiction in another hypothetical variation on *Price v. CTB*, [supra page 805](#), in which the chicken farmer, when sued by the contractor for unpaid bills, impleaded his bank, alleging it had failed to fund a line of credit as it had promised to do. Imagine that the amount in controversy is less than \$75,000.
  - i. Rule 14(a)(1) permits a plaintiff against whom a counterclaim is asserted to bring in a third party to the same extent a defendant may do so.
  - ii. But what about supplemental jurisdiction over that claim? Were the third-party claim asserted by a defendant, say the contractor, supplemental jurisdiction would apply. But §1367(b) precludes supplemental jurisdiction in diversity-only cases "over claims by plaintiffs against persons made parties under Rule 14..." Read literally, the statute seems to deny supplemental jurisdiction over the plaintiff's claim against Bank in the case imagined, even though the chicken farmer is in the position of a defendant as to the counterclaim. Several courts and commentators have suggested that the drafters of the statute did not intend to preclude supplemental jurisdiction under these circumstances. But, so far, courts have held that the plain language of the statute controls, and Farmer is out of luck—and supplemental jurisdiction.

### 3. Compulsory Joinder

This chapter has thus far concentrated on who can be joined in a suit if someone already a party seeks joinder. We

now consider whether there are those who must be joined—even if neither they nor those already in the suit desire to see them there. The topic, sometimes rather confusingly described in terms of “necessary and indispensable parties,” has its roots in eighteenth-century equity practice. Chancery developed the perfectly sensible notions that (1) litigation sometimes affected people who weren’t formal parties; and (2) if the effects were serious enough and the affected persons could be joined, they should be. Rule 19 now embodies these propositions. Reading the Rule might leave one with the impression that it requires courts in every case to consider the most efficient and effective party structure for a lawsuit. That is not how courts have interpreted it.

#### WHAT’S NEW HERE?

- Up to now we have explored joinder devices that someone in the lawsuit can use: joining additional claims or counterclaims, adding additional parties, adding third-party defendants, and the like.
- We now encounter a doctrine, and a Rule, that imagines a situation in which someone not a party to the lawsuit—and perhaps a party that no one in the lawsuit wants to have involved—must nevertheless be added, on pain of the suit’s being dismissed in its entirety.
- If you think this doctrine sounds as if it came from a parallel universe, you’re right. It came, in fact, from the English Court of Chancery, a court that administered a body of law called equity. You have met equity in this course—think injunctions—and will meet it in other courses. For present purposes, courts of equity came from a tradition in which judges did not just decide which party had presented the stronger case, but tried, as best they could, to assure that justice was done. Out of this quest came the idea that sometimes there was a party not presently in the suit who should be. As you will see, the concept does not fit smoothly within a tradition of party responsibility—and autonomy—that otherwise characterizes the U.S. legal system.

#### **Temple v. Synthes Corp.**

498 U.S. 5, reh’g denied, 498 U.S. 1092 (1990)

#### PER CURIAM.

Petitioner Temple, a Mississippi resident, underwent surgery in October 1986 in which a “plate and screw device” was implanted in his lower spine. The device was manufactured by respondent Synthes, Ltd. (U.S.A.) (Synthes), a Pennsylvania corporation. Dr. S. Henry LaRocca performed the surgery at St. Charles General Hospital in New Orleans, Louisiana. Following surgery, the device’s screws broke off inside Temple’s back.

Temple filed suit against Synthes in the United States District Court for the Eastern District of Louisiana. The suit, which rested on diversity jurisdiction, alleged defective design and manufacture of the device. At the same time, Temple filed a state administrative proceeding against Dr. LaRocca and the hospital for malpractice and negligence. At the conclusion of the administrative proceeding, Temple filed suit against the doctor and the hospital in Louisiana state court.

Synthes did not attempt to bring the doctor and the hospital into the federal action by means of a third-party complaint, as provided in Federal Rule of Civil Procedure 14(a). Instead, Synthes filed a motion to dismiss Temple’s federal suit for failure to join necessary parties pursuant to Federal Rule of Civil Procedure 19. Following a hearing, the District Court ordered Temple to join the doctor and the hospital as defendants within twenty days or risk dismissal of the lawsuit. According to the court, the most significant reason for requiring joinder was the interest of judicial economy. The court relied on this Court’s decision in *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968), wherein we recognized that one focus of Rule 19 is “the interest of the courts and the public in complete, consistent, and efficient settlement of controversies.” When Temple failed to join the doctor and the hospital, the court dismissed the suit with prejudice.

Temple appealed, and the United States Court of Appeals for the Fifth Circuit affirmed. The court deemed it “obviously prejudicial to the defendants to have the separate litigations being carried on,” because Synthes’ defense might be that the plate was not defective but that the doctor and the hospital were negligent, while the doctor and hospital, on the other hand, might claim that they were not negligent but that the plate was defective. The Court of Appeals found that claims overlapped and that the District Court therefore had not abused its discretion in ordering joinder under Rule 19. A petition for rehearing was denied.

In his petition for certiorari to this Court, Temple contends that it was error to label joint tortfeasors as indispensable parties under Rule 19(b) and to dismiss the lawsuit with prejudice for failure to join those parties. We agree. Synthes does not deny that it, the doctor, and the hospital are potential joint tortfeasors. It has long been the rule that it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit. Nothing in the 1966 revision of Rule 19 changed that principle. The Advisory Committee Notes to Rule 19(a) explicitly state that “a tortfeasor with the usual ‘joint-and-several’ liability is merely a permissive party to an action against another with like liability.” Advisory Committee’s Notes on Fed. Rule Civ. Proc. 19. There is nothing in Louisiana tort law to the contrary.

The opinion in *Provident Bank*, supra, does speak of the public interest in limiting multiple litigation, but that case is not controlling here. There, the estate of a tort victim brought a declaratory judgment action against an insurance company. We assumed that the policyholder was a person “who, under...[Rule 19](a), should be joined if ‘feasible’” and went on to discuss the appropriate analysis under Rule 19(b), because the policyholder could not be joined without destroying diversity. After examining the factors set forth in Rule 19(b), we determined that the action could proceed without the policyholder; he therefore was not an indispensable party whose absence required dismissal of the suit.

Here, no inquiry under Rule 19(b) is necessary, because the threshold requirements of Rule 19(a) have not been satisfied. As potential joint tortfeasors with Synthes, Dr. LaRocca and the hospital were merely permissive parties. The Court of Appeals erred by failing to hold that the District Court abused its discretion in ordering them joined as defendants and in dismissing the action when Temple failed to comply with the court’s order. For these reasons, we grant the petition for certiorari, reverse the judgment of the Court of Appeals for the Fifth Circuit, and remand for further proceedings consistent with this opinion.

It is so ordered.

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#### *Notes and Problems*

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1. The opinion does not dispute the lower courts’ conclusion that it would be more efficient to have all the claims in a single forum. It nevertheless holds that it was reversible error to dismiss the case. Moreover, the opinion was *per curiam* (by the Court as a whole, rather than signed by an individual Justice). These brief, anonymous opinions are often used when the Court believes the principles so clear that they require no extended discussion. What principle is the Court valuing more highly than the obvious efficiency of consolidating the cases?
2. What does the Court mean by saying that “Synthes did not attempt to bring the doctor and the hospital into the federal action by means of a third-party complaint, as provided in Federal Rule of Civil Procedure 14(a)”?
  - a. As a review of impleader, recall that Synthes could *not* implead the doctor on the basis that his negligence rather than a defective product caused Billy Temple’s injury. (Such a claim would constitute a forbidden “it’s him, not me” use of impleader.)
  - b. So what factual or legal relations would have had to exist for Synthes to be able to implead the doctor or hospital?
3. As further review, consider whether, if the plaintiff had wanted to sue both defendants in the same action, he could have done so.
  - a. As a matter of pleading?
  - b. As a matter of jurisdiction?
4. Ordinarily, one expects that plaintiffs will be eager to sue as many plausible defendants as possible. The strategy in such a case is to have one defendant—perhaps the surgeon—argue that he was not negligent, but the product was defective, while Synthes contends that its product was fine but that the medical defendants were negligent. In such circumstances the defendants, pointing fingers at each other, do part of plaintiff’s work. What risks was Temple’s lawyer running by filing separate lawsuits against the two defendants?
5. *Temple* stands at least for the proposition that Rule 19 does not require the most efficient possible packaging of lawsuits. Nor does it require the joinder of anyone who might be affected by precedent. E.g., *Janney Montgomery Scott, Inc. v. Shepard Niles, Inc.*, 11 F.3d 399, 407 (3d Cir. 1993).
6. Given these background understandings, the “necessary parties” rules therefore typically operate only when “there is some connection of property ownership, contract rights, or obligations between those who are initially made parties and those who have not been joined.” James, Hazard & Leubsdorf at 285. Common situations include:
  - a. Cases involving an obligation on which more than one person is benefitted or burdened by the obligations but

- not all joint obligees or joint obligors are parties.
- b. Cases involving interests in real or personal property in which a person claiming an interest (for example, a joint owner, lessee, mortgagee) is not included as a party.
  - c. Cases involving representative parties in which either the representative or the party being represented is not included.
  - d. Cases involving claims to a limited fund or pool of assets, such that a potential claimant not a party will find the fund depleted by the time her case is heard.
7. Rule 19 seeks to describe when courts should overcome the ordinary presumptions of party autonomy. Read it and apply it to some elementary problems.
- a. Larry is the income beneficiary of a spendthrift trust, and his children have the remainder interest. The trustee has power to appoint the trust to Larry at any time. Larry, a California resident, sues the trustee, an Illinois resident, seeking a declaration that the trustee abused his power by not appointing the trust to him. Any problems?
  - b. Prior to 2006, Husband was married to *W1* and procured insurance from InsCo payable to “my wife.” In 2008 Husband procures a Mexican divorce and marries *W2*. After Husband’s death in 2010, *W1* brings an action against InsCo claiming: (a) Husband and she were never properly divorced; and (b) even if she and Husband were divorced, his intention was to have the policy payable to her. InsCo moves to dismiss for failure to join *W2*. What result?
8. Who can raise an issue of compulsory joinder? Obviously, a party can (see *Temple*). What about the court on its own motion? Rule 19(a)(1) says: “A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if . . .” the conditions are met, suggesting the court has independent power (and perhaps a duty) to make inquiry. In practice, courts will often not know enough about the facts to enter such an order, relying instead on the defendant’s incentives to raise an objection that may derail the lawsuit.
9. How might Rule 19 derail a lawsuit? Rule 19(a) requires a necessary party to be joined if it can be served and joining it does not deprive the court of subject matter jurisdiction over the case. Rule 19(b) considers what a court should do if a party is necessary but cannot be joined for jurisdictional reasons: The options are to continue on with the current parties or to dismiss the case. In the next case, the court considers just this sort of situation.

### **Helzberg’s Diamond Shops v. Valley West Des Moines Shopping Center**

564 F.2d 816 (8th Cir. 1977)

ALSOP, J.

On February 3, 1975, Helzberg’s Diamond Shops, Inc. (Helzberg), a Missouri corporation, and Valley West Des Moines Shopping Center, Inc. (Valley West), an Iowa corporation, executed a written Lease Agreement. The Lease Agreement granted Helzberg the right to operate a full line jewelry store at space 254 in the Valley West Mall in West Des Moines, Iowa. Section 6 of Article V of the Lease Agreement provides:

[Valley West] agrees it will not lease premises in the shopping center for use as a catalog jewelry store nor lease premises for more than two full line jewelry stores in the shopping center in addition to the leased premises. This clause shall not prohibit other stores such as department stores from selling jewelry from catalogs or in any way restrict the shopping center department stores.

Subsequently, Helzberg commenced operation of a full line jewelry store in the Valley West Mall.

Between February 3, 1975 and November 2, 1976 Valley West and two other corporations entered into leases for spaces in the Valley West Mall for use as full line jewelry stores. Pursuant to those leases the two corporations also initiated actual operation of full line jewelry stores. On November 2, 1976, Valley West and Kirk’s Incorporated, Jewelers, an Iowa corporation, doing business as Lord’s Jewelers (Lord’s), entered into a written Lease Agreement. The Lease Agreement granted Lord’s the right to occupy space 261 in the Valley West Mall. Section I of Article V of the Lease Agreement provides that Lord’s will use space 261

...only as a retail specialty jewelry store (and not as a catalogue or full line jewelry store) featuring watches, jewelry (and the repair of same) and incidental better gift items.

However, Lord’s intended to open and operate what constituted a full line jewelry store at space 261.

In an attempt to avoid the opening of a fourth full line jewelry store in the Valley West Mall and the resulting breach of the Helzberg-Valley West Lease Agreement, Helzberg instituted suit seeking preliminary and permanent injunctive relief restraining Valley West’s breach of the Lease Agreement. The suit was filed

in the United States District Court for the Western District of Missouri. Subject matter jurisdiction was invoked pursuant to 28 U.S.C. §1332 based upon diversity of citizenship between the parties and an amount in controversy which exceeded [the statutory amount]. Personal jurisdiction was established by service of process on Valley West pursuant to the Missouri “long arm” statute, Rev. Stat. Mo. §506.500 et seq. (1977). Rule 4(e), Fed. R. Civ. P.

Valley West moved to dismiss pursuant to Rule 19 because Helzberg had failed to join Lord’s as a party defendant. That motion was denied. The district court went on to order that

pending the determination of [the] action on the merits, that [Valley West] be, and it is hereby, enjoined and restrained from allowing, and shall take all necessary steps to prevent, any other tenant in its Valley West Mall (including but not limited to Kirk’s Incorporated, Jewelers, d/b/a Lord’s Jewelers) to open and operate on March 30, 1977, or at any other time, or to be operated during the term of [Helzberg’s] present leasehold, a fourth full line jewelry store meaning a jewelry store offering for sale at retail a broad range of jewelry items at various prices such as diamonds and diamond jewelry, precious and semi-precious stones, watches, rings, gold jewelry, costume jewelry, gold chains, pendants, bracelets, belt buckles, tie tacs, tie slides and earrings, provided, however, nothing contained herein shall be construed to enjoin [Valley West] from allowing the opening in said Valley West Mall of a small store, known by [Valley West] as a boutique, which sells limited items such as only Indian jewelry, only watches, only earrings, or only pearls.

From this order Valley West appeals.

It is clear that Valley West is entitled to appeal from the order granting preliminary injunctive relief. 28 U.S.C. §1292(a)(1). However, Valley West does not attack the propriety of the issuance of a preliminary injunction directly; instead, it challenges the District Court’s denial of its motion to dismiss for failure to join an indispensable party and argues that the District Court’s order fails for lack of specificity in describing the acts of Valley West to be restrained....

Because Helzberg was seeking and the District Court ordered injunctive relief which may prevent Lord’s from operating its jewelry store in the Valley West Mall in the manner in which Lord’s originally intended, the District Court correctly concluded that Lord’s was a party to be joined if feasible. See Rule 19(a)[(1)(b)<sup>\*</sup>] (i), Fed. R. Civ. P. Therefore, because Lord’s was not and is not subject to personal jurisdiction in the Western District of Missouri, the District Court was required to determine whether or not Lord’s should be regarded as indispensable. After considering the factors which Rule 19(b) mandates be considered, the District Court concluded that Lord’s was not to be regarded as indispensable. We agree....

Rule 19(b) requires the court to look first to the extent to which a judgment rendered in Lord’s absence might be prejudicial to Lord’s or to Valley West. Valley West argues that the District Court’s order granting preliminary injunctive relief does prejudice Lord’s and may prejudice Valley West. We do not agree.

It seems axiomatic that none of Lord’s rights or obligations will be ultimately determined in a suit to which it is not a party. Even if, as a result of the District Court’s granting of the preliminary injunction, Valley West should attempt to terminate Lord’s leasehold interest in space 261 in the Valley West Mall, Lord’s will retain all of its rights under its Lease Agreement with Valley West. None of its rights or obligations will have been adjudicated as a result of the present proceedings, proceedings to which it is not a party. Therefore, we conclude that Lord’s will not be prejudiced in a way contemplated by Rule 19(b) as a result of this action.

Likewise, we think that Lord’s absence will not prejudice Valley West in a way contemplated by Rule 19(b). Valley West contends that it may be subjected to inconsistent obligations as a result of a determination in this action and a determination in another forum that Valley West should proceed in a fashion contrary to what has been ordered in these proceedings.

It is true that the obligations of Valley West to Helzberg, as determined in these proceedings, may be inconsistent with Valley West’s obligations to Lord’s. However, we are of the opinion that any inconsistency in those obligations will result from Valley West’s voluntary execution of two Lease Agreements which impose inconsistent obligations rather than from Lord’s absence from the present proceedings.

Helzberg seeks only to restrain Valley West’s breach of the Lease Agreement to which Helzberg and Valley West were the sole parties. Certainly, all of the rights and obligations arising under a lease can be adjudicated where all of the parties to the lease are before the court. Thus, in the context of these proceedings the District Court can determine all of the rights and obligations of both Helzberg and Valley West based upon the Lease Agreement between them, even though Lord’s is not a party to the proceedings.

Valley West’s contention that it may be subjected to inconsistent judgments if Lord’s should choose to file suit elsewhere and be awarded judgment is speculative at best. In the first place, Lord’s has not filed such a suit. Secondly, there is no showing that another court is likely to interpret the language of the two Lease Agreements differently from the way in which the District Court would. Therefore, we also conclude that Valley West will suffer no prejudice as a result of the District Court’s proceeding in Lord’s absence. Any prejudice which Valley West may suffer by way of inconsistent judgments would be the result of Valley

West's execution of Lease Agreements which impose inconsistent obligations and not the result of the proceedings in the District Court.

Rule 19(b) also requires the court to consider ways in which prejudice to the absent party can be lessened or avoided. The District Court afforded Lord's an opportunity to intervene in order to protect any interest it might have in the outcome of this litigation. Lord's chose not to do so. In light of Lord's decision not to intervene we conclude that the District Court acted in such a way as to sufficiently protect Lord's interests.

Similarly, we also conclude that the District Court's determinations that a judgment rendered in Lord's absence would be adequate and that there is no controlling significance to the fact that Helzberg would have an adequate remedy in the Iowa courts were not erroneous. It follows that the District Court's conclusion that in equity and good conscience the action should be allowed to proceed was a correct one.

In sum, it is generally recognized that a person does not become indispensable to an action to determine rights under a contract simply because that person's rights or obligations under an entirely separate contract will be affected by the result of the action. This principle applies to an action against a lessor who has entered into other leases which also may be affected by the result in the action in which the other lessees are argued to be indispensable parties. We conclude that the District Court properly denied the motion to dismiss for failure to join an indispensable party....

In view of the foregoing, it follows that the judgment of the District Court is affirmed.

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### *Procedure as Strategy*

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Notice the striking—though unsuccessful—stance taken by Valley West. Faced with defending a lawsuit against Helzberg's, it argued that *more* people should be suing it, but then with what one imagines were crocodile tears, regretfully noted that Lord's could not be joined for jurisdictional reasons—and therefore the entire suit should be dismissed. The *Helzberg's* court rejected this argument, but one regularly finds this stance taken in Rule 19 cases. A defendant argues (a) that to do perfect justice someone else should be joined to the lawsuit, (b) that for jurisdictional or other reasons that party cannot be joined, and (c) that the suit should therefore be dismissed. In so arguing, the litigants are echoing the views of eighteenth-century Lord Chancellors, who sometimes seemed to be saying that if their courts could not do perfect justice (by joining all who might have an interest in the suit), they would do none at all. The current Rule 19 was drafted in part to avoid this stance; see Rule 19(b).

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### *Notes and Problems*

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1. Consider *Helzberg's* as a fight about former adjudication.
  - a. Assume the suit proceeds without Lord's, and the court enters a permanent injunction forbidding Valley West to rent to Lord's. When Valley West tries to evict Lord's, Lord's sues, alleging that the eviction will be a breach of its lease with Valley West. Valley West points to the injunction, arguing that the court's construction of the lease is binding. What is Lord's winning response to that contention?
  - b. Suppose that in Lord's suit against Valley West the court construes the lease differently from the first court and holds that Lord's is entitled to conduct its business in the mall and decrees specific performance. At this point Valley West is under two conflicting court orders: one requiring that it evict Lord's, the other that it honor its lease with Lord's. Both decrees are valid; what should Valley West do?
  - c. The opinion in *Helzberg's* seems to concede implicitly that the scenario just sketched is possible. What is its response to the dilemma in which Valley West may find itself?
  - d. What would have been the alternative to proceeding with the suit in federal district court in Missouri?
  - e. In light of this alternative, articulate an argument that the court improperly applied Rule 19 and therefore came to the wrong result.
2. *Helzberg's* proceeded in the absence of a party whose joinder would have been desirable. Contrast a case that instead dismissed the suit in the face of similar objections. *Clinton v. Babbitt*, 180 F.3d 1081 (9th Cir. 1999), involved a three-cornered dispute: the Hopi Tribe and Navajo Nation and the Secretary of the Interior. As background, bear in mind that many Indian tribes have for some purposes the status of sovereign nations. The lawsuit turned on conflicting "claims to exclusive use [of land]...between the Hopi Tribe and the Navajo Nation, producing what became known as 'the greatest title problem in the West.'"
  - a. Members of the Navajo Nation living on lands that a settlement had awarded to the Hopi Tribe sued the

Secretary of the Interior, alleging unconstitutional discrimination in the terms of the leases given them as part of the settlement. The Secretary argued that the Hopi Tribe, which stood to lose large sums of money if the settlement fell apart, was a necessary party. But, the argument continued, the Hopi Tribe could not be joined because of sovereign immunity—and the suit must therefore be dismissed. The Ninth Circuit agreed:

The plaintiffs seek, at a minimum, a declaration that Secretary Babbitt cannot constitutionally approve any individual leases between the Navajos and the Hopi Tribe that use the standard terms of the [settlement]. Such a declaration would prohibit the Tribe from fulfilling its obligations under the Settlement Agreement to enter into such leases and would deprive the Tribe of substantial compensation from the United States (over \$25 million and the creation of additional trust lands), which is conditioned on Secretary Babbitt's approval of certain numbers of such leases. The Hopi Tribe, therefore, has a legally protected interest relating to the subject of the action as defined by Rule 19(a)(1)(B)....

...Although no alternative forum exists for the plaintiffs to seek relief, we conclude that the Hopi Tribe's interest in maintaining its sovereign immunity outweighs the interest of the plaintiffs in litigating their claim. See *Quileute*, 18 F.3d at 1460-61 (“[A p]laintiff's interest in litigating a claim may be outweighed by a tribe's interest in maintaining its sovereign immunity [because] society has consciously opted to shield Indian tribes from suit without congressional or tribal consent.” (citations omitted))....

Clinton v. Babbitt, 180 F.3d at 1089-1090.

- b.** Notice the striking result of Rule 19 in such conditions: Because the court cannot do perfect justice, it decides it will do nothing at all. Before it takes such an action, should a court be sure that it is not doing a worse injustice to the existing parties by dismissing than it would do to the unjoined party by proceeding in its absence? Consider a footnote in *Clinton*:

Whether the allegations of the plaintiffs' equal protection claim are sufficient to state a claim upon which relief may be granted is a question we need not reach in this appeal. We note, however, the apparent lack of substance to the claim. First, the plaintiffs admit they are in the unique position of being offered free leases to remain on land to which they have no right, and fail to allege that they are being treated less favorably than any similarly situated individuals. Second, even if the plaintiffs make the threshold showing of disparate treatment they fail to show that this treatment is not rationally related to legitimate legislative goals, such as the peaceful settlement of the Navajo-Hopi land dispute:

The 1996 Settlement Act] will implement a settlement [which is] a consensual resolution of an age-old problem. It creates a way for Navajo families now residing on Hopi land to lawfully remain at the home sites where their families have lived for many generations. At the same time, it preserves the Hopi Tribe's right to exercise jurisdiction over its land. It is based on principles of self-determination for the Tribes and human dignity for all tribal members. With this settlement, both tribes now will be able to devote their efforts and resources to important educational, health, and economic developments for the Navajo and Hopi people.

*Id.* at 1087 n.4. Does this footnote constitute an effort to assure readers that the court has not lost sight of what Rule 19(b) calls “equity and good conscience”?

- 3.** In *Helzberg's*, the asserted jurisdictional obstacle to joinder was personal jurisdiction. In *Clinton*, the obstacle was the sovereign immunity of an Indian tribe. Because claims of sovereign immunity will be rare, and the reach of modern long-arm jurisdiction is long, the more common objection is want of subject matter jurisdiction.
- a.** Take, for example, a variation on the facts of *Helzberg's*. Suppose that *Helzberg's* and *Lord's* were both Missouri corporations. Under those circumstances *Helzberg's* could invoke diversity jurisdiction in its suit against *Valley West* (an Iowa corporation); joining *Lord's* as a defendant would, however, destroy diversity.
- b.** In cases relying entirely on diversity jurisdiction, 28 U.S.C. §1367(b) explicitly excludes from supplemental jurisdiction “claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24...or over claims by persons proposed to be joined as plaintiffs under Rule 19... or seeking to intervene as plaintiffs under Rule 24.” What is the theory underlying denial of supplemental jurisdiction where there is no independent basis for diversity jurisdiction? Sometimes it is said that if the courts permitted ancillary jurisdiction in this situation, it would open the door to collusive manipulation of jurisdiction: *A*, wishing to sue *B* and *C* but lacking complete diversity, would sue just *B*, hoping that *B* would plead *C's* absence and insist on joinder under Rule 19; if supplemental jurisdiction extended to cover this situation, *A* could achieve an otherwise impermissible lawsuit.
- c.** Another section of the same statute (28 U.S.C. §1367(a)), however, suggests that supplemental jurisdiction will extend to such parties if the plaintiff is not asserting claims against them or if there is a ground for federal jurisdiction other than diversity. Is there a theory underlying such a discrepancy between the treatment of plaintiffs invoking diversity jurisdiction and others? Or between the treatment of claims by plaintiffs and others?
- 4.** Should federal courts be more willing under Rule 19(b) to dismiss cases in which the reason for nonjoinder is a problem with subject matter jurisdiction than when the difficulty is personal jurisdiction? The argument for

such a result would be that there will always be a state court where subject matter jurisdiction is not a problem, but (because the state and federal courts have substantially identical reaches under personal jurisdiction) there may not be a court that can resolve the lawsuit if the difficulty is personal jurisdiction.

### C. INTERVENTION

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The joinder devices thus far explored have a common characteristic: They serve to bring into a lawsuit a party who does not want to be there. We turn now to a doctrine with the opposite function: to permit an unjoined person to elbow her way into a suit where no one wants her. Like the doctrines of compulsory joinder, the principles of intervention flow from a recognition that lawsuits may have effects on persons not joined. The effects will not be those of formal preclusion—due process forbids binding one who was not a party—but judgments have broader ripple effects than the formal binding effect of the decree.

To take a common example, suppose that Developer and Zoning Board are engaged in litigation over whether Developer can build an office building on a plot of land bordering a residential area. If Developer wins the suit, Homeowner, whose property lies next to the plot in question, will be affected. If Developer loses the suit, Landowner, who owns another adjacent plot of land that would be more valuable if it can be commercially developed, will be adversely affected. The resulting judgment will not formally bind either Homeowner or Landowner, but it will affect them. Both might wish to influence the outcome of the suit. If they were entitled to intervene, they would thereby become parties to the suit, with the right to present evidence and arguments in the same way as Developer and Zoning Board.

Notice that Developer and Zoning Board (and perhaps the judge as well) may be notably unenthusiastic about intervention. From the standpoint of the existing parties, it complicates and perhaps weakens their litigating strategy. Even an intervenor who seeks the same outcome as one of the parties will have a different perspective and perhaps a different strategy. Moreover, additional parties may make the lawsuit more expensive (each extra lawyer in a deposition will extend its time) and settlement more difficult. Conceptually, intervention means further erosion of the principle of party autonomy, and, carried to a logical extreme, turns every lawsuit into a town meeting at which anyone even distantly “interested” in the topic of litigation becomes a party. The principles of intervention seek to allow some—but not all—who might wish to be involved in a lawsuit to join it. Read Rule 24.

Note the structure of the Rule. It is subdivided into two major categories: intervention of right (Rule 24(a)) and permissive intervention (Rule 24(b)). Intervention of right is designed to give to those with strong interests in the litigation the power to insist on joinder. The terms of Rule 24(a)(2) echo those of Rule 19(a)(1)(B)—“an interest relating to...the subject of the action...so situated that disposing of the action may as a practical matter impair or impede” the interests of would-be intervenor. Permissive intervention is the weaker counterpart, as it is designed to capture those with weaker bases for insisting on joinder. As the terms imply, an applicant who meets the criteria of Rule 24(a) must be allowed to join the lawsuit. An applicant who meets only the criteria of Rule 24(b) may be allowed to join, with the judge’s decision reviewed only for abuse of discretion.

Most of the reported cases focus on Rule 24(a), the general criteria for intervention as of right. That section contains four requirements. The intervention must be timely—the intervenor may not lie in wait until the litigation is on the brink of resolution. Second, the intervenor must have an “interest” in the property or transaction that is the subject of the suit, and, third, that interest must be in some strong way at risk. Finally, even an applicant meeting all these criteria will be denied intervention if those already in the lawsuit are adequately representing the interest. The next case assumes that intervention is timely and analyzes the other three criteria.

#### **Natural Resources Defense Council v. United States Nuclear Regulatory Commission**

578 F.2d 1341 (10th Cir. 1978)

**DOYLE, J.**

**The American Mining Congress and Kerr-McGee Nuclear Corporation seek review of the order of the United States District Court for the District of New Mexico denying their motions to intervene [as] a matter of right or on a permissive basis, pursuant to Rule 24(a)(2) and (b), Fed. R. Civil Proc.**

**The underlying action in which the movants requested intervention was instituted by the Natural Resources Defense Council, Inc., and others. In the action, declaratory and injunctive relief is directed to the United States Nuclear Regulatory Commission (NRC) and the New Mexico Environmental Improvement Agency (NMEIA), prohibiting those agencies from issuing licenses for the operation of uranium mills in New Mexico without first preparing environmental impact statements. Kerr-McGee and United Nuclear are potential recipients of the licenses.**

**Congress, in the Atomic Energy Act of 1954, has authorized the NRC to issue such licenses. NMEIA is involved because under §274(b) of the Act, the NRC is authorized to enter into agreements with the states**

allowing the states to issue licenses. Such agreements have been made with about 25 states including New Mexico. Thus, the action below in effect seeks to prevent the use of §274(b) of the Act so as to avoid the requirement of an impact statement for which provision is made in the National Environmental Policy Act....

The relief sought by the plaintiffs' complaint is, first, that NRC's involvement in the licensing procedure in New Mexico is, notwithstanding the delegation to the state, sufficient to constitute major federal action, whereby the impact statement requirement is not eliminated. Second, that if an impact statement is not required in connection with the granting of licenses, the New Mexico program is in conflict with §274(d)(2) of the Atomic Energy Act of 1954.

The motion of United Nuclear Corporation to intervene is not opposed by the parties and was granted. On May 3, 1977, the date that the complaint herein was filed, NMEIA granted a license to United Nuclear to operate a uranium mill at Church Rock, New Mexico. The complaint seeks to enjoin the issuance of the license thus granted.

It was after that that Kerr-McGee Nuclear Corporation, Anaconda Company, Gulf Oil Corporation, Phillips Petroleum Company, and the American Mining Congress filed motions to intervene. These motions, insofar as they sought intervention as of right, were denied on the ground that the interests of the parties or movants would be adequately represented by United Nuclear. Permissive intervention was also denied. Kerr-McGee and the American Mining Congress both appeal denial of both intervention as of right and permissive intervention.

Our issue is a limited one. We merely construe and weigh Rule 24(a) of the Fed. R. Civ. P. (intervention as of right) and decide in light of the facts and considerations presented whether the denial of intervention was correct. [The court quoted Rule 24(a).] We do not have a subsection (1) situation involving a statutory conferring of right to intervene. Accordingly, we must consider the standards set forth in subsection (2), which are:

1. Whether the applicant claims an interest relating to the property or transaction which is the subject of the action.
2. Whether the claimants are so situated that the disposition of the action may as a practical matter impair or impede their ability to protect that interest.
3. Whether their interest is not adequately represented by existing parties.

[The district court decided that, even if the first two tests were satisfied,] the interests of the movants were adequately protected by United Nuclear [and therefore denied the motion to intervene]. Our conclusion is that the interests of movants in the subject matter is sufficient to satisfy the requirements of Rule 24 and that the threat of loss of their interest and inability to participate is of such magnitude as to impair their ability to advance their interest.

## I

...Strictly to require that the movant in intervention have a direct interest in the outcome of the lawsuit strikes us as being too narrow a construction of Rule 24(a)(2)....

In our case the matter of immediate interest is, of course, the issuance and delivery of the license sought by United Nuclear. However, the consequence of the litigation could well be the imposition of the requirement that an environmental impact statement be prepared before granting any uranium mill license in New Mexico, or, secondly, it could result in an injunction terminating or suspending the agreement between NRC and NMEIA. Either consequence would be felt by United Nuclear and to some degree, of course, by Kerr-McGee, which is said to be one of the largest holders of uranium properties in New Mexico. It operates a uranium mill in Grants, New Mexico, pursuant to an NMEIA license, which application for renewal is pending. A decision in favor of the plaintiffs, which is not unlikely, could have a profound effect upon Kerr-McGee. Hence, it does have an interest within the meaning of Rule 24(a)(2). This interest of Kerr-McGee is in sharp contrast to the minimal interest which was present in *Allard*, wherein it was an interest of environmental groups in the protection of living birds. This was considered insufficient to justify intervention in a case involving feathers which are part of Indian artifacts. Their interest was said to be limited to a general interest in the public. The interest asserted on behalf of Kerr-McGee and the American Mining Congress is one which is a genuine threat to Kerr-McGee and the members of the American Mining Congress to a substantial degree.

We do not suggest that Kerr-McGee could expect better treatment from state authorities than federal. We do recognize that a change in procedure would produce impairing complications.

## II

The next question is whether, assuming the existence of an interest, the chance of impairment is sufficient to fulfill the requirement of Rule 24(a)(2).

...If the relief sought by the plaintiffs is granted, there can be little question but that the interests of the American Mining Congress and of Kerr-McGee would be affected. Plaintiffs contend, however, that appellants would not be bound by such a result if they are not participants. Kerr-McGee points out that even though it may not be *res judicata*, still it would have a *stare decisis* effect. Moreover, with NRC and NMEIA as parties, the result might be more profound than *stare decisis*.

It should be pointed out that the Rule refers to impairment "as a practical matter." Thus, the court is not limited to consequences of a strictly legal nature. The court may consider any significant legal effect in the applicant's interest and it is not restricted to a rigid *res judicata* test. Hence, the *stare decisis* effect might be sufficient to satisfy the requirement. It is said that where, as here, the case is of first impression, the *stare decisis* effect would be important.

Finally, the considerations for requiring an environmental impact statement will be relatively the same in respect to the issuance of a uranium mining license in every instance. Hence, to say that it can be repeatedly litigated is not an answer, for the chance of getting a contrary result in a case which is substantially similar on its facts to one previously adjudicated seems remote.

We are of the opinion, therefore, that appellants have satisfied the impairment criterion.

## III

The final question is whether the trial court was correct in its conclusion that United Nuclear would adequately represent Kerr-McGee and the American Mining Congress.

The finding and conclusion was that the representation would be adequate because United Nuclear, a fellow member of the industry, has interests which were the same as those of the appellants and possessed the same level of knowledge and experience with the ability and willingness to pursue the matter and could adequately represent Kerr-McGee and the members of the American Mining Congress....

United Nuclear is situated somewhat differently in this case than are the other members of the industry since it has been granted its license. From this it is urged by Kerr-McGee that United Nuclear may be ready to compromise the case by obtaining a mere declaration that while environmental impact statements should be issued, this requirement need be prospective only, whereby it would not affect them. While we see this as a remote possibility, we gravely doubt that United Nuclear would opt for such a result. It is true, however, that United Nuclear has a defense of laches that is not available to Kerr-McGee or the others.

7A C. Wright & A. Miller, *Federal Practice & Procedure*, §1909, at 524 (1972), says:

[I]f [an applicant's] interest is similar to, but not identical with, that of one of the parties, a discriminating judgment is required on the circumstances of the particular case, but he ordinarily should be allowed to intervene unless it is clear that the party will provide adequate representation for the absentee.

While the interest of the two applicants may appear similar, there is no way to say that there is no possibility that they will not be different and the possibility of divergence of interest need not be great in order to satisfy the burden of the applicants under *National Farm Lines*.

There are other reasons for allowing intervention. There is some value in having the parties before the court so that they will be bound by the result. American Mining Congress represents a number of companies having a wide variety of interests. This can, therefore, provide a useful supplement to the defense of the case. The same can be said of Kerr-McGee.

The trial court was concerned that the addition of these movants would make the litigation unwieldy. If the intervenors are limited to this group, unwieldiness does not become a problem which the trial court cannot control. It does not appear that there would be a need for additional parties in view of the presence of the American Mining Congress. While we do not express an opinion on the possibilities of further additions, we wish to make clear that the present holdings that the two applicants should be allowed to intervene does not say that others should be added....

The order of the district court is reversed and the cause is remanded with instructions to the trial court to grant the appellants, Kerr-McGee's and American Mining Congress', motions to intervene.

1. Focus on each of the intervenors separately.
  - a. United Nuclear’s motion to intervene was granted without objection. Why? Analyze United Nuclear’s position and explain why it met the criteria of Rule 24.
  - b. Kerr-McGee sought to intervene as of right; the trial court denied the motion. Why? How does the Court of Appeals deal with the trial court’s reason for denying Kerr-McGee’s motion?
  - c. How was the position of the American Mining Congress different from that of any of the other intervenors? How does its case for intervention compare to that of Kerr-McGee?
  - d. Construct an argument that the correct result on these facts was to grant intervention to United Nuclear and the American Mining Congress, but to deny Kerr-McGee’s motion.
  - e. The court holds that both of the would-be intervenors met the criteria of Rule 24(a). Suppose it had come to a different decision. It would then have had to review the decision of the trial court to deny the intervenors permissive intervention under Rule 24(b). Explain why it is likely that the appellate court would have affirmed the trial court’s denial of permissive intervention.
2. Rule 24 applies not only to competing claimants to property but, as *Natural Resources Defense Council* indicates, goes far beyond such a situation. How far?
  - a. Assume *A* and *B* were both injured in a fireworks display held at Memorial Stadium. *A* sues Memorial Stadium and alleges that the stadium was negligent in handling the fireworks, and, in the alternative, that the fireworks display was an extrahazardous activity for which the stadium has absolute liability. *B* seeks to intervene, claiming liability on similar grounds and asserting, as her “interest,” her hope to establish a favorable precedent. Intervention will be denied; the mere interest in favorable precedent cannot be the basis for intervention.
  - b. Plaintiff sues Auto Manufacturer, claiming that a defective design led to her injury. Substantial discovery occurs, followed by a settlement agreement that includes a provision requiring that the materials uncovered by plaintiff in discovery remain confidential. Sixteen persons, each claiming injuries in unrelated accidents involving the same design feature, seek to intervene to challenge the protective order that is part of the settlement. See *Jochims v. Isuzu Motors, Ltd.*, 148 F.R.D. 624 (S.D. Iowa 1993) (permissive intervention granted for limited purpose of challenging motion for protective order).
3. Consider the relationship between Rule 19 and Rule 24. The texts of the two Rules closely resemble each other; more fundamentally, the two Rules address similar issues, Rule 19 from the viewpoint of those already in the lawsuit, Rule 24 from that of those outside it.
  - a. How should a court address the problem that arises when someone who might have been joined—but was not—and might have intervened—but did not—now complains of harm suffered from the judgment entered without her participation?
  - b. Occasionally, courts have hinted that knowledge of a pending action in which one could intervene would suffice to make the judgment binding on such a person, even though she had not in fact intervened. *Helzberg’s Diamond Shops*, supra [page 817](#), has language so suggesting. In *Provident Tradesmens Bank & Trust*, 390 U.S. 101, 114 (1968), the Court remarked:

[I]t might be argued that [a certain nonparty] should be bound by the previous decision because, although technically a nonparty, he had purposely bypassed an adequate opportunity to intervene. We do not now decide whether such an argument would be correct....

*Parklane Hosiery v. Shore*, supra [page 754](#), contained a similar hint, involving not intervention but the failure to join a prior action. Explaining why it was prepared to allow nonmutual-issue preclusion, the *Parklane* Court noted:

The application of offensive collateral estoppel will not here reward a private plaintiff who could have joined in the previous action, since the respondent probably could not have joined in the injunctive action brought by the SEC even had he so desired.

439 U.S. at 331.

In spite of these hints, neither *Provident Tradesmens* nor *Parklane* decided squarely whether one could bind parties who had knowledge of a suit in which their interests were at stake in a lawsuit but who failed to intervene. The next case does so.

**Martin v. Wilks**  
490 U.S. 755 (1989)

**Chief Justice REHNQUIST delivered the opinion of the Court....**

The litigation [that gave rise to the present lawsuit] began in 1974, when the Ensley Branch of the NAACP and seven black individuals filed separate class-action complaints against the City [of Birmingham] and the Board [that made hiring decisions for public employees]. They alleged that both had engaged in racially discriminatory hiring and promotion practices in various public service jobs in violation of Title VII of the Civil Rights Act of 1964 and other federal law. After a bench trial on some issues, but before judgment, the parties entered into two consent decrees, one between the black individuals and the City and the other between them and the Board. These proposed decrees set forth an extensive remedial scheme, including long-term and interim annual goals for the hiring of blacks as firefighters. The decrees also provided for goals for promotion of blacks within the department. The District Court entered an order provisionally approving the decrees and directing publication of notice of the upcoming fairness hearings. Notice of the hearings, with a reference to the general nature of the decrees, was published in two local newspapers. At that hearing, the Birmingham Firefighters Association (BFA) appeared and filed objections as amicus curiae. After the hearing, but before final approval of the decrees, the BFA and two of its members also moved to intervene on the ground that the decrees would adversely affect their rights. The District Court denied the motions as untimely and approved the decrees. Seven white firefighters, all members of the BFA, then filed a complaint against the City and the Board seeking injunctive relief against enforcement of the decrees. The seven argued that the decrees would operate to illegally discriminate against them; the District Court denied relief....

A new group of white firefighters, the *Wilks* respondents, then brought suit against the City and the Board in District Court. They too alleged that, because of their race, they were being denied promotions in favor of less qualified blacks in violation of federal law. The Board and the City admitted to making race conscious employment decisions, but argued the decisions were unassailable because they were made pursuant to the consent decrees. A group of black individuals, the *Martin* petitioners, were allowed to intervene in their individual capacities to defend the decrees.

The defendants moved to dismiss the reverse discrimination cases as impermissible collateral attacks on the consent decrees....After trial the District Court granted the motion to dismiss....

On appeal, the Eleventh Circuit reversed. It held that “[b]ecause...[the *Wilks* respondents] were neither parties nor privies to the consent decrees,...their independent claims of unlawful discrimination are not precluded.”...

We granted certiorari and now affirm the Eleventh Circuit’s judgment. All agree that “[i]t is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.” *Hansberry v. Lee*, 311 U.S. 32, 40 (1940) [see infra [page 842](#)]. This rule is part of our “deep-rooted historic tradition that everyone should have his own day in court.” 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* §4449, p. 417 (1981) (18 Wright). A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings.<sup>2</sup> Petitioners argue that, because respondents failed to timely intervene in the initial proceedings, their current challenge to actions taken under the consent decree constitutes an impermissible “collateral attack.” They argue that respondents were aware that the underlying suit might affect them and if they chose to pass up an opportunity to intervene, they should not be permitted to later litigate the issues in a new action. The position has sufficient appeal to have commanded the approval of the great majority of the Federal Courts of Appeals, but we agree with the contrary view expressed by the Court of Appeals for the Eleventh Circuit in this case.

We begin with the words of Justice Brandeis in *Chase National Bank v. Norwalk*, 291 U.S. 431 (1934):

The law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger....Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights.

*Id.* at 441.

While these words were written before the adoption of the Federal Rules of Civil Procedure, we think the Rules incorporate the same principle; a party seeking a judgment binding on another cannot obligate that person to intervene; he must be joined....Against the background of permissive intervention set forth in *Chase National Bank*, the drafters cast Rule 24, governing intervention, in permissive terms. See Fed. Rule Civ. Proc. 24(a) (intervention as of right) (“[on timely motion, the court must permit anyone to intervene]”); Fed. Rule Civ. Proc. 24(b) (permissive intervention) (“[on timely motion, the court may permit anyone to intervene]”).<sup>\*</sup> They determined that the concern for finality and completeness of judgments would be “better [served] by mandatory joinder procedures.” 18 Wright §4452, p. 453. Accordingly, Rule 19(a) provides for mandatory joinder in circumstances where a judgment rendered in the absence of a person may “leave [an existing party] subject to a substantial risk of incurring...inconsistent obligations....” Rule 19(b) sets forth the factors to be considered by a court in deciding whether to allow an action to proceed in the absence of an

interested party.

Joinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree.<sup>6</sup> The parties to a lawsuit presumably know better than anyone else the nature and scope of relief sought in the action, and at whose expense such relief might be granted. It makes sense, therefore, to place on them a burden of bringing in additional parties where such a step is indicated, rather than placing on potential additional parties a duty to intervene when they acquire knowledge of the lawsuit. The linchpin of the “impermissible collateral attack” doctrine—the attribution of preclusive effect to a failure to intervene—is therefore quite inconsistent with Rule 19 and Rule 24....

Petitioners...rely on our decision in *Provident Tradesmans Bank*, supra, as authority for the view which they espouse. In that case we discussed Rule 19 shortly after parts of it had been substantially revised, but we expressly left open the question of whether preclusive effect might be attributed to a failure to intervene.

Petitioners contend that a different result should be reached because the need to join affected parties will be burdensome and ultimately discouraging to civil rights litigation. Potential adverse claimants may be numerous and difficult to identify; if they are not joined, the possibility for inconsistent judgments exists. Judicial resources will be needlessly consumed in relitigation of the same question.

Even if we were wholly persuaded by these arguments as a matter of policy, acceptance of them would require a rewriting rather than an interpretation of the relevant Rules. But we are not persuaded that their acceptance would lead to a more satisfactory method of handling cases like this one. It must be remembered that the alternatives are a duty to intervene based on knowledge, on the one hand, and some form of joinder, as the Rules presently provide, on the other. No one can seriously contend that an employer might successfully defend against a Title VII claim by one group of employees on the ground that its actions were required by an earlier decree entered in a suit brought against it by another, if the later group did not have adequate notice or knowledge of the earlier suit.

The difficulties petitioners foresee in identifying those who could be adversely affected by a decree granting broad remedial relief are undoubtedly present, but they arise from the nature of the relief sought and not because of any choice between mandatory intervention and joinder. Rule 19’s provisions for joining interested parties are designed to accommodate the sort of complexities that may arise from a decree affecting numerous people in various ways. We doubt that a mandatory intervention rule would be any less awkward. As mentioned, plaintiffs who seek the aid of the courts to alter existing employment policies, or the employer who might be subject to conflicting decrees, are best able to bear the burden of designating those who would be adversely affected if plaintiffs prevail; these parties will generally have a better understanding of the scope of likely relief than employees who are not named but might be affected. Petitioners’ alternative does not eliminate the need for, or difficulty of, identifying persons who, because of their interests, should be included in a lawsuit. It merely shifts that responsibility to less able shoulders.

Nor do we think that the system of joinder called for by the Rules is likely to produce more relitigation of issues than the converse rule. The breadth of a lawsuit and concomitant relief may be at least partially shaped in advance through Rule 19 to avoid needless clashes with future litigation. And even under a regime of mandatory intervention, parties who did not have adequate knowledge of the suit would relitigate issues. Additional questions about the adequacy and timeliness of knowledge would inevitably crop up. We think that the system of joinder presently contemplated by the Rules best serves the many interests involved in the run of litigated cases, including cases like the present one....

Justice STEVENS, with whom Justice BRENNAN, Justice MARSHALL, and Justice BLACKMUN join, dissenting.

As a matter of a law there is a vast difference between persons who are actual parties to litigation and persons who merely have the kind of interest that may as a practical matter be impaired by the outcome of a case. Persons in the first category have a right to participate in a trial and to appeal from an adverse judgment; depending on whether they win or lose, their legal rights may be enhanced or impaired. Persons in the latter category have a right to intervene in the action in a timely fashion, or they may be joined as parties against their will. But if they remain on the sidelines, they may be harmed as a practical matter even though their legal rights are unaffected. One of the disadvantages of sideline-sitting is that the bystander has no right to appeal from a judgment no matter how harmful it may be.

In this case the Court quite rightly concludes that the white firefighters who brought the second series of Title VII cases could not be deprived of their legal rights in the first series of cases because they had neither intervened nor been joined as parties. The consent decrees obviously could not deprive them of any contractual rights, such as seniority or accrued vacation pay, or of any other legal rights, such as the right to have their employer comply with federal statutes like Title VII. There is no reason, however, why the consent

decrees might not produce changes in conditions at the white firefighters' place of employment that, as a practical matter, may have a serious effect on their opportunities for employment or promotion even though they are not bound by the decrees in any legal sense. The fact that one of the effects of a decree is to curtail the job opportunities of nonparties does not mean that the nonparties have been deprived of legal rights or that they have standing to appeal from that decree without becoming parties....

## PERSPECTIVES

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*Martin v. Wilks* takes on special significance due to its location. Birmingham, Alabama was the site of dramatic struggles in the 1960s as the city resisted desegregation. At one point, police dogs were turned on unarmed demonstrators. At another point, the city's fire department was deployed to turn fire hoses on demonstrators, an incident captured in the adjacent picture. As you can imagine, that gave the continuing legal efforts to integrate that fire department deep salience.



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### Notes and Problems

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1. Consider both the sequence of litigative events and the identity of the parties involved. The basic lawsuit involved one "entity plaintiff" (the NAACP) and seven individual plaintiffs suing a pair of entity defendants (the city and the county personnel board, which was responsible for staffing firehouse positions).
  - a. The plaintiffs and defendants engaged in considerable litigation—including a trial of some issues—before arriving at a settlement.
  - b. There were then three separate efforts to challenge the settlement, each by a slightly different set of individual and entity parties. Be sure you understand which groups took which actions at which stages of the

lawsuit. Why, as the Court saw matters, did none of these prior challenges bind the *Wilks* respondents from bringing their claims?

2. Put yourself in the position of the original parties. They have fought each other to exhaustion and have arrived at a settlement that they are prepared to live with. Now comes a group not previously involved in the litigation—but standing on its sidelines—who contend that the terms of the settlement disadvantage them in an unlawful way.
  - a. Explain why the original parties to the suit would be unhappy about this development.
  - b. Describe the argument—ultimately rejected by the Court—that the original parties used to explain why the white firefighters should be bound by the settlement agreement, even though they had not participated in the lawsuit or in the settlement negotiations. Though it was rejected by the majority, this argument got four votes. Why?
3. *Wilks* can be understood as a question of who has the responsibility to ensure that the requisite interests are represented in the lawsuit. One view, rejected by the majority, is that the absentees have the burden of invoking Rule 24 to intervene if they have notice of the lawsuit. On this view the penalty for failing to intervene is that one must subsequently suffer under any unfavorable result. The other view, adopted in *Wilks*, is that those in the suit share with the court the responsibility for joining the absentees. On this view the penalty for failing to locate and join all absentee interests is that one must face the prospect of subsequent litigation when the absentees do assert their interests. As a matter of either good judicial administration or due process, is the choice between the two paths clear?
4. What is the source of law for the decision in *Wilks*? Is it an interpretation of Rule 19 or is it based on the Due Process Clause? The decision itself does not answer this question. Note, though, its import: If *Wilks* is based on the Due Process Clause, a statute purporting to overrule *Wilks* would be unconstitutional.
  - a. Congress apparently concluded that *Wilks* was not based on the Due Process Clause, because, after *Wilks*, Congress enacted and the President signed legislation aimed at, among other things, reversing the holding of the case. 42 U.S.C. §2000e2(n). The statute prohibits a collateral challenge to a consent decree in a civil rights case complaining of employment discrimination if the challenger is “a person who, prior to the entry of [the consent decree] had—(i) actual notice...of the proposed judgment...; and (ii) a reasonable opportunity to present objections to such judgment or order; or (iii)...a person whose interests were adequately represented” in the first action. Explain why, on the facts of *Wilks*, this statute would lead to a result different from that decision.
  - b. The legislation applies only to employment discrimination consent decrees. It would not apply, for example, to a school desegregation decree or an antitrust consent judgment that adversely affected nonparties. Is there something about employment discrimination litigation that led Congress to dictate a special procedural rule? Or did Congress, focused on overturning the holding of *Wilks*, overlook the application of its holding to other contexts?

## D. INTERPLEADER

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In discussing necessary parties, we looked briefly at a case in which a husband made a life insurance policy payable to “my wife.” Suppose the couple subsequently divorced, Husband remarried and later died. Suppose both wives claim the proceeds of the policy. If they bring separate suits on the policy, it is possible that, to the consternation of the insurance company, both will win. The same situation could occur if a bank held an account of a small business, whose members had a falling out. Suppose two competing claimants appear at the bank, each wanting to withdraw the entire account. In both cases, the “stakeholder”—the insurer or the bank—concedes that it owes the money—but it wants some way to bind everyone to an adjudication of the dispute. The stakeholder wants a procedure that will bind all claimants.

In the past, any possible resolution of the stakeholder’s dilemma had to overcome two difficulties: (1) the unavailability of an effective procedural device to join both claimants, and (2) possible jurisdictional and venue limitations. *Interpleader* provides a procedure by which a stakeholder—often a bank or insurer—can require the competing claimants to litigate their rights to the fund or property in question. Rule 22 typifies such a joinder provision; note that it allows interpleader even if the stakeholder asserts some claim on the assets itself—as might be the case if a bank wanted to reduce the balance of the account by the amount of an unpaid loan. Typically, the stakeholder invokes interpleader, joining the claimants as parties.

Such a proceeding will, however, fail to yield a stable resolution of the dispute if the forum lacks jurisdiction over the claimants. As an illustration of the jurisdictional difficulties such limitations could pose, consider *New York Life Insurance Co. v. Dunlevy*, 241 U.S. 518 (1916). Father, in Pennsylvania, bought an insurance policy that

paid a lump sum amount after a set number of years. The sum came due, but Father and Daughter disagreed about whether he or she was entitled to the sum. One of Daughter's creditors brought suit in Pennsylvania. The insurer, knowing of the dispute between Father and Daughter, interpleaded Father, Daughter, and Creditor. The Pennsylvania court ruled that Father was entitled to the proceeds. Daughter, dissatisfied by this result, sued the insurer in California. Insurer contended that the Pennsylvania suit precluded Daughter's claim. Wrong, held the U.S. Supreme Court—because Pennsylvania had not acquired personal jurisdiction over Daughter, who lived in California. The insurer was thus liable—a second time—for the policy proceeds.

Congress responded to the procedural uncertainties and the jurisdictional issues presented in cases like *Dunlevy* by enacting the Federal Interpleader Act, codified at 28 U.S.C. §§1335, 1397, and 2361. This legislation accomplishes several tasks:

- The Interpleader Act broadens the circumstances in which interpleader is available, eliminating some restrictions that older equity doctrines had imposed. See §1335.
- The Act removes limitations on federal subject matter jurisdiction. How does it do this? See §1335(a).
- The Act permits nationwide service of process. See §2361. Thus, in *Dunlevy*, Daughter would be subject to the jurisdiction of the federal courts in Pennsylvania, which could thus resolve all the parties' conflicting claims.
- The Act expands venue provisions to permit venue where any claimant resides. See §1397.

Rule 22 closely resembles the Interpleader Act. But Rule 22 interpleaders are subject to the normal rules for subject matter jurisdiction (diversity between all plaintiffs and all defendants); personal jurisdiction (jurisdiction within the state); and venue (residency of all defendants, or where the claim arises). In practice, Rule 22 interpleader is used when the stakeholder is a citizen of one state and all claimants are citizens of a second state. In such a case, there is no jurisdiction under the Interpleader Act because no two claimants are of diverse citizenship. In such cases, however, the normal rules for jurisdiction and venue can be satisfied by an action in the state of all claimants.

The table below illustrates some differences between statutory interpleader and Rule 22 interpleader.

<i>Issue</i>	<i>“Statutory” Interpleader</i>	<i>“Rule” Interpleader</i>
Federal Subject Matter Jurisdiction —Diversity	Minimal diversity, determined as between claimants	Complete diversity, determined as between stakeholder and claimants
—Amount	\$500	\$75,000+
Personal Jurisdiction	Nationwide service of process	Must meet ordinary jurisdiction rules; contacts with claimants required; service under Rule 4
Venue	Residence of one or more claimants	Ordinary venue rules under 28 U.S.C. §1391
Injunctions (typically to freeze assets or require their delivery to a claimant)	Specifically provided for interpleader cases in 28 U.S.C. §2361	No specific basis; courts have used 28 U.S.C. §2361 (“where necessary in aid of . . . jurisdiction”)

The next case is a straightforward illustration of interpleader and the different jurisdictional hoops one must pass through to bring a claim pursuant to the statute and Rule.

**Southern Farm Bureau Life Ins. Co. v. Davis**

2010 WL 1245024 (W.D. La. 2010)

**MINALDI, J.**

Presently before the court is a Motion to Dismiss filed by the defendant, Robyn Little Davis (“Ms. Davis”). The motion is opposed by the plaintiff, Southern Farm Bureau Life Insurance Company (“Farm Bureau”). For the reasons stated herein, the Motion to Dismiss will be denied.

**Facts**

The plaintiff, Farm Bureau, filed this interpleader action naming as defendant, Ms. Davis and the unopened succession [meaning the as-yet unknown heirs] of her husband, Mr. Davis. At issue is a life insurance policy with a face value of \$95,000.00 insuring the life of Mr. Davis.

The named beneficiary of the policy, Ms. Davis, has been arrested and charged with killing Mr. Davis. Pursuant to Louisiana law, a beneficiary of the life insurance policy cannot recover proceeds if she is deemed

to have been criminally responsible for the death, disablement, or injury of the insured, or judicially determined to have participated in the intentional, unjustified killing of the insured. If a primary beneficiary is disqualified to receive the benefits of the policy and there is no contingent beneficiary, the life insurance proceeds are to be paid to the estate of the insured. La. R.S. 22:901.

### Law

...In any case in federal court, federal subject matter jurisdiction must be present before the court may properly consider the claim. *Cf. Richmond, Fredericksburg & Potomac R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991). Plaintiff initiated this interpleader action in order to fulfill its obligations under the insurance policy insuring the life of Mr. Davis and to be discharged from any future actions involving the policy. The concept of interpleader is that, where two or more persons are engaged in a dispute over some property, and the subject of that dispute is in the hands of a third party who is willing to give up the property, the third person is not obliged to incur the expense and risk of defending the action. Rather, the third party may give up the property and be relieved from further actions concerning the matter, leaving the court to resolve the dispute between the persons claiming an interest in the disputed property. *Cf. Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Fed. Prac. & Proc. Civ. 3d §1701, at 534; Selective Ins. Co. of America v. Norris*, 209 F. Supp. 2d 580, 581-582 (E.D.N.C. 2002).

In the instant case, the plaintiff is the third party willing to give up the subject of the dispute, namely the \$95,000 insurance policy amount. The defendants are those persons with a presumed interest in the property held by the plaintiff. Through this interpleader action, the plaintiff is surrendering the value of the policy to the court in order to be relieved of all its obligations under the policy.

To determine whether there is jurisdiction, this court must examine the two central interpleader provisions, statutory interpleader, 28 U.S.C. §1335, and rule interpleader, Fed. R. Civ. P. 22. While the concept of interpleader under both statutory and rule interpleader is similar, their jurisdictional differences are significant. “The central distinction between statutory interpleader and rule interpleader is the basis for a federal court’s subject matter jurisdiction under each.” *Commercial Union Ins. Co. v. United States*, 999 F.2d 581, 584 (D.C. Cir. 1993).

Statutory interpleader under 28 U.S.C. §1335 confers on federal courts jurisdiction over certain interpleader claims. §1335 declares that “district courts shall have original jurisdiction of any civil action of interpleader,” as long as the amount in controversy equals \$500 or more and the *claimants* are at least minimally diverse. 28 U.S.C. §1335(a). In other words, assuming the requisite jurisdictional amount is met, statutory interpleader still requires that two or more of the adverse claimants to a contested fund be “of diverse citizenship as defined in section 1332 of this title.” 28 U.S.C. §1335(a)(1). In the present case, although the amount in controversy exceeds \$500, there is no diversity between the defendant claimants. Therefore, there is no jurisdiction under statutory interpleader.

Rule interpleader is a procedural device that does not alone confer federal jurisdiction over a claim. An interpleader brought under Rule 22 must fall within one of the general statutory grants of federal jurisdiction. This may include diversity jurisdiction, provided that the complete diversity and amount in controversy requirements are met. In the instant case, the amount in controversy is over \$75,000.00, and there is diversity between the plaintiff and the defendants. Because the requirements for general diversity jurisdiction are satisfied, the court has jurisdiction over plaintiff’s interpleader action under Rule 22.

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### Notes and Problems

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1. First, understand the underlying action. Why did the insurance company file this interpleader action? What does it want? Who are the potential claimants of the insurance policy proceeds?
2. Now, make sure that you understand the different requirements of statutory interpleader and rule interpleader. The trial concludes that it has jurisdiction over the case under Rule 22 but not §1335. Why?
3. As the opinion notes, interpleader is one of the instances in which a statute has based diversity jurisdiction on minimal diversity rather than the complete diversity required under §1332(a). As you will see in the next section, the class action provides another instance. This minimal interpretation of diversity has been held to be constitutional. *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523 (1967).

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## E. CLASS ACTIONS

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## 1. Introduction

A class action permits, in the words of Rule 23, one or more parties to “sue or be sued as representative parties on behalf” of all those similarly situated. The underlying concept is simple: If many persons find themselves in the same situation, advantages may flow from aggregating their many lawsuits into one. But one side’s advantage may be another’s nightmare as it now faces numerous similarly situated persons rather than a single plaintiff. In practice, the class action has stimulated comments as favorable as “one of the most socially useful remedies in history” and as negative as “legalized blackmail.”<sup>3</sup> Technically a joinder device, the class action has a potential effect on the judicial system and the substantive law unmatched by other joinder devices discussed in this chapter. The class action repays study: It raises some of the most challenging procedural issues on the current legal scene, and it raises questions that lie close to the heart of civil litigation—the nature of representation and the purpose of a lawsuit.

Although one can trace collective litigation into the mists of the common law, the modern class action traces its immediate pedigree only to 1966. See generally Stephen C. Yeazell, *From Medieval Group Litigation to the Modern Class Action* (Yale Univ. Press 1987). The revision of Rule 23 in that year sparked a new interest in and widespread use of class actions, prompting reaction of the type quoted above. Class actions clearly differ from the normal litigation model in which an individual plaintiff seeks redress from an individual defendant. The difference is not merely quantitative. For reasons that will become clear in the following materials, the ability to aggregate large numbers of litigants tends to shift the focus from the client to the lawyer, from damages to attorneys’ fees, and from litigation to settlement.

The effect of class actions on the substantive law is subtler. It is not that the availability of class actions literally changes the statutes or the content of the case law, but, rather, that rules devised for one-on-one litigation have different effects in the context of mass litigation. As you saw in [Chapter 5](#)’s discussion of litigation finance, the legal system makes some claims and defenses uneconomical to bring or defend. If your cell phone carrier overcharges you by \$2, you might call or e-mail to complain. But if the carrier does not reverse the charge, few of us would bring a lawsuit: The amount at stake would not begin to justify the expense of a suit. By the same token, if—defying economic rationality—you did sue, the carrier would likely settle; the suit would not be worth defending. Now suppose the carrier made similar overcharges to a million customers. If they could join together in a single lawsuit, the economics of litigation would change dramatically: The suit is worth bringing, and it’s worth defending. Is that a good thing? That question, in various forms, poses the debate surrounding the class action. When the availability of class actions increases the number of claims that are brought rather than simply facilitating the bringing of large numbers of claims that would have been brought separately, the impact of the underlying substantive law may be greatly heightened. Some have argued that this effect is a regrettable aspect of the rule. Others have argued that the increased potential for deterring wrongdoers and forcing wider compliance with the law is a powerful argument in favor of the device.

Alongside the debate about whether the class action is a good thing stands a second issue—that of legal representation. In most of the litigation you have thus far studied, someone hires a lawyer (or finds one to take the case on a contingent basis). As the lawyer conducts the suit, rules of professional responsibility require her to let her client make major litigation decisions—whether to sue and whether and on what terms to settle being among the most important. In class actions, however, there is no client in the ordinary sense of the word. There is a class of people—say cell phone users from the hypothetical case above—and there are representative parties (a few of those who have been overcharged, who are identified as plaintiffs by name in the complaint). But these representatives have no legal authority to make litigation decisions on behalf of the million members of the class. That means that the class’s lawyer stands in a position of enormous responsibility: She must act in the best interests of the class without being able to discuss the case with them. Increasing that burden is the circumstance that the lawyer will often be negotiating her own fee at the same time that she is negotiating the terms of the settlement on behalf of the class. This very difficult professional situation provides a second focus for the debate over the class action, as you will see.

We start with a pair of cases that provide the constitutional grounding for the modern class action; from there we move to the current statutory requirements and problems of settlement and representation.

## 2. The Class Action and the Constitution

Above the controversy surrounding the class action stand a pair of constitutional arguments that both enable and limit the procedure. Both flow from the Due Process Clause. One argument inquires whether a party can be bound by litigation to which he is not a party. The other asks whether due process requires certain procedures within the class action in order for it to be a valid adjudication of the absentees’ rights.

### a. Representative Adequacy

Fundamental to the class action is the idea that a suit, conducted by a representative on behalf of a number of persons who are not formal parties, may nevertheless bind the entire represented class. In that respect it represents a departure from the ordinary proposition that one may be bound only by litigation to which one is a party. One might cite any number of cases for this proposition, including *Martin v. Wilks*, supra [page 830](#). The next case works out the conditions under which such a representative may bind those who are not parties. It limits the class action, but at the same time it gives the class action, thus limited, great potential power.

## PERSPECTIVES

A biography of the named party's daughter sets the stage, while demonstrating that one person's "legal technicality" can be another's leading constitutional case:

[Lorraine Hansberry] was the youngest of Nannie Perry Hansberry and Carl Augustus Hansberry's four children. Her father founded Lake Street Bank, one of the first banks for blacks in Chicago[,] and ran a successful real estate business....

Despite their middle-class status, the Hansberrys were subject to segregation. When she was eight years old, Hansberry's family deliberately attempted to move into a restricted neighborhood. Restrictive covenants, in which white property owners agreed not to sell to blacks, created a ghetto known as the "Black Belt" on Chicago's South Side. Carl Hansberry, with the help of Harry H. Pace, president of the Supreme Liberty Life Insurance Company and several white realtors, secretly bought property at 413 East Sixtieth Street and 6140 South Rhodes Avenue. The Hansberrys moved into the house on Rhodes Avenue in May 1937. The family was threatened by a white mob, which threw a brick through a window, narrowly missing Lorraine. The Supreme Court of Illinois upheld the legality of the restrictive covenant and forced the family to leave the house. The U.S. Supreme Court reversed the decision on a legal technicality. The result was the opening of thirty blocks of South Side Chicago to African Americans....

In *A Raisin in the Sun*, the first play written by an African American to be produced on Broadway, [Lorraine Hansberry] drew upon the lives of the working class people who rented from her father and who went to school with her on Chicago's South Side....

Chicago Public Library, Lorraine Hansberry: A Brief Biography, available at [www.chipublic.org/003cpl/oboc/raisin/biography.html](http://www.chipublic.org/003cpl/oboc/raisin/biography.html).



**Hansberry v. Lee**

Mr. Justice STONE delivered the opinion of the Court.

The question is whether the Supreme Court of Illinois, by its adjudication that petitioners in this case are bound to a judgment rendered in an earlier litigation to which they were not parties, has deprived them of the due process of law guaranteed by the Fourteenth Amendment....

[The case was decided before *Shelley v. Kraemer*, 334 U.S. 1 (1948), holding racially restrictive covenants unenforceable. The Hansberrys, a black family, bought a house in an area of Chicago allegedly covered by a racially restrictive covenant. The covenant said it did not take effect unless signed by owners of 95 percent of the frontage. In fact, the signers represented only 54 percent. Lee brought an action to enjoin breach of the covenant, naming as defendants both the Hansberrys, who had purchased a home allegedly in violation of the covenant, and the people from whom the Hansberrys had bought the property. One of the Hansberrys' defenses was that the covenant was unenforceable because not enough owners had signed it. Plaintiff countered by referring to *Burke v. Kleiman*, an earlier suit to enforce the same covenant. In *Burke*, a property owner "on behalf of herself and other property owners in like situation" sued four named individuals allegedly in violation of the covenant. *Burke* was litigated in the Illinois courts, where the parties had stipulated (falsely) that the requisite 95 percent had signed, and the earlier court had adopted that stipulation in its findings. *Burke* upheld the covenant. The Supreme Court of Illinois in the present case determined that *Burke* had been a class action, that the Hansberrys and their vendors were members of the class of plaintiffs in *Burke*, and that they were therefore bound by the findings in the previous action even though those findings were factually erroneous.]

To the defense that the agreement had never become effective because owners of 95 per cent of the frontage had not signed it, respondents pleaded that that issue was res judicata by the decree in an earlier suit. To this petitioners pleaded, by way of rejoinder, that they were not parties to that suit or bound by its decree, and that denial of their right to litigate, in the present suit, the issue of performance of the condition precedent to the validity of the agreement would be a denial of due process of law guaranteed by the Fourteenth Amendment. It does not appear, nor is it contended that any of petitioners is the successor in interest to or in privity with any of the parties in the earlier suit.

The [state]...court, after a trial on the merits, found that owners of only about 54 per cent of the frontage had signed the agreement, and that the only support of the judgment in the *Burke* case was a false and fraudulent stipulation of the parties that owners of 95 per cent had signed. But it ruled that the issue of performance of the condition precedent to the validity of the agreement was res judicata as alleged and entered a decree for respondents....

From this the Supreme Court of Illinois concluded in the present case that *Burke v. Kleiman* was a "class" or "representative" suit, and that in such a suit, "where the remedy is pursued by a plaintiff who has the right to represent the class to which he belongs, other members of the class are bound by the results in the case unless it is reversed or set aside on direct proceedings"; that petitioners in the present suit were members of the class represented by the plaintiffs in the earlier suit and consequently were bound by its decree....

State courts are free to attach such descriptive labels to litigations before them as they may choose and to attribute to them such consequences as they think appropriate under state constitutions and laws, subject only to the requirements of the Constitution of the United States. But when the judgment of a state court, ascribing to the judgment of another court the binding force and effect of res judicata, is challenged for want of due process it becomes the duty of this Court to examine the course of procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes.

It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. *Pennoyer v. Neff*. A judgment rendered in such circumstances is not entitled to the full faith and credit which the Constitution and statutes of the United States prescribe, *Pennoyer v. Neff*; and judicial action enforcing it against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments require.

To these general rules there is a recognized exception that, to an extent not precisely defined by judicial opinion, the judgment in a "class" or "representative" suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it.

The class suit was an invention of equity to enable it to proceed to a decree in suits where the number of those interested in the subject of the litigation is so great that their joinder as parties in conformity to the usual rules of procedure is impracticable. Courts are not infrequently called upon to proceed with causes in which the number of those interested in the litigation is so great as to make difficult or impossible the joinder of all because some are not within the jurisdiction or because their whereabouts is unknown or where if all

were made parties to the suit its continued abatement by the death of some would prevent or unduly delay a decree. In such cases where the interests of those not joined are of the same class as the interests of those who are, and where it is considered that the latter fairly represent the former in the prosecution of the litigation of the issues in which all have a common interest, the court will proceed to a decree....

[T]here is scope within the framework of the Constitution for holding in appropriate cases that a judgment rendered in a class suit is *res judicata* as to members of the class who are not formal parties to the suit. Here, as elsewhere, the Fourteenth Amendment does not compel state courts or legislatures to adopt any particular rule for establishing the conclusiveness of judgments in class suits, nor does it compel the adoption of the particular rules thought by this Court to be appropriate for the federal courts. With a proper regard for divergent local institutions and interests, this Court is justified in saying that there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it.

It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present, or where they actually participate in the conduct of the litigation in which members of the class are present as parties, or where the interest of the members of the class, some of whom are present as parties, is joint, or where for any other reason the relationship between the parties present and those who are absent is such as legally to entitle the former to stand in judgment for the latter.

In all such cases, so far as it can be said that the members of the class who are present are, by generally recognized rules of law, entitled to stand in judgment for those who are not, we may assume for present purposes that such procedure affords a protection to the parties who are represented, though absent, which would satisfy the requirements of due process and full faith and credit. Nor do we find it necessary for the decision of this case to say that, when the only circumstance defining the class is that the determination of the rights of its members turns upon a single issue of fact or law, a state could not constitutionally adopt a procedure whereby some of the members of the class could stand in judgment for all, provided that the procedure were so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue. We decide only that the procedure and the course of litigation sustained here by the plea of *res judicata* do not satisfy these requirements.

The restrictive agreement did not purport to create a joint obligation or liability. If valid and effective its promises were the several obligations of the signers and those claiming under them. The promises ran severally to every other signer. It is plain that in such circumstances all those alleged to be bound by the agreement would not constitute a single class in any litigation brought to enforce it. Those who sought to secure its benefits by enforcing it could not be said to be in the same class with or represent those whose interest was in resisting performance, for the agreement by its terms imposes obligations and confers rights on the owner of each plot of land who signs it. If those who thus seek to secure the benefits of the agreement were rightly regarded by the state Supreme Court as constituting a class, it is evident that those signers or their successors who are interested in challenging the validity of the agreement and resisting its performance are not of the same class in the sense that their interests are identical so that any group who had elected to enforce rights conferred by the agreement could be said to be acting in the interest of any others who were free to deny its obligation.

Because of the dual and potentially conflicting interests of those who are putative parties to the agreement in compelling or resisting its performance, it is impossible to say, solely because they are parties to it, that any two of them are of the same class. Nor without more, and with the due regard for the protection of the rights of absent parties which due process exacts, can some be permitted to stand in judgment for all.

It is one thing to say that some members of a class may represent other members in a litigation where the sole and common interest of the class in the litigation, is either to assert a common right or to challenge an asserted obligation. It is quite another to hold that all those who are free alternatively either to assert rights or to challenge them are of a single class, so that any group, merely because it is of the class so constituted, may be deemed adequately to represent any others of the class in litigating their interests in either alternative. Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires. The doctrine of representation of absent parties in a class suit has not hitherto been thought to go so far. Apart from the opportunities it would afford for the fraudulent and collusive sacrifice of the rights of absent parties, we think that the representation in this case no more satisfies the requirements of due process than a trial by a judicial officer who is in such situation that he may have an interest in the outcome of the litigation in conflict with that of the litigants.

The plaintiffs in the *Burke* case sought to compel performance of the agreement in behalf of themselves

and all others similarly situated. They did not designate the defendants in the suit as a class or seek any injunction or other relief against others than the named defendants, and the decree which was entered did not purport to bind others. In seeking to enforce the agreement the plaintiffs in that suit were not representing the petitioners here whose substantial interest is in resisting performance. The defendants in the first suit were not treated by the pleadings or decree as representing others or as foreclosing by their defense the rights of others; and, even though nominal defendants, it does not appear that their interest in defeating the contract outweighed their interest in establishing its validity. For a court in this situation to ascribe to either the plaintiffs or defendants the performance of such functions on behalf of petitioners here, is to attribute to them a power that it cannot be said that they had assumed to exercise, and a responsibility which, in view of their dual interests it does not appear that they could rightly discharge.

Reversed.

Mr. Justice MCREYNOLDS, Mr. Justice ROBERTS and Mr. Justice REED concur in the result.

### WHAT'S NEW HERE?

- The Supreme Court held that a member of a class could not be bound by a judgment involving the class unless that member was “adequately represented.”
- That holding has a negative and a positive implication. The negative: Because the Court held that Hansberry had not been adequately represented, he was not bound by the judgment in the purported class action.
- The positive: *If* one could construct a procedure that would result in adequate representation, a class member would be bound, even though she did not appear as a formal party to the lawsuit. (Scattered prior cases involving class-like equity suits had implied this, but it had never arisen as a sharply defined constitutional question.)

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### Notes and Problems

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1. How does the principle of (in)adequate representation apply to the facts of *Hansberry*?
  - a. Were the Hansberrys and their vendors “represented” in the earlier class action, according to the Illinois courts?
  - b. On which side? The only plausible class was a group of persons seeking to enforce the covenant against those who wished to buy or sell property free of racial restrictions. Surely the Hansberrys weren’t represented by this class.
  - c. If there had been a defendant class in *Burke v. Kleiman* as well—a class consisting of all those who challenged the validity of the covenant—one could at least begin to discuss whether the Hansberrys were members of that class. But the defendants in *Burke* were four named individuals who purported to represent only themselves. So, on its face, it represents massive confusion to describe *Burke v. Kleiman* as a class suit that bound the Hansberrys.
2. At this point, the U.S. Supreme Court had a problem. The Court doesn’t have jurisdiction to correct confusion, even massive confusion, within state courts unless that confusion falls within its jurisdiction. The only way the Court could reach the Illinois judgment was to find a constitutional error.
  - a. What was the constitutional error?
  - b. The *Hansberry* opinion tells us that the Illinois Supreme Court deemed the earlier action to have been a class action even though it was not conducted with any real attention to the interests of the “class” members. Couldn’t the result in *Hansberry* have rested on the much narrower ground that due process is denied when binding effect is given to a judgment in an action in which no attempt was made to consider the problems of representing a group of absentees? Isn’t the real problem that no one tried to represent the Hansberrys’ interests in the earlier suit?
3. In explaining why the prior litigation did not bind the Hansberrys, the Court contrasted appropriate class actions with inappropriate ones:

It is one thing to say that some members of a class may represent other members in a litigation where the sole and common interest of the class in the litigation is either to assert a common right or to challenge an asserted obligation. It is quite another to hold that all those who are free alternatively either to assert rights or to challenge them are of a single class, so that any group, merely because it is of the class so constituted, may be deemed adequately to represent any others of the class in litigating their interests in either alternative.

311 U.S. at 44-45.

In the context of the *Hansberry* case itself, the statement has special force. Professor Allen Kamp's research revealed that the Burke family, who sold to the Hansberrys, had been the leaders of the plaintiff class in the first lawsuit and then later changed their minds about the covenant:

The Court's words, "free to assert or deny" [rights] did not refer to an abstract possibility—that is exactly what had happened. The party enforcing the covenant in Burke was the wife of the person who had sold his house to Carl Hansberry... Although the language is so sweeping it could apply to and invalidate every class action, what actually happened in *Burke* and *Hansberry* was unique—that husband of the class representative in the first action had become a defendant and sought to subvert the goals of the plaintiff class.

Allen Kamp, The History Behind *Hansberry v. Lee*, 20 U.C. Davis L. Rev. 481, 497 (1987).

4. The problem of the binding power of a class action usually boils down to a question of fairness to parties who may not have been adequately represented. Although the court in the first action can help to ensure adequate representation of such parties, no ruling to that effect in the first action should bind them if in fact they were not adequately represented. Thus, *Hansberry* can also be cited for the proposition that a person asserted to be bound by former class litigation has the right collaterally to challenge the adequacy of the representation in the class suit.

*Gonzales v. Cassidy*, 474 F.2d 67 (5th Cir. 1973), nicely illustrated this point: An unnamed member of a class was not precluded from bringing a later action even though an earlier class action had failed. The named plaintiff in the earlier action had succeeded in securing relief for himself; at that point, the second court ruled, he had become an inadequate representative of the class by failing to appeal. Failure of the plaintiff in the second action to intervene in the first action for the purpose of appealing was held not to be fatal to his argument that the first decision should not bind him.

#### **b. Personal Jurisdiction**

*Hansberry* tells us that for a class action to bind absentees the representation of the class must be adequate. Does due process place further constraints on the operation of the class action?

### **Phillips Petroleum v. Shutts**

472 U.S. 797 (1985)

REHNQUIST, J.

[Phillips produces and sells natural gas. Some of this gas came from land leased from others. Phillips paid royalties on the gas it extracted from each parcel of leased land. The royalty was based on the price for which the gas was finally sold; increases in the selling price required approval by a federal agency. While regulatory approval was pending, however, Phillips sold the gas at higher prices but paid royalties only on the lower, already-approved prices, releasing the funds accumulated from the increased royalties only when the increase met with regulatory approval. Phillips's defense of this practice rested on the difficulty of obtaining rebates from the royalty owners if the price increases were not approved. Phillips paid the royalty owners no interest on the money it held (and invested) pending regulatory approval.

Plaintiff Irl Shutts filed a suit on behalf of himself and 33,000 small royalty owners, claiming that they were entitled to interest on the money during the period when Phillips was awaiting approval of its price increases. The average claim of the class members was \$100. Suit was filed in Kansas state court, which certified the action under a state provision substantially resembling Federal Rule of Civil Procedure 23.]

After the class was certified respondents provided each class member with notice through first-class mail. The notice described the action and informed each class member that he could appear in person or by counsel; otherwise each member would be represented by Shutts and the Andersons, the named plaintiffs. The notices also stated that class members would be included in the class and bound by the judgment unless they "opted out" of the lawsuit by executing and returning a "request for exclusion" that was included with the notice. The final class as certified contained 28,100 members; 3,400 had "opted out" of the class by returning the request for exclusion, and notice could not be delivered to another 1,500 members, who were also excluded. Less than 1,000 of the class members resided in Kansas. Only a minuscule amount, approximately one quarter of one percent, of the gas leases involved in the lawsuit were on Kansas land.

[After some procedural skirmishing over the class action issue, the case went to trial. On the merits, the Kansas court held “as a matter of Kansas equity law” that Phillips owed the royalty owners interest and entered judgment for the plaintiff class.]

Petitioner raised two principal claims in its appeal to the Supreme Court of Kansas. It first asserted that the Kansas trial court did not possess personal jurisdiction over absent plaintiff class members as required by *International Shoe Co. v. Washington* and similar cases. Related to this first claim was petitioner’s contention that the “opt-out” notice to absent class members, which forced them to return the request for exclusion in order to avoid the suit, was insufficient to bind class members who were not residents of Kansas or who did not possess “minimum contacts” with Kansas. Second, petitioner claimed that Kansas courts could not apply Kansas law to every claim in the dispute. The trial court should have looked to the laws of each State where the leases were located to determine, on the basis of conflict of laws principles, whether interest on the suspended royalties was recoverable, and at what rate....

Reduced to its essentials, petitioner’s argument is that unless out-of-state plaintiffs affirmatively consent, the Kansas courts may not exert jurisdiction over their claims. Petitioner claims that failure to execute and return the “request for exclusion” provided with the class notice cannot constitute consent of the out-of-state plaintiffs; thus Kansas courts may exercise jurisdiction over these plaintiffs only if the plaintiffs possess the sufficient “minimum contacts” with Kansas as that term is used in cases involving personal jurisdiction over out-of-state defendants. E.g., *International Shoe Co. v. Washington*, *Shaffer v. Heitner*, *World-Wide Volkswagen Corp. v. Woodson*. Since Kansas had no prelitigation contact with many of the plaintiffs and leases involved, petitioner claims that Kansas has exceeded its jurisdictional reach and thereby violated the due process rights of the absent plaintiffs....

Although the cases like *Shaffer* and *Woodson* which petitioner relies on for a minimum contacts requirement all dealt with out-of-state defendants or parties in the procedural posture of a defendant, petitioner claims that the same analysis must apply to absent class-action plaintiffs. In this regard petitioner correctly points out that a chose in action is a constitutionally recognized property interest possessed by each of the plaintiffs. *Mullane v. Central Hanover Bank & Trust Co.* An adverse judgment by Kansas courts in this case may extinguish the chose in action forever through *res judicata*. Such an adverse judgment, petitioner claims, would be every bit as onerous to an absent plaintiff as an adverse judgment on the merits would be to a defendant. Thus, the same due process protections should apply to absent plaintiffs: Kansas should not be able to exert jurisdiction over the plaintiffs’ claims unless the plaintiffs have sufficient minimum contacts with Kansas.

We think petitioner’s premise is in error. The burdens placed by a State upon an absent class-action plaintiff are not of the same order or magnitude as those it places upon an absent defendant. An out-of-state defendant summoned by a plaintiff is faced with the full powers of the forum State to render judgment *against* it. The defendant must generally hire counsel and travel to the forum to defend itself from the plaintiff’s claim, or suffer a default judgment. The defendant may be forced to participate in extended and often costly discovery, and will be forced to respond in damages or to comply with some other form of remedy imposed by the court should it lose the suit. The defendant may also face liability for court costs and attorney’s fees....

A class-action plaintiff, however, is in quite a different posture....

In sharp contrast to the predicament of a defendant haled into an out-of-state forum, the plaintiffs in this suit were not haled anywhere to defend themselves upon pain of a default judgment. As commentators have noted, from the plaintiffs’ point of view a class action resembles a “quasi-administrative proceeding, conducted by the judge.” A plaintiff class in Kansas and numerous other jurisdictions cannot first be certified unless the judge, with the aid of the named plaintiffs and defendant, conducts an inquiry into the common nature of the named plaintiffs and the absent plaintiffs’ claims, the adequacy of representation, the jurisdiction possessed over the class, and any other matters that will bear upon proper representation of the absent plaintiffs’ interest. See, e.g., Kan. Stat. Ann. §60-223 (1983), Fed. Rule Civ. Proc. 23. Unlike a defendant in a civil suit, a class-action plaintiff is not required to fend for himself. See Kan. Stat. Ann. §60-223(d) (1983). The court and named plaintiffs protect his interest. Indeed, the class-action defendant itself has a great interest in ensuring that the absent plaintiffs’ claims are properly before the forum....

The concern of the typical class-action rules for the absent plaintiffs is manifested in other ways. Most jurisdictions, including Kansas, require that a class action, once certified, may not be dismissed or compromised without the approval of the court. In many jurisdictions such as Kansas the court may amend the pleadings to ensure that all sections of the class are represented adequately. Kan. Stat. Ann. §60-223(d) (1983); see also e.g., Fed. Rule Civ. Proc. 23(d).

Besides this continuing solicitude for their rights, absent plaintiff class members are not subject to other burdens imposed upon defendants. They need not hire counsel or appear. They are almost never subject to

counterclaims or cross-claims, or liability for fees or costs.<sup>2</sup> Absent plaintiff class members are not subject to coercive or punitive remedies. Nor will an adverse judgment typically bind an absent plaintiff for any damages, although a valid adverse judgment may extinguish any of the plaintiff's claim which was litigated.

...

In most class actions an absent plaintiff is provided at least with an opportunity to "opt out" of the class, and if he takes advantage of that opportunity he is removed from the litigation entirely. This was true of the Kansas proceedings in this case....

Because States place fewer burdens upon absent class plaintiffs than they do upon absent defendants in nonclass suits, the Due Process Clause need not and does not afford the former as much protection from state-court jurisdiction as it does the latter. The Fourteenth Amendment does protect "persons," not "defendants," however, so absent plaintiffs as well as absent defendants are entitled to some protection from the jurisdiction of a forum State which seeks to adjudicate their claims. In this case we hold that a forum State may exercise jurisdiction over the claim of an absent class-action plaintiff, even though that plaintiff may not possess the minimum contacts with the forum which would support personal jurisdiction over a defendant. If the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law,<sup>3</sup> it must provide minimal procedural due process protection. The plaintiff must receive notice plus an opportunity, to be heard and participate in the litigation, whether in person or through counsel. The notice must be the best practicable, "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity, to present their objections." *Mullane*. The notice should describe the action and the plaintiffs' rights in it. Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court. Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members....

We think that the procedure followed by Kansas, where a fully descriptive notice is sent first-class mail to each class member, with an explanation of the right to "opt out," satisfies due process....

The Kansas courts applied Kansas contract and Kansas equity law to every claim in this case, notwithstanding that over 97 percent of the gas leases and some 97 percent of the plaintiffs in the case had no apparent connection to the State of Kansas except for this lawsuit. Petitioner protested that the Kansas courts should apply the laws of the States where the leases were located, or at least apply Texas and Oklahoma law because so many of the leases came from those States. The Kansas courts disregarded this contention and found petitioner liable for interest on the suspended royalties as a matter of Kansas law, and set the interest rates under Kansas equity principles....

...We make no effort to determine for ourselves which law must apply to the various transactions involved in this lawsuit, and we reaffirm our observation in *Allstate* that in many situations a state court may be free to apply one of several choices of law. But the constitutional limitations laid down in cases such as *Allstate* and *Home Insurance Co. v. Dick* must be respected even in a nationwide class action.

We therefore affirm the judgment of the Supreme Court of Kansas insofar as it upheld the jurisdiction of the Kansas courts over the plaintiff class members in this case, and reverse its judgment insofar as it held that Kansas law was applicable to all of the transactions which it sought to adjudicate. We remand the case to that Court for further proceedings not inconsistent with this opinion.

Justice POWELL took no part in the decision of this case.

Justice STEVENS [concurred with the majority opinion on the class action issue and dissented only on the choice of law question].

#### WHAT'S NEW HERE?

- Because Kansas had a class action rule that closely tracked Rule 23, and the defendant argued that the notice and opt-out provisions of that Rule denied the class members due process, *Shutts* had to decide whether those provisions were constitutional. Held: yes.
- In so doing, *Shutts* raised a question it didn't decide: Were the less rigorous notice provisions of Rule 23(b) (1) and (2) constitutional?

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## Notes and Problems

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1. Start by admiring the defendant's clever argument.
  - a. According to the defendant, how did the plaintiff class members in this case resemble defendants in ordinary cases?
  - b. According to the defendant, what implication did that resemblance have for the conduct of the class action?
  - c. How did the Supreme Court disagree with defendant?
2. Now turn to *Shutts*'s implications for our understanding of due process and the class action. At the time of *Shutts*, Rule 23 was silent about whether any notice was required for (b)(1) and (b)(2) classes. Rule 23(c)(2)(A) now provides that "the court may direct appropriate notice" to (b)(1) and (b)(2) classes. Does *Shutts* shed any light on when a court should require notice?
3. Suppose that Kansas, instead of excluding the 1,500 royalty owners who could not be located, had included them in the class. Would these unnotified absentees have been bound by the resulting judgment? *Shutts* suggests not, but recall the facts of *Mullane v. Central Hanover Bank & Trust* ([Chapter 2](#)). In that case, the Court held that a number of unnotified trust beneficiaries would be bound by a judgment because they had been adequately represented by those who were notified. If *Mullane* is good law, then notice to those who can't easily be located is not required. This is how lower courts and commentators have read *Shutts* and *Mullane*: So long as notice was reasonably calculated to reach class members, class members who did not actually receive notice of the action are still bound.
4. *Shutts*, besides raising issues of notice and due process, reminds us that, under the influence of Rule 23, class actions have taken deep root in state courts. It also reminds us that nationwide classes, whether in state or federal courts, present very difficult issues of choice of law: Recall that one of the questions facing the Kansas and U.S. Supreme Courts was what law—that of Kansas or of some other state—should apply to the leases. Many of the issues raised by *Shutts* are very much alive today.

### 3. The Class Action and Federalism

Besides its lessons on personal jurisdiction, *Shutts* touches on two other important features of the modern class action. First, though not all states provide for class actions, many do, and thus state as well as federal courts can entertain class actions—including class actions in which, as in *Shutts*, most members of the class reside outside the state in question.

Second, in spite of its multistate class membership *Shutts* was stuck in Kansas courts because of the way in which the Supreme Court had applied its subject matter jurisdiction doctrine to class actions. When a class suit is based on a federal statute, jurisdiction will arise under federal law and §1331 (or some other more specific jurisdiction statute).

But what about diversity cases? To take a concrete example, what if *Shutts* had been filed in a federal court invoking diversity jurisdiction? Or what if Phillips Petroleum had sought to remove the case from Kansas state court to a federal court? Class members were scattered over 50 states, and the defendant, incorporated in Delaware, had its headquarters in Oklahoma. The federal courts have seemed uncertain about how to think about diversity jurisdiction and class actions. Well before the Federal Rules, *Supreme Tribe of Ben-Hur*<sup>\*</sup> v. *Cauble*, 255 U.S. 356 (1921), held that for purposes of diversity, courts should look to the citizenship only of the class representatives and ignore the class members. *Supreme Tribe* thus created an exception to the complete diversity rule for class actions, and to that extent lowered jurisdictional barriers to the multistate diversity-based class action. So far, things would look good for diversity jurisdiction in *Shutts*.

Forty years later, as class actions grew in the wake of the 1966 Rules revisions, the Supreme Court had what appeared to be second thoughts. In a pair of cases, it held that both the named plaintiff and each member of the class had to satisfy the amount in controversy requirement. So our hypothetical *Shutts* diversity action would have been doomed in 1985 because many of those entitled to royalty payments had only small amounts at stake.

But two recent developments—one from the courts, the other from Congress—change the picture again. In *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546 (2005), the Court interpreted the supplemental jurisdiction statute, 28 U.S.C. §1367, to allow such smaller-claims actions under the basic diversity statute, so long as the named party satisfied the amount in controversy requirement. What would this do to our hypothetical *Shutts* diversity action? The answer is we don't know; since amount in controversy was not an issue in the Kansas court, the opinions do not tell us whether the named party (or any of the claimants) met the requisite amount; if they had,

*Shutts* would have met the requirements for diversity jurisdiction.

In the same year *Allapattah* was decided, Congress entered the scene. Responding to complaints that a few state courts had certified some large class actions of questionable merits—suits that could not be removed to the federal courts because they failed to satisfy the requirements of diversity jurisdiction—Congress enacted the Class Action Fairness Act of 2005. Referred to by lawyers as CAFA, the Act is codified in a new Chapter 114 of 28 U.S.C., in amendments to 28 U.S.C. §1332, and a new removal provision 28 U.S.C. §1453.

The Act makes broad use of the principle that Article III requires only minimal diversity. It grants original jurisdiction to the federal courts in class actions in which “any member of the class of plaintiffs” possesses the requisite diversity with respect to “any defendant.” This invocation of bare diversity is coupled with the ability to aggregate claims of all class members to reach the \$5 million amount in controversy requirement. 28 U.S.C. §1332(d)(2). Such suits may be brought under original jurisdiction or, under the provisions of §1453, may be removed by “any defendant,” whether or not a citizen of the state in which the action arose.

These provisions use diversity jurisdiction to “federalize” many class actions previously within the exclusive jurisdiction of the state courts. Displaying some uncertainty about how far this federalization should go, the Act both allows and commands federal courts to remand actions in which state interests seem to predominate. It does so by providing that a federal court whose jurisdiction is thus invoked “may...decline” to exercise it under some circumstances and “shall...decline” to exercise it in others. Section 1332(d)(3) defines the factors relevant to the discretionary power to decline federal jurisdiction. Those factors include the relative size of the in-state and out-of-state class membership, “whether the claims asserted involve matters of national or interstate interest,” which state’s law will apply to the claims, and the connection of the forum to the class members, the harm, and the defendant. 28 U.S.C. §1332(d)(3). Recall that these factors bear not on certification but on federal diversity jurisdiction.

Section 1332(d)(4) delineates the circumstances in which a federal court must decline jurisdiction: if two-thirds or more of the members of the proposed plaintiff class are citizens of the state in which the action was brought and either (1) the primary defendants are also citizens of that state or (2) at least one defendant is a citizen of that state and the principal injuries also occurred there.

The next case illustrates an effort by a litigant who wished to remain in state court to evade the grasp of CAFA.

### **Standard Fire Ins. Co. v. Knowles**

133 S. Ct. 1345 (2012)

**Justice BREYER delivered the opinion of the Court.**

**The Class Action Fairness Act of 2005 (CAFA) provides that the federal “district courts shall have original jurisdiction” over a civil “class action” if, among other things, the “matter in controversy exceeds the sum or value of \$5,000,000.” The statute adds that “to determine whether the matter in controversy exceeds the sum or value of \$5,000,000,” the “claims of the individual class members shall be aggregated.”**

**The question presented concerns a class-action plaintiff who stipulates, prior to certification of the class, that he, and the class he seeks to represent, will not seek damages that exceed \$5 million in total. Does that stipulation remove the case from CAFA’s scope? In our view, it does not.**

#### **I**

**In April 2011 respondent, Greg Knowles, filed this proposed class action in an Arkansas state court against petitioner, the Standard Fire Insurance Company. Knowles claimed that, when the company had made certain homeowner’s insurance loss payments, it had unlawfully failed to include a general contractor fee. And Knowles sought to certify a class of “hundreds, and possibly thousands” of similarly harmed Arkansas policyholders. In describing the relief sought, the complaint says that the “Plaintiff and Class stipulate they will seek to recover total aggregate damages of less than five million dollars.” An attached affidavit stipulates that Knowles “will not at any time during this case...seek damages for the class...in excess of \$5,000,000 in the aggregate.”**

**On May 18, 2011, the company, pointing to CAFA’s jurisdictional provision, removed the case to Federal District Court [where the judge accepted the stipulation as binding and remanded to state court.] 28 U.S.C. §1332(d); §1453....**

**The company appealed from the remand order, but the Eighth Circuit declined to hear the appeal. See 28 U.S.C. §1453(c)(1) (2006 ed., Supp. V) (providing discretion to hear an appeal from a remand order). [The Supreme Court granted the insurer’s petition for certiorari.]**

#### **II**

**CAFA provides...“the claims of the individual class members shall be aggregated” [in calculating the amount in controversy.] And those “class members” include “persons (named or unnamed) who fall within**

the definition of the *proposed* or certified class.” §1332(d)(1)(D) (emphasis added)....

The District Court in this case found that resulting sum would have exceeded \$5 million *but for* the stipulation. And we must decide whether the stipulation makes a critical difference.

In our view, it does not. Our reason is a simple one: Stipulations must be binding. See 9 J. Wigmore, Evidence §2588, p. 821 (J. Chadbourn rev. 1981) (defining a “judicial admission or stipulation” as an “express waiver made...by the party or his attorney conceding for the purposes of the trial the truth of some alleged fact” (emphasis deleted)); 9 Wigmore, *supra*, §2590, at 822 (the “vital feature” of a judicial admission is “universally conceded to be its *conclusiveness* upon the party making it”). The stipulation Knowles proffered to the District Court, however, does not speak for those he purports to represent.

That is because a plaintiff who files a proposed class action cannot legally bind members of the proposed class before the class is certified. Because his precertification stipulation does not bind anyone but himself, Knowles has not reduced the value of the putative class members’ claims. For jurisdictional purposes, our inquiry is limited to examining the case “as of the time it was filed in state court.” At that point, Knowles lacked the authority to concede the amount-in-controversy issue for the absent class members. The Federal District Court, therefore, wrongly concluded that Knowles’ precertification stipulation could overcome its finding that the CAFA jurisdictional threshold had been met.

Knowles concedes that “[f]ederal jurisdiction cannot be based on contingent future events.” Brief for Respondent 20. Yet the two legal principles to which we have just referred—that stipulations must be binding and that a named plaintiff cannot bind precertification class members—mean that the amount to which Knowles has stipulated is in effect contingent.

If, for example, as Knowles’ complaint asserts, “hundreds, and possibly thousands” of persons in Arkansas have similar claims, and if each of those claims places a significant sum in controversy, the state court might certify the class and permit the case to proceed, but only on the condition that the stipulation be excised. Or a court might find that Knowles is an inadequate representative due to the artificial cap he purports to impose on the class’ recovery....Even were these possibilities remote in Knowles’ own case, there is no reason to think them farfetched in other cases where similar stipulations could have more dramatic amount-lowering effects....

The strongest counterargument, we believe, takes a syllogistic form: First, *this* complaint contains a presently nonbinding stipulation that the class will seek damages that amount to less than \$5 million. Second, if the state court eventually certifies that class, the stipulation will bind those who choose to remain as class members. Third, if the state court eventually insists upon modification of the stipulation (thereby permitting class members to obtain more than \$5 million), it will have in effect created a new, *different* case. Fourth, CAFA, however, permits the federal court to consider only the complaint that the plaintiff has filed, *i.e.*, *this* complaint, not a new, modified (or amended) complaint that might eventually emerge.

Our problem with this argument lies in its conclusion. We do not agree that CAFA forbids the federal court to consider, for purposes of determining the amount in controversy, the very real possibility that a nonbinding, amount-limiting, stipulation may not survive the class certification process. This potential outcome does not result in the creation of a new case not now before the federal court. To hold otherwise would, for CAFA jurisdictional purposes, treat a nonbinding stipulation as if it were binding, exalt form over substance, and run directly counter to CAFA’s primary objective: ensuring “Federal court consideration of interstate cases of national importance.” It would also have the effect of allowing the subdivision of a \$100 million action into 21 just-below-\$5-million state-court actions simply by including nonbinding stipulations; such an outcome would squarely conflict with the statute’s objective....

Knowles also points out that federal courts permit individual plaintiffs, who are the masters of their complaints, to avoid removal to federal court, and to obtain a remand to state court, by stipulating to amounts at issue that fall below the federal jurisdictional requirement. That is so. But the key characteristic about those stipulations is that they are legally binding on all plaintiffs. That essential feature is missing here, as Knowles cannot yet bind the absent class....

In sum, the stipulation at issue here can tie Knowles’ hands, but it does not resolve the amount-in-controversy question in light of his inability to bind the rest of the class. For this reason, we believe the District Court, when following the statute to aggregate the proposed class members’ claims, should have ignored that stipulation. Because it did not, we vacate the judgment below and remand the case for further proceedings consistent with this opinion.

It is so ordered.

- At one level this is a routine amount in controversy case dealing with the same issues one confronts in individual litigation. You may recall from [Chapter 3](#) that Congress has passed legislation dealing with similar efforts by parties to manipulate the amount in controversy in non-class litigation. See, for example, the provisions of 28 U.S.C. §1446(c), permitting a court considering a removal petition to hold a hearing to decide whether the amount in controversy in fact exceeds the statutory limit.
- But the case gets its bite from the circumstances that (a) the class has not been certified, and (b) if the stipulation is allowed to stand Knowles might become an inadequate representative of the class. You will see both these themes played out in more detail in the next section, which deals with the standards for class certification.

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### *Procedure as Strategy*

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As in other settings, both lawyers are using procedural rules for strategic and tactical reasons. We don't know why Knowles believed that an Arkansas state court would be more hospitable to his claim than a federal court sitting in Arkansas, but he must have strongly so believed—so much that he was willing to leave money on the table by his stipulation (although perhaps he was willing just to leave other class members' money on the table—thus the Court's concern about his ability to adequately represent the interests of those class members). Similarly, we don't know why Standard Fire Insurance's lawyers felt strongly enough about litigating in the federal system that they were prepared to spend many tens of thousands of dollars appealing the district judge's remand ruling. As with many other jurisdictional battles lawyers often have strong intuitions about which forum will be more hospitable to their claims or defenses. Those intuitions can be based on factors ranging from guesses about how a state's highest court will view their case—if it gets that far—to knowledge about the predilections of the state judiciary (or perhaps even a single state or federal judge) to thoughts about the demography of a prospective jury. In jurisdictional cases, these intuitions rarely get articulated in an opinion, but you can be sure that the lawyers on both sides have thought about them.

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### *Notes and Problems*

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1. As you unpack the case, begin with the mechanics.
  - a. It began as a state court filing.
  - b. What did defendant then do? (And what section of what federal statute permitted it to do so?)
  - c. What happened in the district court?
  - d. Ordinarily, decisions of a district court to remand to state court are not appealable. 28 U.S.C. §1447(d). If this had been an individual case, the defendant would have been stuck back in state court. But one of CAFA's provisions, codified at 28 U.S.C. §1453(c), gives the courts of appeals discretion to hear an appeal of a CAFA remand order ("may accept an appeal"). As you will see in the next section, the Rules as well as CAFA create special avenues for the discretionary appeals of some preliminary class actions rulings.
  - e. How did the Eighth Circuit exercise that discretion?
  - f. And how did the insurer challenge the Eighth Circuit's decision?
2. Now to the merits of the case—at least the procedural merits.
  - a. Be sure you understand why, in ordinary, two-party litigation, Knowles's stipulation about damages would have been dispositive and likely welcomed by the defendant (because it would reduce the risk of a higher verdict).
  - b. Then, explain how the "classiness" of the case rendered Knowles's stipulation not dispositive.
  - c. Finally, looking ahead to the next section, see if you understand why Knowles's stipulation might—but might not—have been dispositive had the class been certified before he made the stipulation. (Don't worry if you're unsure of this point: All will become clear in the course of the next few pages.)
3. Recall that federal courts in diversity cases are bound to apply the law of the state in which the case was filed, including that state's choice of law principles. (See [supra page 265](#).)
  - a. So, although *Knowles* will be litigated in federal district court, that court will be applying the substantive law



dueling characterizations of the device as those quoted in the introduction to this section: “legalized blackmail” and “one of the most socially useful remedies in history.”

To understand this debate, one has to see how the 1966 revisions of Rule 23 opened new possibilities for the class action. Courts have for the past 50 years been working out those possibilities—and their limits. The starting point is, as always, the text of the Rule. That text establishes a series of hurdles for class actions to surmount on their way to “certification,” a process described in Rule 23(c). To become certified, a class action must meet both the requirements of Rule 23(a) and also fit into one of the three categories of Rule 23(b).

Practitioners refer to the four requirements of Rule 23(a) as numerosity, commonality, typicality, and adequacy of representation. To establish a case as a class action, the person seeking to represent the class must show that each of these requirements is satisfied.

- Numerosity (Rule 23(a)(1)) is established if the class representative can show that enough persons are in the class to make joining them as individuals impractical. Courts occasionally certify classes as small as a few score, but typically classes consist of at least hundreds of persons.
- Commonality (Rule 23(a)(2)) captures the idea that the class should be a class—that it should consist of persons who share characteristics that matter in terms of the substantive law involved. We have already encountered this idea in *Mosley v. General Motors*, supra [page 798](#). *Mosley* discussed commonality as a requirement for joining individual plaintiffs under Rule 20. A similar requirement of cohesiveness recurs in class actions. For example, a “class” consisting of all persons who have claims against the United States would not have much in common: One person would be seeking an income tax refund, another compensation for an accident involving a postal truck, and a third might be seeking Social Security benefits. A much-litigated question is whether the members of the class have *enough* in common to justify class certification. Since virtually all classes proposed will have some characteristics in common and some unshared characteristics, there is much room for argument. This requirement is one focus of *Wal-Mart v. Dukes*, infra [page 866](#).
- Typicality (Rule 23(a)(3)) is the requirement that class representatives stand, in significant respects, in the same shoes as the average class member. For example, in a case alleging mismanagement of a pension plan, if most members of the class have lost a few hundred dollars, it would raise a typicality problem if the class representative alleged losses of tens of thousands—or vice versa. The premise underlying the typicality requirement is that the class’s lawyers will be making litigation decisions with the representative in mind. In order to protect the interests of the absent class members, one would want the representative clients to have the same incentives and motivations as the average class members. In practice, the class representatives have proved far less significant than the lawyers, and judges have consequently been willing to bend the requirements of typicality if they are assured that the last requirement—adequacy of representation—is fulfilled.
- Adequacy (Rule 23(a)(4)) has two dimensions. One focuses on the class representatives, the other on the class’s prospective lawyer. Let us start with the representatives. To take an obvious point, a class representative should not be an employee or a relative of the lawyer—relationships that would conflict with the representative’s decisions about the litigation. Class representatives have been found inadequate because their real reason for pursuing the class action was to gain leverage for their own case. Still other class representatives have been found inadequate for reasons like those in *Hansberry*: Their interests conflicted in some way with those of some or all of the class members. In *Hansberry*, you will recall the problem was that the class in which *Hansberry* was supposed to be included consisted of people trying to enforce the racially restrictive covenant that *Hansberry* was attacking. But more subtle conflicts can also doom a representative. Consider *Knowles*, supra [page 855](#), where the court rejected *Knowles*’s stipulation concerning damages because it might have put him at odds with class members if it appeared that the insurer’s payment policies had damaged the class members by *more* than \$5 million.

The second branch of the “adequacy” determination requires courts to focus on the class’s lawyer—recognizing that the lawyer will be making many of the most significant decisions. Rule 23(g) enumerates factors a court should consider in selecting class counsel. The lawyer should have no conflicts that would cloud the representation. The lawyer has to be sufficiently skillful and equipped with sufficient support and resources to handle the case. To use an extreme example, it is unlikely that a young lawyer with the ink still drying on her bar certificate would be found to be an adequate representative in a complex class action. Conversely, courts finding adequacy typically recite the lawyer’s experience with previous similar cases. Decisions also note the lawyer’s and firm’s ability to finance protracted litigation—many class actions will be long and expensive. Looking in a different direction, Rule 23(g)(1)(A)(i) tells the court to consider “work [prospective] counsel has done in identifying or investigating potential claims in the action”—thus crediting the entrepreneurial activity of counsel. Rule 23(g) also empowers the court to ask prospective counsel what

fees it might eventually ask for—because in most class actions the court must approve lawyers’ fees.

Having surmounted the hurdles of Rule 23(a), the lawyer seeking class certification still has to show that the litigation fits within one of the three categories of Rule 23(b). One might ask why: If the case fits the requirements of Rule 23(a), should it not be a class action? The answer lies in the law’s uncertainty about the goals of the class action. The drafters of the Rule were understandably unsure about the potential of the class action—for good or for ill. They had two fairly clear cases in mind that they thought should usually be treated as class actions—the situations described in Rule 23(b)(1) and 23(b)(2)—and a residual category—the (b)(3) cases—where they wanted courts to proceed cautiously.

The first situation—the 23(b)(1) class—is essentially a mass-production version of Rule 19. For example, suppose a city proposes to issue bonds to build a new civic auditorium. One group of citizens sues to block the issuance of the bonds; another group sues the city to insist that it go forward with the bonds and the project. If those suits proceed separately, the city might find itself the subject of incompatible judicial rulings: Issue the bonds; do not issue the bonds. By grouping the challengers and the supporters into classes, the court prevents a situation in which “varying adjudications with respect to individual class members” (the taxpayers) “would establish incompatible standards of conduct for the party opposing the class” (the city). Or, to take another example, suppose that a number of claimants all seek to collect on claims that exceed insurance coverage. Under such circumstances, Rule 23(b)(1) provides a way to assure that similarly situated parties are treated alike.

Rule 23(b)(2) provides for class actions where the party opposing the class has acted or refused to act “on grounds that apply generally to the class.” The Advisory Committee notes that subdivision (b)(2) is not limited to such claims. Courts have glossed Rule 23(b)(2) by limiting it to cases in which the plaintiffs are primarily seeking injunctive or declaratory relief. Again, such a description fits the standard civil rights case, where the typical relief sought is an injunction requiring some action—voter registration, school integration, changes in employment practices—by a defendant. An often litigated question is how much incidental monetary relief a Rule 23(b)(2) class can seek before the action ceases to be primarily injunctive and therefore ineligible for Rule 23(b)(2) treatment; you will see that issue coming to the surface in *Wal-Mart v. Dukes*, the next case.

The final category of class actions—those brought under Rule 23(b)(3)—has proved the most controversial. It comprises all class actions not captured in Rule 23(b)(1) and 23(b)(2). In particular, it includes all claims in which the plaintiffs are seeking primarily money damages. Rule 23(b)(3) provides that a court can certify such a class only if it meets two criteria in addition to those in 23(a): that the issues common to the class members “predominate” over those affecting only individual class members; and that a class action is “superior” to any other method for “fairly and efficiently” adjudicating the controversy. Rule 23(b)(3) also sets forth factors a court should consider in certifying a (b)(3) class, one of which is the “likely difficulties in managing a class action.” That last factor can be important; class actions typically require active court management and can consume substantial amounts of judicial time.

In practice, (b)(3) actions can be subdivided into two groups. One group consists of what one might call “small claims” lawsuits: actions in which many persons allege small amounts of damage. Examples include the hypothetical cell phone overcharge described earlier in this section. Typically, such claims are probably not worth any individual plaintiff’s time or money to bring and only the class action device makes them viable. Because of this feature, lawyers sometimes refer to this group of class actions as “negative value” cases—meaning that to pursue claims on an individual basis would cost more than the case could yield. As a result, in such actions the defendant is, as a practical matter, immune from liability unless a class is certified.

At the other end of the scale of Rule 23(b)(3) actions lies what is often called the “mass tort”—an airplane crash, a hotel fire, the exposure of hundreds of thousands of workers to asbestos fibers. The drafters of Rule 23 suggested in the Advisory Committee notes that such cases would not usually be appropriate for class treatment, but in recent decades courts have increasingly—and controversially—certified class actions in mass torts. In these suits, the incentives for a class action change. To plaintiffs, they continue to offer the increased bargaining power that comes from aggregation and the prospect of a single overwhelming damage judgment. In contrast to the small claims cases, they also offer some advantages to defendants—consolidation (of suits that would have been brought even without the class action), efficiency, and the possibility of a global settlement.

Placing a class action in one of the Rule 23 categories is more than a matter of analytical neatness. Whole cases may stand or fall as a result of the classification. This unexpected consequence flows from two sources. First, Rule 23(b)(3) requires the certifying judge to engage in a complicated weighing of advantages and disadvantages, unnecessary for (b)(1) and (b)(2) classes—as a result of which he may rule against certification.

Second, Rule 23(c)(2)(B) requires individual notice to all members of Rule 23(b)(3) classes who can be identified through reasonable effort; by contrast, Rule 23(c)(2)(A) allows, but does not require, “appropriate notice” to the class in 23(b)(1) and (b)(2) cases. Because the Supreme Court has held that the representative plaintiff must

initially pay for such notice, inability to bear these costs may end the suit. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). There is a third significant difference between the class types: Members of a Rule 23(b)(3) class, when notified of the action, must also be given an opportunity to opt out of the class. Rule 23(b)(3) class members may get another opportunity to opt out when the case is settled. Members of (b)(1) and (b)(2) classes, in contrast, are unable to opt out.

The notes that follow ask you to apply what you have learned in this elementary description of Rule 23.

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### *Notes and Problems*

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1. The regents of State University announce a tuition increase that applies only to out-of-state students. Two thousand such students stand to have their tuition increased. The president of the Student Association, an in-state student, announces that she is filing suit on behalf of the affected students to enjoin the regents from implementing the increase.
  - a. With which of the requirements of Rule 23(a) will the prospective class action have the most difficulty?
  - b. What additional information will the court likely require about the student's attorney in order to decide whether the suit meets the criteria of Rule 23(a)?
  - c. Suppose that after some rearrangement, the court rules that the class meets the requirements of Rule 23(a); into which category of Rule 23(b) would it fall?
2. Assume that the tuition increase described in the preceding note has gone into effect and has been paid by the out-of-state students. One enterprising such student discovers that the regents adopted the increase at a closed meeting—in violation of state law—and that it is therefore unlawful. He proposes to file suit as representative of a class of all out-of-state students.
  - a. Student (as class representative) proposes to seek an injunction ordering reduced tuition in the following school year. Do you see why such a plan for relief may cause the court to find Student an inadequate representative (and perhaps an atypical one) for at least some members of the class?
  - b. Suppose Student proposes to remedy the adequacy of representation problems exposed in 2a by seeking cash refunds to all students, present and former, who paid the allegedly unlawful higher fees. What will this change in remedy do to the classification of the lawsuit under Rule 23(b)? Which consequences will that change in classification have on the costs of litigating the claim? See Rule 23(c)(2)(B).
  - c. Suppose Student finally decides to seek certification of a Rule 23(b)(3) class seeking cash refunds to all students who paid the higher fees. The costs of notifying the class are estimated to be in the neighborhood of \$30,000. How might this fact cause a court that was otherwise satisfied that Student met the criteria of Rule 23(a)(4) to reconsider its decision and to decertify the class?
3. Rule 23 can seem, at first glance, like a laundry list of complex and interrelated requirements without any particular rhyme or reason. Yet the drafters of this Rule, and those who have debated its efficacy, would tell you that these requirements balance multiple conflicting interests and pressures related to class actions.
  - a. In litigation, as with so much else in life, those with more economic and social power are at an advantage. Procedure rules have the potential to shift those power relations in dramatic ways. The class action puts the power-shifting potential of procedure into sharp relief. In a case brought by an individual consumer against a large corporation, the corporation will almost certainly have the upper hand. But in a case brought by a class of thousands of consumers, financed by a group of plaintiffs' attorneys, the economic and social dynamics shift. Business groups argue that this financial shift causes plaintiff classes to seek "blackmail settlements" for meritless claims. Certification requirements, particularly those in Rule 23(b)(3), limit the kinds of disputes that can be certified as class actions, and thereby limit the reach of class actions' power-shifting potential.
  - b. Class action rules also aim to guide the complex relationship between a lawyer and a class. When a lawyer represents a single client, communication, consultation, and lines of authority are generally well established. In a class action, each of these areas becomes more difficult to maneuver. Rules governing commonality and adequacy at the class certification stage, and notice at multiple stages of the litigation process, aim to address some of these problems of legal representation endemic to the class action.
4. Now consider a case in which both Rules 23(a) and 23(b) posed what turned out to be insurmountable obstacles for one of the largest class actions ever brought. The decision both provides a guided application of Rule 23, and an articulation of common concerns about the class action.

### **Wal-Mart Stores, Inc. v. Dukes**

Justice SCALIA delivered the opinion of the Court.

We are presented with one of the most expansive class actions ever. The District Court and the Court of Appeals approved the certification of a class comprising about one and a half million plaintiffs, current and former female employees of petitioner Wal-Mart who allege that the discretion exercised by their local supervisors over pay and promotion matters violates Title VII by discriminating against women. In addition to injunctive and declaratory relief, the plaintiffs seek an award of backpay. We consider whether the certification of the plaintiff class was consistent with Federal Rules of Civil Procedure 23(a) and (b)(2).

## I

### A

Petitioner Wal-Mart is the Nation's largest private employer. It operates four types of retail stores throughout the country: Discount Stores, Supercenters, Neighborhood Markets, and Sam's Clubs. Those stores are divided into seven nationwide divisions, which in turn comprise 41 regions of 80 to 85 stores apiece. Each store has between 40 and 53 separate departments and 80 to 500 staff positions. In all, Wal-Mart operates approximately 3,400 stores and employs more than one million people.

Pay and promotion decisions at Wal-Mart are generally committed to local managers' broad discretion, which is exercised "in a largely subjective manner." Local store managers may increase the wages of hourly employees (within limits) with only limited corporate oversight. As for salaried employees, such as store managers and their deputies, higher corporate authorities have discretion to set their pay within preestablished ranges.

Promotions work in a similar fashion. Wal-Mart permits store managers to apply their own subjective criteria when selecting candidates as "support managers," which is the first step on the path to management. Admission to Wal-Mart's management training program, however, does require that a candidate meet certain objective criteria, including an above-average performance rating, at least one year's tenure in the applicant's current position, and a willingness to relocate. But except for those requirements, regional and district managers have discretion to use their own judgment when selecting candidates for management training. Promotion to higher office—*e.g.*, assistant manager, co-manager, or store manager—is similarly at the discretion of the employee's superiors after prescribed objective factors are satisfied.

### B

The named plaintiffs in this lawsuit, representing the 1.5 million members of the certified class, are three current or former Wal-Mart employees who allege that the company discriminated against them on the basis of their sex by denying them equal pay or promotions, in violation of Title VII of the Civil Rights Act of 1964.

...

These plaintiffs, respondents here, do not allege that Wal-Mart has any express corporate policy against the advancement of women. Rather, they claim that their local managers' discretion over pay and promotions is exercised disproportionately in favor of men, leading to an unlawful disparate impact on female employees. And, respondents say, because Wal-Mart is aware of this effect, its refusal to cabin its managers' authority amounts to disparate treatment. Their complaint seeks injunctive and declaratory relief, punitive damages, and backpay. It does not ask for compensatory damages.

Importantly for our purposes, respondents claim that the discrimination to which they have been subjected is common to *all* Wal-Mart's female employees. The basic theory of their case is that a strong and uniform "corporate culture" permits bias against women to infect, perhaps subconsciously, the discretionary decisionmaking of each one of Wal-Mart's thousands of managers—thereby making every woman at the company the victim of one common discriminatory practice. Respondents therefore wish to litigate the Title VII claims of all female employees at Wal-Mart's stores in a nationwide class action.

### C

Class certification is governed by Federal Rule of Civil Procedure 23. [The opinion quoted Rule 23(a), noting that all class actions must satisfy those requirements.]

[T]he proposed class must satisfy at least one of the three requirements listed in Rule 23(b). Respondents rely on Rule 23(b)(2), which applies when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."

Invoking these provisions, respondents moved the District Court to certify a plaintiff class consisting of "[a]ll women employed at any Wal-Mart domestic retail store at any time since December 26, 1998, who

have been or may be subjected to Wal-Mart’s challenged pay and management track promotions policies and practices.” As evidence that there were indeed “questions of law or fact common to” all the women of Wal-Mart, as Rule 23(a)(2) requires, respondents relied chiefly on three forms of proof: statistical evidence about pay and promotion disparities between men and women at the company, anecdotal reports of discrimination from about 120 of Wal-Mart’s female employees, and the testimony of a sociologist, Dr. William Bielby, who conducted a “social framework analysis” of Wal-Mart’s “culture” and personnel practices, and concluded that the company was “vulnerable” to gender discrimination.

Wal-Mart unsuccessfully moved to strike much of this evidence. It also offered its own countervailing statistical and other proof in an effort to defeat Rule 23(a)’s requirements of commonality, typicality, and adequate representation. Wal-Mart further contended that respondents’ monetary claims for backpay could not be certified under Rule 23(b)(2), first because that Rule refers only to injunctive and declaratory relief, and second because the backpay claims could not be manageably tried as a class without depriving Wal-Mart of its right to present certain statutory defenses. With one limitation not relevant here, the District Court granted respondents’ motion and certified their proposed class. [Invoking Rule 23(f), which permits a Court of Appeals to accept an appeal from an order “granting or denying class-action certification,” Wal-Mart appealed.]

## D

A divided en banc Court of Appeals substantially affirmed the District Court’s certification order....

[As part of its ruling,] the Court of Appeals determined that the action could be manageably tried as a class action because the District Court could adopt the approach the Ninth Circuit approved in *Hilao v. Estate of Marcos*, 103 F.3d 767, 782-787 (1996). There compensatory damages for some 9,541 class members were calculated by selecting 137 claims at random, referring those claims to a special master for valuation, and then extrapolating the validity and value of the untested claims from the sample set....

## II

The class action is “an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.” In order to justify a departure from that rule, “a class representative must be part of the class and ‘possess the same interest and suffer the same injury’ as the class members.” Rule 23(a) ensures that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate. The Rule’s four requirements—numerosity, commonality, typicality, and adequate representation—“effectively ‘limit the class claims to those fairly encompassed by the named plaintiff’s claims.’”

## A

The crux of this case is commonality—the rule requiring a plaintiff to show that “there are questions of law or fact common to the class.” Rule 23(a)(2).<sup>5</sup> That language is easy to misread, since “[a]ny competently crafted class complaint literally raises common ‘questions.’” Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 131-132 (2009). For example: Do all of us plaintiffs indeed work for Wal-Mart? Do our managers have discretion over pay? Is that an unlawful employment practice? What remedies should we get? Reciting these questions is not sufficient to obtain class certification. Commonality requires the plaintiff to demonstrate that the class members “have suffered the same injury.” This does not mean merely that they have all suffered a violation of the same provision of law. Title VII, for example, can be violated in many ways—by intentional discrimination, or by hiring and promotion criteria that result in disparate impact, and by the use of these practices on the part of many different superiors in a single company. Quite obviously, the mere claim by employees of the same company that they have suffered a Title VII injury, or even a disparate-impact Title VII injury, gives no cause to believe that all their claims can productively be litigated at once. Their claims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.

“What matters to class certification...is not the raising of common ‘questions’—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.”

Nagareda, *supra*, at 132.

Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc. We recognized in *Falcon* that

“sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question,” and that certification is proper only if “the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.” Frequently that “rigorous analysis” will entail some overlap with the merits of the plaintiff’s underlying claim. That cannot be helped. “[T]he class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff’s cause of action.” *Falcon, supra*.<sup>6</sup> Nor is there anything unusual about that consequence: The necessity of touching aspects of the merits in order to resolve preliminary matters, *e.g.*, jurisdiction and venue, is a familiar feature of litigation.

In this case, proof of commonality necessarily overlaps with respondents’ merits contention that Wal-Mart engages in a *pattern or practice* of discrimination.<sup>7</sup> That is so because, in resolving an individual’s Title VII claim, the crux of the inquiry is “the reason for a particular employment decision.” Here respondents wish to sue about literally millions of employment decisions at once. Without some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members’ claims for relief will produce a common answer to the crucial question *why was I disfavored*.

## B

This Court’s opinion in *Falcon* describes how the commonality issue must be approached[:]

“Conceptually, there is a wide gap between (a) an individual’s claim that he has been denied a promotion [or higher pay] on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual’s claim and the class claim will share common questions of law or fact and that the individual’s claim will be typical of the class claims.”

*Falcon* suggested two ways in which that conceptual gap might be bridged. First, if the employer “used a biased testing procedure to evaluate both applicants for employment and incumbent employees, a class action on behalf of every applicant or employee who might have been prejudiced by the test clearly would satisfy the commonality and typicality requirements of Rule 23(a).” Second, “[s]ignificant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes.” We think that statement precisely describes respondents’ burden in this case. The first manner of bridging the gap obviously has no application here; Wal-Mart has no testing procedure or other company-wide evaluation method that can be charged with bias. The whole point of permitting discretionary decisionmaking is to avoid evaluating employees under a common standard.

The second manner of bridging the gap requires “significant proof” that Wal-Mart “operated under a general policy of discrimination.” That is entirely absent here. Wal-Mart’s announced policy forbids sex discrimination, and as the District Court recognized the company imposes penalties for denials of equal employment opportunity. The only evidence of a “general policy of discrimination” respondents produced was the testimony of Dr. William Bielby, their sociological expert. Relying on “social framework” analysis, Bielby testified that Wal-Mart has a “strong corporate culture,” that makes it “vulnerable” to “gender bias.” He could not, however, “determine with any specificity how regularly stereotypes play a meaningful role in employment decisions at Wal-Mart. At his deposition...Dr. Bielby conceded that he could not calculate whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking....Bielby[’s testimony] is worlds away from “significant proof” that Wal-Mart “operated under a general policy of discrimination.”

## C

The only corporate policy that the plaintiffs’ evidence convincingly establishes is Wal-Mart’s “policy” of *allowing discretion* by local supervisors over employment matters. On its face, of course, that is just the opposite of a uniform employment practice that would provide the commonality needed for a class action....

To be sure, we have recognized that, “in appropriate cases,” giving discretion to lower-level supervisors can be the basis of Title VII liability under a disparate-impact theory—since “an employer’s undisciplined system of subjective decisionmaking [can have] precisely the same effects as a system pervaded by impermissible intentional discrimination.” But the recognition that this type of Title VII claim “can” exist does not lead to the conclusion that every employee in a company using a system of discretion has such a claim in common....

Respondents have not identified a common mode of exercising discretion that pervades the entire company—aside from their reliance on Dr. Bielby’s social frameworks analysis that we have rejected. In a company of Wal-Mart’s size and geographical scope, it is quite unbelievable that all managers would exercise their discretion in a common way without some common direction. Respondents attempt to make that

showing by means of statistical and anecdotal evidence, but their evidence falls well short.

The statistical evidence consists primarily of regression analyses performed by Dr. Richard Drogin, a statistician, and Dr. Marc Bendick, a labor economist. After considering regional and national data, Drogin concluded that “there are statistically significant disparities between men and women at Wal-Mart...[and] these disparities...can be explained only by gender discrimination.” 603 F.3d, at 604 (internal quotation marks omitted). Bendick compared work-force data from Wal-Mart and competitive retailers and concluded that Wal-Mart “promotes a lower percentage of women than its competitors.” *Ibid*.

Even if they are taken at face value, these studies are insufficient to establish that respondents’ theory can be proved on a classwide basis.... As Judge Ikuta observed in her dissent, “[i]nformation about disparities at the regional and national level does not establish the existence of disparities at individual stores, let alone raise the inference that a companywide policy of discrimination is implemented by discretionary decisions at the store and district level.” A regional pay disparity, for example, may be attributable to only a small set of Wal-Mart stores, and cannot by itself establish the uniform, store-by-store disparity upon which the plaintiffs’ theory of commonality depends.... [For these and other reasons, the Court found this expert testimony insufficient to suggest a common practice.]

Respondents’ anecdotal evidence suffers from the same defects, and in addition is too weak to raise any inference that all the individual, discretionary personnel decisions are discriminatory....Here...respondents filed some 120 affidavits reporting experiences of discrimination—about 1 for every 12,500 class members—relating to only some 235 out of Wal-Mart’s 3,400 stores....Even if every single one of these accounts is true, that would not demonstrate that the entire company “operate[s] under a general policy of discrimination.”...

In sum, we agree with Chief Judge Kozinski that the members of the class:

“held a multitude of different jobs, at different levels of Wal-Mart’s hierarchy, for variable lengths of time, in 3,400 stores, sprinkled across 50 states, with a kaleidoscope of supervisors (male and female), subject to a variety of regional policies that all differed....Some thrived while others did poorly. They have little in common but their sex and this lawsuit.” (dissenting opinion).

### III

We also conclude that respondents’ claims for backpay were improperly certified under Federal Rule of Civil Procedure 23(b)(2). Our opinion in *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121 (1994) (*per curiam*) expressed serious doubt about whether claims for monetary relief may be certified under that provision. We now hold that they may not, at least where (as here) the monetary relief is not incidental to the injunctive or declaratory relief.

#### A

Rule 23(b)(2) allows class treatment when “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” One possible reading of this provision is that it applies *only* to requests for such injunctive or declaratory relief and does not authorize the class certification of monetary claims at all. We need not reach that broader question in this case, because we think that, at a minimum, claims for *individualized* relief (like the backpay at issue here) do not satisfy the Rule. The key to the (b)(2) class is “the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.” Nagareda, 84 N.Y.U. L. Rev. at 132. In other words, Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant. Similarly, it does not authorize class certification when each class member would be entitled to an individualized award of monetary damages.

That interpretation accords with the history of the Rule. Because Rule 23 “stems from equity practice” that predated its codification, in determining its meaning we have previously looked to the historical models on which the Rule was based. As we observed in *Amchem*, “[c]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples” of what (b)(2) is meant to capture. In particular, the Rule reflects a series of decisions involving challenges to racial segregation—conduct that was remedied by a single classwide order. In none of the cases cited by the Advisory Committee as examples of (b)(2)’s antecedents did the plaintiffs combine any claim for individualized relief with their classwide injunction.

Permitting the combination of individualized and classwide relief in a (b)(2) class is also inconsistent with the structure of Rule 23(b). Classes certified under (b)(1) and (b)(2) share the most traditional justifications for class treatment—that individual adjudications would be impossible or unworkable, as in a (b)(1) class, or that the relief sought must perforce affect the entire class at once, as in a (b)(2) class. For that reason these

are also mandatory classes: The Rule provides no opportunity for (b)(1) or (b)(2) class members to opt out, and does not even oblige the District Court to afford them notice of the action. Rule 23(b)(3), by contrast, is an “adventuresome innovation” of the 1966 amendments, framed for situations “in which ‘class-action treatment is not as clearly called for’” (quoting Advisory Committee’s Notes, 28 U.S.C. App., p. 697 (1994 ed.)). It allows class certification in a much wider set of circumstances but with greater procedural protections. Its only prerequisites are that “the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” Rule 23(b)(3). And unlike (b)(1) and (b)(2) classes, the (b)(3) class is not mandatory; class members are entitled to receive “the best notice that is practicable under the circumstances” and to withdraw from the class at their option. See Rule 23(c)(2)(B).

Given that structure, we think it clear that individualized monetary claims belong in Rule 23(b)(3). The procedural protections attending the (b)(3) class—predominance, superiority, mandatory notice, and the right to opt out—are missing from (b)(2) not because the Rule considers them unnecessary, but because it considers them unnecessary *to a (b)(2) class*. When a class seeks an indivisible injunction benefitting all its members at once, there is no reason to undertake a case-specific inquiry into whether class issues predominate or whether class action is a superior method of adjudicating the dispute. Predominance and superiority are self-evident. But with respect to each class member’s individualized claim for money, that is not so—which is precisely why (b)(3) requires the judge to make findings about predominance and superiority before allowing the class. Similarly, (b)(2) does not require that class members be given notice and opt-out rights, presumably because it is thought (rightly or wrongly) that notice has no purpose when the class is mandatory, and that depriving people of their right to sue in this manner complies with the Due Process Clause. In the context of a class action predominantly for money damages we have held that absence of notice and opt-out violates due process. While we have never held that to be so where the monetary claims do not predominate, the serious possibility that it may be so provides an additional reason not to read Rule 23(b)(2) to include the monetary claims here....

## B

Against that conclusion, respondents argue that their claims for backpay were appropriately certified as part of a class under Rule 23(b)(2) because those claims do not “predominate” over their requests for injunctive and declaratory relief. They rely upon the Advisory Committee’s statement that Rule 23(b)(2) “does not extend to cases in which the appropriate final relief relates *exclusively or predominantly* to money damages.”...

Respondents’ predominance test...creates perverse incentives for class representatives to place at risk potentially valid claims for monetary relief. In this case, for example, the named plaintiffs declined to include employees’ claims for compensatory damages in their complaint. That strategy of including only backpay claims made it more likely that monetary relief would not “predominate.” But it also created the possibility (if the predominance test were correct) that individual class members’ compensatory-damages claims would be *precluded* by litigation they had no power to hold themselves apart from. If it were determined, for example, that a particular class member is not entitled to backpay because her denial of increased pay or a promotion was *not* the product of discrimination, that employee might be collaterally estopped from independently seeking compensatory damages based on that same denial. That possibility underscores the need for plaintiffs with individual monetary claims to decide *for themselves* whether to tie their fates to the class representatives’ or go it alone—a choice Rule 23(b)(2) does not ensure that they have....

## C

The Court of Appeals believed that it was possible to replace such proceedings with Trial by Formula. A sample set of the class members would be selected, as to whom liability for sex discrimination and the backpay owing as a result would be determined in depositions supervised by a master. The percentage of claims determined to be valid would then be applied to the entire remaining class, and the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the sample set to arrive at the entire class recovery—without further individualized proceedings. We disapprove that novel project. Because the Rules Enabling Act forbids interpreting Rule 23 to “abridge, enlarge or modify any substantive right,” 28 U.S.C. §2072(b); a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims. And because the necessity of that litigation will prevent backpay from being “incidental” to the classwide injunction, respondents’ class could not be certified even assuming, *arguendo*, that “incidental” monetary relief can be awarded to a 23(b)(2) class.

\* \* \*

The judgment of the Court of Appeals is *Reversed*.

Justice GINSBURG, with whom Justice BREYER, Justice SOTOMAYOR, and Justice KAGAN join, concurring in part and dissenting in part.

The class in this case, I agree with the Court, should not have been certified under Federal Rule of Civil Procedure 23(b)(2). The plaintiffs, alleging discrimination in violation of Title VII, seek monetary relief that is not merely incidental to any injunctive or declaratory relief that might be available. A putative class of this type may be certifiable under Rule 23(b)(3), if the plaintiffs show that common class questions “predominate” over issues affecting individuals—e.g., qualification for, and the amount of, backpay or compensatory damages—and that a class action is “superior” to other modes of adjudication.

Whether the class the plaintiffs describe meets the specific requirements of Rule 23(b)(3) is not before the Court, and I would reserve that matter for consideration and decision on remand.<sup>1</sup> The Court, however, disqualifies the class at the starting gate, holding that the plaintiffs cannot cross the “commonality” line set by Rule 23(a)(2). In so ruling, the Court imports into the Rule 23(a) determination concerns properly addressed in a Rule 23(b)(3) assessment....

\* \* \*

The Court errs in importing a “dissimilarities” notion suited to Rule 23(b)(3) into the Rule 23(a) commonality inquiry. I therefore cannot join [Part II](#) of the Court’s opinion.

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### *Procedure as Strategy*

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Consider the impact of the *Wal-Mart* decision on the parties to this case. The Court does not hold that the plaintiffs have suffered no discrimination. But the effect of the procedural ruling in this case changed dramatically the nature of the litigation they could pursue. A million individual suits would have been difficult or impossible to maintain. Instead, following the Court’s decision, the plaintiffs’ counsel filed regional class actions in California, Texas, Tennessee, Florida, and Wisconsin. The class certification motions have been winding their ways through the courts.

Consider also what would have happened if the Supreme Court had affirmed the decision to certify the class. The likely result would not have been trial but intense settlement negotiations. Faced with a certified class of this size, even a defendant with Wal-Mart’s resources would likely decide that settlement was the most rational approach, regardless of its view of the merits of the case.

Consequently, in this and similar class actions, the decision on certification is often the most important event in the litigation.

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### *Notes and Problems*

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1. The majority gives two reasons the class should not have been certified, citing different portions of Rule 23. What are the reasons and what are the sections of Rule 23 that the majority says prevent certification?
2. All nine Justices agree as to one of those reasons.
  - a. What is it?
  - b. Why, in the view of a unanimous Court, did the class fail to meet that requirement?
  - c. What would have been the consequence if the Court had limited itself to the ground on which all the Justices agreed? Where would that have left the plaintiffs?
3. Failed litigation strategies are always easy to pick apart in hindsight. Instead, as a way of better understanding Rule 23, try to reconstruct the choices made by the plaintiffs’ lawyers and to understand them in light of the structure of the Rule. All class actions have to jump through Rule 23(a) hoops, demonstrating numerosity, typicality, commonality, and adequacy of representation.
  - a. Numerosity was not going to pose a problem.
  - b. Nor was adequacy of representation going to pose a problem so far as the lawyers were concerned. Plaintiffs were represented by a joint venture of law firms and nonprofit pro bono affinity groups with a special interest in gender equality. They were skilled and experienced lawyers and were adequately financed—two areas of special concern to judges certifying classes.
  - c. Though it proved unsuccessful, they also had a strategy for addressing the typicality and commonality

requirements. Describe that strategy. The majority opinion suggests that the plaintiffs should have gathered statistical evidence about gender disparities at each store. Imagine a strategy conference early in the case at which someone suggested that course of action: What would have been the objections?

- d. Battles over expert evidence have become increasingly important in class certification. Older decisions suggested that it would suffice for plaintiffs pursuing class certification to present evidence that—if believed—would justify class treatment. Some recent cases have applied a more demanding standard: The certifying court must weigh and resolve the class of experts and certify the class only if it decides by a preponderance of the evidence that the testimony supporting the commonality and typicality of the class outweighs the defendant’s challenge to that evidence. In *re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305 (3d Cir. 2008). *Wal-Mart* does not directly address this question, but its treatment of the plaintiff’s expert testimony may suggest that it is leaning in the direction of the *Hydrogen Peroxide* court.
4. The second fateful decision was to seek certification as a Rule 23(b)(2) class. A unanimous Court rejects that approach on the ground that individualized claims (primarily for back pay) were too significant a part of the case to make a Rule 23(b)(2) class appropriate.
    - a. Class action lawyers will tell you that, on the whole, Rule 23(b)(2) cases are easier to bring than Rule 23(b)(3) class actions.
      - i. First, the case does not have to leap through the additional hoops posed by Rule 23(b)(3), hoops that lawyers abbreviate by referring to the “superiority” requirements of that subsection. In a number of cases, courts have found that class actions that meet the requirements of Rule 23(a) fail those of Rule 23(b)(3). In a case this large manageability might present an especially significant challenge. So, if the plaintiffs’ lawyers could avoid Rule 23(b)(3), they would want to.
      - ii. Second, as the majority opinion notes, Rule 23(c)(2)(b) requires that in all Rule 23(b)(3) cases each plaintiff who can be identified through reasonable effort (hear the echo of *Mullane* here?) must be individually notified and given a chance to withdraw (“opt out”) of the class (see *Shutts*). Prior cases held that the plaintiffs must bear the entire expense of that notice—here involving a million and a half present and former Wal-Mart employees.
    - b. So, on both grounds, Rule 23(b)(2) must have looked like the way to go—if they could.
  5. Having made that choice, why did the plaintiffs’ lawyers add claims for back pay, claims that led a unanimous Court to hold that a Rule 23(b)(2) class could not be certified?
    - a. Look back at Rule 23(a)(4) and (g)(4) and consider the plaintiffs’ lawyers’ problem.
    - b. If they dropped the claims for back pay, they might have a “clean” Rule 23(b)(2) class. But if they dropped the claims for back pay, they would have much less settlement leverage: Back pay for 1.5 million women would add up to a large number, and might encourage Wal-Mart to settle and implement the structural changes sought by plaintiffs. The possibility of a back pay award could also entice for-profit attorneys to join the plaintiffs’ team. Moreover, dropping the back pay claim could imperil or prevent certification: Could they look the court in the eye and say they were adequately representing over a million clients, many of whom, if the allegations in the complaint could be proved, had lost money in wages?
  6. *Wal-Mart* does not hold that it is impossible to bring a large employment discrimination class action, but it does suggest that future such efforts will have to be more focused, and will perhaps require deeper pre-filing investigation and investment and more discovery and investment at the certification stage.

## 5. Settlement of Class Actions and the “Settlement Class”

The student will already have understood that the effect of the class action is more than the simple gathering together of similar cases. That proposition is particularly true at the settlement stage—the way in which most class actions, like other lawsuits, end. Settlement presents several difficult problems unique to the class action. Most of those problems flow from the circumstance that, in many class actions (especially those created by Rule 23(b)(1) and (b)(3)), the litigative group is organized only for purposes of the lawsuit. In the most extreme cases the “group” may exist only in the abstract—as, for example, the sharers of some hypothesized interest. Yet many of the ordinary rules of litigation assume a client who hires a lawyer, guides the case, authorizes settlement, and benefits directly from any relief. Exacerbating the situation is that the class’s lawyers, on whom we have been counting to represent the class adequately, are typically negotiating their own fees at the same time as relief for the class. So the law has to worry about the potential conflict of interest: the temptation to trade a tiny bit of relief for the class for a large fee agreement. In some notorious cases preceding the enactment of the Class Action Fairness Act of 2005, settlements involved large fees for the plaintiffs’ lawyers, whose clients got only coupons that might be of no value unless they chose to purchase a sometimes expensive product. Several bodies of law address these problems, taking two approaches—requiring lots of transparent process to expose conflicts and simply forbidding some forms of

settlements.

To approach the problem, suppose counterfactually that the Supreme Court had approved the certification of a class in *Wal-Mart v. Dukes* and that, after an unsuccessful motion for summary judgment, the parties began to talk about settlement. Further suppose that the proposed settlement involved offering new promotion opportunities to existing Wal-Mart female employees, establishing a fund that would be used to give those employees additional training and education (thus enabling them to advance more quickly), and a public outreach campaign, funded by Wal-Mart, that, while not conceding any violations of law, made it known that the company had improved its practices in regard to women and was making special efforts to hire and promote women managers. Finally, suppose that the plaintiffs' lawyers submitted a proposed fees bill of \$1,500,000; you may recall that in civil rights actions like this one, a prevailing plaintiff may claim a fee from the opposing party.

Start with Rule 23(e), which requires court approval of a settlement of a class action. To order such approval, the judge must first "direct notice in a reasonable manner to all class members who would be bound by the proposal." Rule 23(e)(1). This notice must occur without regard to what sort of class action is involved, but Rule 23(e) does not require individual notice. So sometimes such notices take the form of newspaper ads, online postings, radio spots, and the like. Given that some of the members of the class would have left Wal-Mart's employment, it's very likely that they could be reached only through such non-individualized means.

Such notices include information about the terms of settlement and that those objecting to the terms of the settlement may do so. If the settlement involves a Rule 23(b)(3) class, it may offer a second chance for individual members to opt out of the class and the settlement. And, to prevent objectors being "bought off" by the settling parties, objections may not be withdrawn without court approval. Rule 23(e)(5). In each of these ways, class settlements look very different from ordinary settlements.

After such notice, the court must conduct a hearing at which it hears arguments from the settling parties about why the settlement is fair to the class members. At this hearing, the Rule permits class members to come forward to object to the settlement terms. The idea is that they will have an incentive to do so because, at least in common fund cases, the lawyer's fee is coming out of a fund, the remainder of which will be distributed to the class. In a number of cases, objectors have come forward. Indeed, some critics say that the fairness hearings have spawned a group of professional "objectors," who are themselves hoping to win fees by raising objections that cause the parties to add a bit to the settlement terms.

The Class Action Fairness Act of 2005 adds additional features. For example, CAFA requires that, if the defendant is subject to state or federal regulation, that the regulatory authorities be notified of the suit and a pending settlement. 28 U.S.C. §1715. In the *Wal-Mart* case, both state and federal agencies that regulate labor and employment would have to be notified. Although the statute does not directly so state, the idea seems to be that a regulator could appear at a settlement hearing and offer an opinion about the appropriateness of the settlement, given its expertise regarding the unlawful acts alleged. The same notice could presumably trigger greater regulatory scrutiny if the regulator thought that the acts involved suggested other forms of unlawful behavior. Consider how the Rule and statutes interact in some hypothetical cases.

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### *Notes and Problems*

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1. A manufacturer of "scrubber" equipment that removes environmentally harmful residues from smokestack emissions has its plant and headquarters in Arizona. The manufacturer has been sued in federal court by a class consisting of present and former female employees; the complaint alleges gender discrimination in employment and promotion and invokes both state and federal statutes. In particular, it alleges that women employees have not been offered the highest-paying jobs in the production division on the grounds that some of the chemicals used in production pose special health problems for women. The court certifies a Rule 23(b)(2) class. The parties work out a proposed settlement involving some additional job opportunities for women and some changes in manufacturing practices.
  - a. To whom does Rule 23 require that notice of the settlement be given?
  - b. Must the members of the class be given an opportunity to opt out of the settlement?
2. In such a settlement, 28 U.S.C. §1715 would also require that notice be sent to the Attorney General of the United States (because the complaint alleged violation of federal law) and to "the person in the State [here Arizona] who has the primary regulatory or supervisory authority with respect to the defendant." One imagines that the parties might be unsure whether that would mean the state official with primary responsibilities over labor conditions or the state official charged with regulating manufacturing or environmental conditions. In case of uncertainty, the statute allows the parties to notify the state's attorney general, on the theory that he or she can figure out who else to notify.

3. One member of the class receives notice of the settlement, consults her own lawyer, and files an objection that the proposal does not remove the discriminatory practices to which she has been subjected. After her objection is received, she is promoted, and seeks to withdraw her objection. Can she? Under what circumstances?

#### **a. Fees**

In class actions, fee agreements and disputes are closely bound with settlements—because of the inherent conflict between the class and the lawyers in some settlements. In most litigation, the client pays the lawyer’s fee because she has agreed to do so, and the lawyer may not settle without the client’s agreement. Neither holds true for the class action. While the named representative party in a class action may have such an agreement, that contract does not bind absentees. Yet it may seem that the lawyer whose work has benefited the class should be paid for that work. In class actions that recover money damages, courts apply the “common fund” doctrine, described *supra* [page 356](#). According to this doctrine, a plaintiff whose efforts create a fund is entitled to have those who benefit contribute to his lawyer’s fee. In class actions that create funds for distribution to class members, the doctrine is applied more directly: Courts regularly award the class lawyer a fee taken directly from the fund created by the litigation.

How should the court calculate such a fee? One school of thought is that a simple percentage is appropriate, using the analogy of contingent fee arrangements. Others point out that the key ingredient in a contingent fee calculation—the agreement between lawyer and client—is missing in the class action context. They argue instead that the proper way to calculate fees is to start with the appropriate hourly rate of the lawyer taking into account such factors as special risks, novelty of the issues, and the like. This latter method—often called “the lodestar” method, because the hourly rate provides a point of reference by which the court can “steer”—is used in federal courts, but not all states adhere to it. In practice, the two methods may often arrive at similar results.

Setting these fees presents problems because most class actions settle and the fee award is made in the context of a settlement approval hearing required by Rule 23(e). At that hearing the representatives of the class and defendant, who will have agreed on an appropriate amount of fees, are unlikely to raise questions casting doubt on the agreed amount or on the vigorousness of the litigation leading to the settlement. Moreover, because the fees are negotiated at the same time as the relief going to the class members, lawyers for the class and the defendant may be tempted to put more dollars into the fees than into relief for the class, thus buying off the plaintiffs’ lawyer. A special version of this problem has arisen in so-called coupon settlements, in which members of the class get coupons—good for some discount on future purchases of cars, software, etc.—but the plaintiffs’ lawyers are paid in cash. All of these issues replicate the fundamental structural feature of the class action—that the class’s lawyer is representing a diffuse group, who cannot directly instruct or monitor the lawyer’s actions.

The law addresses these problems in two ways. For all class actions, Rule 23(e) requires notice to the absent class members and a hearing and judicial finding that the proposed settlement is “fair, reasonable, and adequate.” And Rule 23(h) creates a process the court must use to approve any attorneys’ fees—including those embodied in a settlement: It requires notice, hearing, findings, and an opportunity to object to fees. Congress has specifically addressed aspects of the coupon settlement in 28 U.S.C. §1712, part of the Class Action Fairness Act of 2005. That section provides that fee awards in such a settlement must be based on the value of the coupons actually redeemed, not on the hypothetical value of the settlement if all such coupons were redeemed. Consider how some representative fee problems should be solved.

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#### *Notes and Problems*

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1. Solo Practitioner brings a class action on behalf of a group of plaintiffs, alleging they were overcharged for their automobiles. The case is settled after three years, during which time Solo has devoted a third of her professional hours to it. The suit grants injunctive relief and \$100,000 in compensatory damages. The 200 members of the class will share in whatever remains of the proceeds after Solo’s fee is paid. The judge finds that Solo spent more than 1,500 hours on the case. The court also finds that in her other legal work Solo billed clients at \$75 an hour. Finally, the court finds that similarly skilled lawyers working in larger firms typically bill for such work at not less than \$150 per hour.
  - a. Should the court use Solo’s actual hourly rate or the higher rate for comparable big-firm lawyers?
  - b. This was Solo’s first piece of comparably complex litigation. The judge finds that a more experienced practitioner would have devoted 200 fewer hours to the case. Should the judge subtract this amount from the hours Solo actually expended?
  - c. Even using the lower billing rate and fewer hours, multiplying the hours times the rate will yield a sum nearly as great as the \$100,000 recovery. What should the court do?

2. In a class action seeking several millions of dollars in damages, the defendant offers to settle for a total sum of \$100,000, with \$95,000 allocated to lawyers' fees and \$5,000 to the 500 plaintiffs.
  - a. Such separately negotiated attorneys' fees are ethical, but they are also not binding on the court. The trial judge has the power to assess the proposed attorneys' fees award for fairness.
  - b. How should the judge decide whether to approve such an offer?
3. In a suit against a software manufacturer, the plaintiff alleged that the defendant created software that would block users from downloading free software that competed with that of the defendant. A proposed settlement would give coupons to the members of the class good for purchases of future software from defendant, and enjoins defendant to "unblock" existing software in one of its periodic downloads. If all the coupons were redeemed, the class would get discounts of \$10 million.
  - a. How should the court decide on the value of the coupons for fee-setting purposes? See 28 U.S.C. §1712(d).
  - b. Suppose the court decides that the value of the redeemed coupons is likely to be about \$1 million. How should the court value the injunctive relief for fee-setting purposes?
4. Finally, in other class actions that involve no money damages (likely brought under Rule 23(b)(2)), the injunctive relief will justify a fee—to be paid by defendant—based on a fee-shifting statute (e.g., 42 U.S.C. §1988(b)). Setting fees in such cases presents challenges—how, for example, does one calculate the "going rate" for various practice specialties?—but in principle these fees pose fewer challenges than do those in money damages cases.

### **b. Damages and Injunctive Relief**

In class actions, damages pose an issue that rarely arises in ordinary cases: making sure that the class recovery finds its way into the hands of the class members. Class members often are unaware of the class action and subsequent recovery and consequently don't claim damages. The nature of some types of class actions makes notice difficult. One proposed solution to the problem is the *fluid class recovery*, under which, in the case of a class consisting of past consumers that dealt with a company, damages would be distributed to future consumers through rate reductions lasting long enough to exhaust the recovery. Or the proposed relief may run to those who currently occupy the position of now-departed members of the class. The terms of the hypothetical settlement in the *Wal-Mart* case contain some such elements—training designed to benefit current employees, which will not help those who have moved to other jobs. Note that the ordinary purpose of litigation—compensation of the plaintiff for a wrong suffered—is not served by the fluid class recovery because some of the beneficiaries are not the people who have suffered the harm but merely people similar to them. Fluid class recovery thus serves to deter the defendants but not to compensate the plaintiffs. Is that a problem? Or is it a virtue?

### **c. Settlement and Dismissal**

Class actions gain their power, and their controversial status, because they combine groups for litigation that are often not otherwise organized. Suddenly confronted not by scattered claimants, each with a paltry amount at stake, but instead by a giant group claiming many millions of dollars in damages, defendants sometimes claim unfairness—that they are forced to settle regardless of the merits of the case because bankruptcy looms if they lose. But the tables can turn. Suppose a class with great potential liability could be certified—and the claims then settled for far less than they were worth. Such a settlement might, through the doctrines of former adjudication, bar its members from individual suits. In such a situation the class action would have turned from defendant's nightmare ("legalized blackmail" in the quotation at the start of this section) into a lawyers' conspiracy against the class members. Is that a fair description of the next case? Or does it instead embody both fairness and creativity in the highest traditions of the legal system?

### **Amchem Products, Inc. v. Windsor**

521 U.S. 591 (1997)

**Justice GINSBURG delivered the opinion of the Court.**

**This case concerns the legitimacy under Rule 23 of the Federal Rules of Civil Procedure of a class-action certification sought to achieve global settlement of current and future asbestos-related claims. The class proposed for certification potentially encompasses hundreds of thousands, perhaps millions, of individuals tied together by this commonality: each was, or some day may be, adversely affected by past exposure to asbestos products manufactured by one or more of 20 companies. Those companies, defendants in the lower courts, are petitioners here....**

## I

### A

The settlement-class certification we confront evolved in response to an asbestos-litigation crisis. A United States Judicial Conference Ad Hoc Committee on Asbestos Litigation, appointed by The Chief Justice in September 1990, described facets of the problem in a 1991 report:

[This] is a tale of danger known in the 1930s, exposure inflicted upon millions of Americans in the 1940s and 1950s, injuries that began to take their toll in the 1960s, and a flood of lawsuits beginning in the 1970s. On the basis of past and current filing data, and because of latency period that may last as long as 40 years for some asbestos related diseases, a continuing stream of claims can be expected. The final toll of asbestos related injuries is unknown. Predictions have been made of 200,000 asbestos disease deaths before the year 2000 and as many as 265,000 by the year 2015.

The most objectionable aspects of asbestos litigation can be briefly summarized: dockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether.

Report of The Judicial Conference Ad Hoc Committee on Asbestos Litigation 2-3 (Mar. 1991).

Real reform, the report concluded, required federal legislation creating a national asbestos dispute-resolution scheme....To this date, no congressional response has emerged.

In the face of legislative inaction, the federal courts—lacking authority to replace state tort systems with a national toxic tort compensation regime—endeavored to work with the procedural tools available to improve management of federal asbestos litigation. Eight federal judges, experienced in the superintendence of asbestos cases, urged the Judicial Panel on Multidistrict Litigation (MDL Panel), to consolidate in a single district all asbestos complaints then pending in federal courts. Accepting the recommendation, the MDL Panel transferred all asbestos cases then filed, but not yet on trial in federal courts to a single district, the United States District Court for the Eastern District of Pennsylvania; pursuant to the transfer order, the collected cases were consolidated for pretrial proceedings before Judge Weiner. The order aggregated pending cases only; no authority resides in the MDL Panel to license for consolidated proceedings claims not yet filed.

### B

After the consolidation, attorneys for plaintiffs and defendants formed separate steering committees and began settlement negotiations....Settlement talks... concentrated on devising an administrative scheme for disposition of asbestos claims not yet in litigation. In these negotiations, counsel for masses of inventory plaintiffs\* endeavored to represent the interests of the anticipated future claimants, although those lawyers then had no attorney-client relationship with such claimants.

Once negotiations seemed likely to produce an agreement purporting to bind potential plaintiffs, CCR[, a consortium of defendants,] agreed to settle, through separate agreements, the claims of plaintiffs who had already filed asbestos-related lawsuits....After settling the inventory claims, CCR, together with the plaintiffs' lawyers CCR had approached, launched this case, exclusively involving persons outside the MDL Panel's province—plaintiffs without already pending lawsuits.<sup>3</sup>

### C

The class action thus instituted was not intended to be litigated. Rather, within the space of a single day, January 15, 1993, the settling parties—CCR defendants and the representatives of the plaintiff class described below—presented to the District Court a complaint, an answer, a proposed settlement agreement, and a joint motion for conditional class certification.

The complaint identified nine lead plaintiffs, designating them and members of their families as representatives of a class comprising all persons who had not filed an asbestos-related lawsuit against a CCR defendant as of the date the class action commenced, but who (1) had been exposed—occupationally or through the occupational exposure of a spouse or household member—to asbestos or products containing asbestos attributable to a CCR defendant, or (2) whose spouse or family member had been so exposed. Untold numbers of individuals may fall within this description. All named plaintiffs alleged that they or a member of their family had been exposed to asbestos-containing products of CCR defendants. More than half of the named plaintiffs alleged that they or their family members had already suffered various physical injuries as a result of the exposure. The others alleged that they had not yet manifested any asbestos-related condition. The complaint delineated no subclasses; all named plaintiffs were designated as representatives of the class as a whole.

The complaint invoked the District Court's diversity jurisdiction....

A stipulation of settlement accompanied the pleadings; it proposed to settle, and to preclude nearly all class members from litigating against CCR companies, all claims not filed before January 15, 1993, involving compensation for present and future asbestos-related personal injury or death. An exhaustive document exceeding 100 pages, the stipulation presents in detail an administrative mechanism and a schedule of payments to compensate class members who meet defined asbestos-exposure and medical requirements. The stipulation describes four categories of compensable disease: mesothelioma; lung cancer; certain “other cancers” (colon-rectal, laryngeal, esophageal, and stomach cancer); and “non-malignant conditions” (asbestosis and bilateral pleural thickening). Persons with “exceptional” medical claims—claims that do not fall within the four described diagnostic categories—may in some instances qualify for compensation, but the settlement caps the number of “exceptional” claims CCR must cover....

For each qualifying disease category, the stipulation specifies the range of damages CCR will pay to qualifying claimants. Payments under the settlement are not adjustable for inflation. Mesothelioma claimants—the most highly compensated category—are scheduled to receive between \$20,000 and \$200,000. The stipulation provides that CCR is to propose the level of compensation within the prescribed ranges; it also establishes procedures to resolve disputes over medical diagnoses and levels of compensation.

Class members are to receive no compensation for certain kinds of claims, even if otherwise applicable state law recognizes such claims....Although not entitled to present compensation, exposure-only claimants and pleural claimants may qualify for benefits when and if they develop a compensable disease and meet the relevant exposure and medical criteria. Defendants forgo defenses to liability, including statute of limitations pleas.

Class members, in the main, are bound by the settlement in perpetuity, while CCR defendants may choose to withdraw from the settlement after ten years. A small number of class members—only a few per year—may reject the settlement and pursue their claims in court. Those permitted to exercise this option, however, may not assert any punitive damages claim or any claim for increased risk of cancer. Aspects of the administration of the settlement are to be monitored by the AFL-CIO and class counsel. Class counsel are to receive attorneys’ fees in an amount to be approved by the District Court.

#### D

On January 29, 1993, as requested by the settling parties, the District Court conditionally certified, under Federal Rule of Civil Procedure 23(b)(3), an encompassing opt-out class....Judge Weiner assigned to Judge Reed, also of the Eastern District of Pennsylvania, “the task of conducting fairness proceedings and of determining whether the proposed settlement is fair to the class.” [The district court approved the settlement.]

#### E

The Court of Appeals [reversing]...found that “serious intra-class conflicts precluded the class from meeting the adequacy of representation requirement” of Rule 23(a)(4)....

### III

To place this controversy in context, we briefly describe the characteristics of class actions for which the Federal Rules provide. Rule 23, governing federal-court class actions, stems from equity practice and gained its current shape in an innovative 1966 revision....

In the decades since the 1966 revision of Rule 23, class action practice has become ever more “adventurous” as a means of coping with claims too numerous to secure their “just, speedy, and inexpensive determination” one by one. See Fed. Rule Civ. Proc. 1. The development reflects concerns about the efficient use of court resources and the conservation of funds to compensate claimants who do not line up early in a litigation queue....

Among current applications of Rule 23(b)(3), the “settlement only” class has become a stock device. Although all Federal Circuits recognize the utility of Rule 23(b)(3) settlement classes, courts have divided on the extent to which a proffered settlement affects court surveillance under Rule 23’s certification criteria....

### IV

We granted review to decide the role settlement may play, under existing Rule 23, in determining the propriety of class certification....

Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, see Fed. Rule Civ. Proc. 23(b)(3) (D), for the proposal is that there be no trial. But other specifications of the rule—those designed to protect absentees by blocking unwarranted or overbroad class definitions—demand undiluted, even heightened,

attention in the settlement context. Such attention is of vital importance, for a court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold. See Fed. Rule Civ. Proc. 23(c), (d).<sup>16</sup> And, of overriding importance, courts must be mindful that the rule as now composed sets the requirements they are bound to enforce. Federal Rules take effect after an extensive deliberative process involving many reviewers: a Rules Advisory Committee, public commenters, the Judicial Conference, this Court, the Congress. The text of a rule thus proposed and reviewed limits judicial inventiveness. Courts are not free to amend a rule outside the process Congress ordered, a process properly tuned to the instruction that rules of procedure “shall not abridge...any substantive right.” 28 U.S.C. §2072(b).

Rule 23(e) [at the time of the decision,] on settlement of class actions, read[] in its entirety: “A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.” This prescription was designed to function as an additional requirement, not a superseding direction, for the “class action” to which Rule 23(e) refers is one qualified for certification under Rule 23(a) and (b)...The safeguards provided by the Rule 23(a) and (b) class-qualifying criteria, we emphasize, are not impractical impediments—checks shorn of utility—in the settlement class context....

Federal courts, in any case, lack authority to substitute for Rule 23’s certification criteria a standard never adopted—that if a settlement is “fair,” then certification is proper. Applying to this case criteria the rulemakers set, we conclude that the Third Circuit’s appraisal is essentially correct. Although that court should have acknowledged that settlement is a factor in the calculus, a remand is not warranted on that account. The Court of Appeals’ opinion amply demonstrates why—with or without a settlement on the table—the sprawling class the District Court certified does not satisfy Rule 23’s requirements....

#### A

We address first the requirement of Rule 23(b)(3) that “[common] questions of law or fact...predominate over any questions affecting only individual members.” The District Court concluded that predominance was satisfied based on two factors: class members’ shared experience of asbestos exposure and their common “interest in receiving prompt and fair compensation for their claims, while minimizing the risks and transaction costs inherent in the asbestos litigation process as it occurs presently in the tort system.”...

The predominance requirement stated in Rule 23(b)(3), we hold, is not met by the factors on which the District Court relied. The benefits asbestos-exposed persons might gain from the establishment of a grand-scale compensation scheme is a matter fit for legislative consideration, but it is not pertinent to the predominance inquiry. That inquiry trains on the legal or factual questions that qualify each class member’s case as a genuine controversy, questions that preexist any settlement....

#### B

Nor can the class approved by the District Court satisfy Rule 23(a)(4)’s requirement that the named parties “will fairly and adequately protect the interests of the class.” The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent....

As the Third Circuit pointed out, named parties with diverse medical conditions sought to act on behalf of a single giant class rather than on behalf of discrete subclasses. In significant respects, the interests of those within the single class are not aligned. Most saliently, for the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future....

The settling parties, in sum, achieved a global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected. Although the named parties alleged a range of complaints, each served generally as representative for the whole, not for a separate constituency.

...

The Third Circuit found no assurance here—either in the terms of the settlement or in the structure of the negotiations—that the named plaintiffs operated under a proper understanding of their representational responsibilities. That assessment, we conclude, is on the mark.

#### C

Because we have concluded that the class in this case cannot satisfy the requirements of common issue predominance and adequacy of representation, we need not rule, definitively, on the notice given here. In accord with the Third Circuit, however, we recognize the gravity of the question whether class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous.

## V

The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure. Congress, however, has not adopted such a solution. And Rule 23, which must be interpreted with fidelity to the Rules Enabling Act and applied with the interests of absent class members in close view, cannot carry the large load CCR, class counsel, and the District Court heaped upon it. As this case exemplifies, the rulemakers' prescriptions for class actions may be endangered by "those who embrace [Rule 23] too enthusiastically just as [they are by] those who approach [the rule] with distaste." C. Wright, *Law of Federal Courts* 508 (5th ed. 1994)....

Justice O'CONNOR took no part in the consideration or decision of this case.

Justice BREYER, with whom Justice STEVENS joins, concurring in part and dissenting in part.

Although I agree with the Court's basic holding that "settlement is relevant to a class certification," I find several problems in its approach that lead me to a different conclusion. First, I believe that the need for settlement in this mass tort case, with hundreds of thousands of lawsuits, is greater than the Court's opinion suggests. Second, I would give more weight than would the majority to settlement-related issues for purposes of determining whether common issues predominate. Third, I am uncertain about the Court's determination of adequacy of representation, and do not believe it appropriate for this Court to second-guess the District Court on the matter without first having the Court of Appeals consider it. Fourth, I am uncertain about the tenor of an opinion that seems to suggest the settlement is unfair. And fifth, in the absence of further review by the Court of Appeals, I cannot accept the majority's suggestions that "notice" is inadequate....

### WHAT'S NEW HERE?

- Unlike *Wal-Mart v. Dukes*, in which the defendant vigorously fought class certification, the *Amchem* defendants supported class certification. They did so because certification (and an approved settlement) would at one fell swoop eliminate not only pending lawsuits but also those that had not yet been brought.
- In the ordinary case when both sides support a settlement, that is the end of the matter. In this one, the Supreme Court overturned a settlement supported by both sides.
- The Court says it did so because the way in which the settlement was achieved strongly suggested a conflict of interest between the set of plaintiffs with existing claims and the set of plaintiffs with latent claims—with the same lawyers seeking to represent both.

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### Notes and Problems

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1. *Amchem* exposes numerous issues, some of which challenge the most basic assumptions about the nature of civil litigation. In that respect it is a fitting close both to this chapter on joinder and to the student's exploration of civil procedure.
2. Start by defining the respects in which *Amchem* is an unusual case, even within the category of class actions, which are themselves unusual if measured by ordinary litigation standards.
  - a. In a typical class action the plaintiff files a complaint; there is a battle over class certification, followed (if the class is certified) by discovery, perhaps a summary judgment motion, and settlement discussions. What happened in *Amchem*?
  - b. In many ordinary, single-plaintiff/single-defendant cases, the parties settle before suit is filed. To use the asbestos context, a lawyer for a former shipyard worker alleging injuries from inhalation of asbestos dust could approach an asbestos manufacturer and settle the claim without ever filing a complaint. Why didn't the parties do so in *Amchem*? Why *couldn't* they do so if they wanted the settlement to have the intended effect?
  - c. What did the parties—in particular the defendants—want to get from class certification that they could not have gotten in any other way?
3. To answer Problem 2c, one must be clear about the definition of the class. The persons involved in the *Amchem*

litigation comprised two groups.

- a. There were individual claimants who had filed complaints against various asbestos manufacturers (the so-called inventory claimants). These cases had been consolidated (under the provision for Multidistrict Litigation, 28 U.S.C. §1407). These claims could have been settled without regard to class certification; indeed, it was the discussion of their settlement that led to the proposed class action.
- b. Who, then, were the other members of the class?
- c. Put yourself in the position of a defendant. Why would you have wanted the class certification and settlement before being willing to settle the “inventory” of individual cases?
- d. The Supreme Court has emphasized that it meant what it said in *Amchem* about the avoidance of conflicts of interest by lawyers representing classes. Striking down another asbestos settlement class in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), the Court said:

One may take a settlement amount as good evidence of the maximum available if one can assume that parties of equal knowledge and negotiating skill agreed upon the figure through arms-length bargaining, unhindered by any considerations tugging against the interests of the parties ostensibly represented in the negotiation. But no such assumption may be indulged in this case, or probably in any class action settlement with the potential for gigantic fees. In this case, certainly, any assumption that plaintiffs’ counsel could be of a mind to do their simple best in bargaining for the benefit of the settlement class is patently at odds with the fact that at least some of the same lawyers representing plaintiffs and the class had also negotiated the separate settlement of 45,000 pending claims, the full payment of which was contingent on a successful global settlement agreement or the successful resolution of the insurance coverage dispute... Class counsel thus had great incentive to reach any agreement in the global settlement negotiations that they thought might survive a Rule 23(e) fairness hearing, rather than the best possible arrangement for the substantially unidentified global settlement class... The resulting incentive to favor the known plaintiffs in the earlier settlement was, indeed, an egregious example of the conflict noted in *Amchem* resulting from divergent interests of the presently injured and future claimants.

Id. at 852-853.

4. In spite of *Amchem* and *Ortiz* there have been both settlement classes and procedures that achieved some of the goals of the settlement class without using that form.
  - a. For an example of an approved settlement class, see *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020-1021 (9th Cir. 1997), in which plaintiffs sued an auto manufacturer alleging a defective latch in a van’s door. Affirming the district court’s approval of a settlement class, the Ninth Circuit carefully distinguished *Amchem*:

At the heart of *Amchem* was concern over settlement allocation decisions; asbestos manufacturers had a designated amount of money that was not fairly distributed between present and future claimants. The *Amchem* settlement eliminated all present and future claims against asbestos manufacturers, with class counsel attempting to represent both groups of plaintiffs. The Supreme Court found this dual representation to be particularly troubling, given that present plaintiffs had a clear interest in a settlement that maximized current funds, while future plaintiffs had a strong interest in preserving funds for their future needs and protecting the total fund against inflation.

Unlike the class in *Amchem*, this class of minivan owners does not present an allocation dilemma. Potential plaintiffs are not divided into conflicting discrete categories, such as those with present health problems and those who may develop symptoms in the future. Rather, each potential plaintiff has the same problem: an allegedly defective rear latchgate which requires repair or commensurate compensation. The differences in severity of personal injury present in *Amchem* are avoided here by excluding personal injury and wrongful death claims. Similarly, there is no structural conflict of interest based on variations in state law, for the named representatives include individuals from each state, and the differences in state remedies are not sufficiently substantial so as to warrant the creation of subclasses. Representatives of other potential subclasses are included among the named representatives, including owners of every minivan model. However, even if the named representatives did not include a broad cross-section of claimants, the prospects for irreparable conflict of interest are minimal in this case because of the relatively small differences in damages and potential remedies.

Is this an adequate response?

- b. For an example of a settlement device that achieves many of the goals of the settlement class without the defects found in *Amchem*, consider a settlement between a pharmaceutical house and plaintiffs not certified as a class. Merck manufactured a widely prescribed pain medicine, Vioxx, which was withdrawn from the market after it was found to increase the risk of heart disease. Twenty-six thousand lawsuits followed, some from survivors of those who had died of heart disease after taking the drug, others from those who had suffered some identifiable health harm, and still others who alleged only increased anxiety and stress from fear of future effects. As in *Amchem*, many of these were consolidated before a single federal district judge pursuant to the multidistrict litigation provisions. Merck defended the claims initially, trying a number, losing some big verdicts but winning the majority of the cases (15 out of 20, according to one news report). Plaintiffs’ and defendant’s lawyers then negotiated a global settlement, providing a total of \$5 billion to be disbursed according to a schedule, with claimants suffering death or serious injury receiving amounts in excess of \$1 million, but those with less serious injuries far less. The part of the settlement that resembles the *Amchem* settlement class are three provisions: (1) that the plaintiffs’ lawyers recommend it to their clients;

- (2) that the settlement would not go into effect unless 85 percent of all claimants accepted the settlement; and  
 (3) that the plaintiffs' lawyers agreed not to represent any plaintiff who chooses not to accept the settlement.  
 Are the first and third provisions consistent with the lawyer's duty to his client?
5. As one can gather from the disagreement between majority and dissent, the judiciary, academia, and the bar are divided on the desirability of settlements like *Amchem* and *Ortiz*—and perhaps that in the *Vioxx* case just described.
    - a. One experienced observer of the legal scene described such cases as violations of due process and “the sale of res judicata at a bargain basement price.”
    - b. Others have praised them as embodying the highest traditions of judicial creativity and lawyers' cooperation.
    - c. In part, one's assessment may depend on one's assumptions about the alternatives. If one thinks that the alternative is an expeditiously conducted civil trial, much of the straining to find that the settlement did not breach either the principles of due process or of professional ethics will seem unnecessary and undesirable. One can find some evidence to support the thesis that the “ordinary” litigation system was developing methods of coping with the asbestos cases.
    - d. If one thinks that the alternative is the death or financial destitution of those waiting in line for such a civil trial, then the district courts' rulings in *Amchem* and *Ortiz* will seem both humane and sensible. One can find some evidence that the litigation system was drowning in asbestos litigation and that litigation expenses, including lawyers' fees, were consuming two-thirds of the amounts recovered.
  6. Beyond this level of debate is a subsidiary one about legal institutions. Some who would accept the argument that courts were doing badly with asbestos litigation would nevertheless say that there were other institutions that could have and should have responded.
    - a. One candidate was Congress, which could have created an administrative system (like that for workers' compensation) for dealing with the asbestos claims. The Black Lung Benefits Act, 30 U.S.C. §§901 et seq., might have provided a model. Under the Act, funded by a tax on coal, miners who show disability produced by exposure to coal dust collect benefits from a federal agency. As the opinion in *Amchem* noted, Congress has not acted in a similar way in the case of asbestos. Does that mean that the courts should act on their own? Or has the courts' search for solutions taken the political heat off Congress and thereby thwarted a legislative solution?
    - b. Another candidate was the bankruptcy courts. Some have argued that bankruptcy courts are in the business of collective litigation: They regularly resolve cases in which large numbers of creditors have claims against an entity. Moreover, they are expressly vested with the power to do the sort of quasi-administrative tasks achieved by the proposed settlement. One theoretical objection to the settlement class in *Ortiz* was that by using Rule 23(b)(1) and a limited fund rationale, the defendants were seeking the sort of protection they might have achieved in bankruptcy without subjecting themselves to the powers of a bankruptcy proceeding that might have dug much more deeply into their pockets.
  7. As a nice summation of your grasp of civil procedure, be prepared either to defend or to attack the *Amchem* settlement—and explain your grounds for doing so—both as a matter of procedural law and of political theory.

### Assessment Questions

- Q1. Plaintiff files a complaint against an automobile Dealer and an automobile Manufacturer. The complaint, which is properly before the court under diversity jurisdiction, alleges that Plaintiff was injured in an accident caused by a defect in the vehicle's steering mechanism. The following questions ask you about what pleading(s) should be filed. Your options in answering are (1) an answer; (2) a cross-claim; (3) a counterclaim; (4) a third-party claim; and (5) none of the above.
  - A. Dealer wants to assert that Manufacturer is contractually obligated to indemnify Dealer for any liability that Dealer may have to Plaintiff in the action. What pleading, if any, should Dealer file?
  - B. Manufacturer wants to assert that the vehicle was not defective when delivered to Dealer and that any defect must have been introduced by Dealer when the vehicle was being prepared for delivery to customer. What pleading, if any, should Manufacturer file?
  - C. Manufacturer wants to assert that Dealer has failed to pay for several vehicles that Manufacturer delivered to Dealer (not including the vehicle at issue in the action). Can it do so? What pleading, if any, should Manufacturer file?

- D.** Dealer wants to assert that Plaintiff owes Dealer money for a breach of contract that has no relationship whatsoever to the vehicle or accident at issue in Plaintiff's complaint. Can Dealer do so? What pleading, if any, should it use?
- E.** Dealer and Manufacturer both want to assert that there was no defect in the vehicle and that the accident was solely the result of Plaintiff's negligence. What pleading, if any, should Dealer and Manufacturer use?
- Q2.** Plaintiff sues Defendant alleging that Defendant infringed Plaintiff's patent. Defendant wants to assert that Plaintiff and a Competitor of Defendant are liable to Defendant for compensatory and punitive damages for conspiring to use frivolous patent claims to create a monopoly in violation of antitrust laws. Assume that the court would have personal jurisdiction over Competitor, and that Competitor's addition as a party would not defeat subject matter jurisdiction. What pleading, if any, should Defendant file?
- A.** A counterclaim against Plaintiff, joining Competitor as an additional party.
- B.** A denial of the relevant allegations of the complaint.
- C.** An affirmative defense that Competitor was responsible for any violation of law.
- D.** An impleader action against Competitor.
- Q3.** Joinder of claims and parties in contemporary civil litigation...
- A.** Substantially departs from the preceding common law regime.
- B.** Is controlled by the Federal Rules.
- C.** Is both facilitated and limited by jurisdictional statutes and doctrines.
- Q4.** Imagine a car purchase that has gone sour. Buyer sues Dealer in a diversity action, alleging Buyer was injured by a design defect. Dealer denies the defect, joins Manufacturer as a third-party defendant, and files a counterclaim against Buyer for unpaid repair bills on the vehicle in question. Buyer believes that his online billpay service should have paid these bills and is liable for its failure to do so. Which of the following are true?
- A.** If there is a legal basis for Dealer's third-party claim against Manufacturer, supplemental jurisdiction will extend to this claim.
- B.** Rule 14 permits Buyer to join Online Billpay Service as a third-party defendant on the counterclaim.
- C.** If there is a legal basis for Buyer's third-party complaint against Online, supplemental jurisdiction will extend to this claim.
- Q5.** California Buyer purchases from Nevada Dealer a vehicle made by California Manufacturer. In San Francisco, Buyer becomes involved in a collision with Oregon Driver. Buyer invokes diversity jurisdiction to sue Dealer in federal district court in Nevada. Identify the correct statement(s).
- A.** Manufacturer can intervene as of right, on the basis that Dealer is likely to try to cast the blame on Manufacturer.
- B.** Dealer will succeed if he argues that where there are three plausibly liable parties (Manufacturer and Driver, in addition to Dealer), Rule 19 requires that all they be joined—or, at a minimum, the court should explain why not.
- C.** Driver can intervene as of right, on the ground that if Dealer prevails, it will make Buyer more likely to come after him.
- D.** On these facts, no nonparty has plausible grounds for required joinder or intervention as of right.
- Q6.** Regents of State University raise tuition, and current students sue to challenge this action. In response Regents propose a settlement that they won't charge the current students the increased tuition, but that they will have to curtail future academic programs to offset the cost. Identify the correct statement(s).
- A.** Just-admitted students (who will be freshmen next year) have grounds to intervene in this suit as a class.
- B.** The Regents can invoke Rule 19 to join the just-admitted students.
- Q7.** Joe files a claim against General Motors, seeking damages for injuries resulting from a defective ignition switch. GM answers, asserting former adjudication as a defense, and then moves for summary judgment attaching papers showing a judgment in a (b)(3) class action brought on behalf of those injured under similar circumstances. Joe can avoid preclusion if...

- A. He can show that he received notice of the class suit and chose to opt out of it.
  - B. He can show that, although his address was available in the GM files, plaintiff's counsel failed to mail him notice of the suit.
  - C. He can show that he was not adequately represented in the former suit.
  - D. None of the above: Joe is bound by the former suit.
- Q8.** A group of ten parents sue on behalf of all parents in the community to force a local elementary school to close on the basis that its grounds—a former landfill—are contaminated. Assume that the requisites of subject matter jurisdiction are satisfied. In its current form the suit might nevertheless fail to be certified as a class if...
- A. A substantial number of parents that would be part of the class wanted the school to remain open while on-site remediation occurred.
  - B. The class's lawyer was just out of law school.
  - C. The class representatives could not afford to send individual mail notice to all the class members.
  - D. Neither the class nor its lawyers had substantial assets.

### Analysis of Assessment Questions

- Q1A.** The correct response is 4—a third-party claim; this is a classic instance of passing on liability.
- Q1B.** The correct response is 1—an answer, in which the Manufacturer would simply deny liability; in the course of litigation it could tell its version of events—that the Dealer must have done it.
- Q1C.** The correct response is 5—none of the above. Because this cross-claim does not arise from the same transaction or occurrence as the main claim, Rule 13(g) does not permit its assertion. Manufacturer will need to file a separate action against Dealer.
- Q1D.** The correct response is 3—a counterclaim. Because this counterclaim is not transactionally related, it is permissive and therefore no supplemental jurisdiction will attach, but Rule 13(b) permits its assertion.
- Q1E.** The correct response is 1—an answer, in which both defendants would deny liability.
- Q2.** A is the only correct response. A counterclaim joining an additional party; see Rule 13(h). Because this counterclaim will involve common questions of law or fact Rule 20 permits the addition of Competitor as an additional party on the counterclaim.
- Q3.** A, B, and C are the correct responses.
- Q4.** A and B are the correct responses. A is correct because the third-party claim falls within 28 U.S.C. §1367(a) and does not fall within the exclusions of §1367(b). B is correct because as to the counterclaim Buyer is a “defending party” within the meaning of Rule 14. C is wrong: by the plain language of §1367(b), language the courts have interpreted according to its literal meaning, no supplemental jurisdiction extends to claims by plaintiffs (here Buyer) against persons made parties under Rule 14 (here Online) if doing so would defeat diversity. The drafters may well have meant to extend supplemental jurisdiction in this situation, but the courts have said that the statute means what its language says.
- Q5.** D is the only correct response. A is incorrect because Dealer can cast all the blame it likes but the judgment won't bind Manufacturer and won't impair or impede Manufacturer's ability to defend its interests: Defendants regularly try to cast blame on some absent party. B is wrong because, as *Temple v. Synthes* demonstrates, Rule 19 does not require plaintiffs to package their lawsuits in the most efficient possible form. C is wrong because, though Buyer may sue Driver, his exclusion from the first suit doesn't impair or impede his ability to defend himself if that suit does occur.
- Q6.** Both A and B are correct. A is correct because the new students can make a plausible case that “as a practical matter” the Regents' action will decrease the funds available for their education. (The new students would be a Rule 23(b)(2) class.) B is correct because, if they have read *Martin v. Wilks* and want to bind both current and future students, the Regents will want to join them.
- Q7.** A, B, and C are the correct responses. A is correct because one of the consequences of opting out of a class action is that one neither receives its benefits, if any, nor its burdens. B is correct because, since this was a Rule 23(b)(3) suit, plaintiff's counsel was obligated by Rule 26(c)(2)(B), as well as *Mullane v. Central Hanover Bank & Trust*, to provide individual notice to “all members who can be identified through reasonable effort.” C is correct because *Hansberry v. Lee* permits collateral attack on a class judgment by one alleging inadequate representation.
- Q8.** A, B, and D are the correct responses. A is correct because the apparently conflicting wishes of the parents

might well defeat both the typicality and the adequate representation requirements of Rule 23(a). B is correct because such a lawyer would be very unlikely to be able—as a matter of professional competence—adequately to represent the class. D is very likely correct because part of representative adequacy includes the ability to finance the lawsuit. C is wrong because this will be a (b)(2) class, which would not require individual notice to all class members (though some form of notice would likely be required).

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13. State courts, which share jurisdiction over truth-in-lending actions, have considered the nexus between such claims in the opposite procedural posture. Where creditors bring actions on the debt, state courts have split on the question of whether the debtor may assert a truth-in-lending counterclaim otherwise barred by the Act's one-year statute of limitations. 15 U.S.C.A. §1640(e). Where the counterclaim can be regarded as arising from the same transaction as the claim, courts have permitted the counterclaim as a "recoupment" or "setoff" without regard to the statute of limitations. The similarity between the requirements for recoupment and those for Rule 13(a) compulsory counterclaims has been noted....

\* [At the time of the decision, the relevant portion of Rule 20 read: "All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action...."—EDS.]

3. The court finds it necessary to dispel any worry that its rule might permit defendants to improperly encumber ongoing lawsuits by simply asserting claims of implied contractual indemnity. Rule 14(a) grants federal courts discretion in determining the propriety of a third party complaint, and in making its determination, a court may consider the burden upon the litigation that might ensue, as well as the merit of the third party complaint.... Rules 21 and 42 further provide original plaintiffs protection against vexatious litigation by permitting the court to drop parties or to sever claims. In the present matter, the court deems it appropriate to allow the factual record to develop so that the role of ITW's products in the allegedly defective chicken houses can be determined. Under the rationale that a stitch in time saves nine, the court considers it more efficient to determine liability presently rather than to risk potential relitigation on all the issues at a later date. This conclusion is underscored given that forty identical suits were filed against Latco.

\* [Renumbered to reflect the current position of the relevant provision in Rule 19.—EDS.]

2. We have recognized an exception to the general rule when, in certain limited circumstances, a person, although not a party, has his interests adequately represented by someone with the same interests who is a party. See *Hansberry v. Lee*, 311 U.S. 32, 41-42 (1940) ("class" or "representative" suits); Fed. Rule Civ. Proc. 23 (same); *Montana v. United States*, 440 U.S. 147, 154-155 (1979) (control of litigation on behalf of one of the parties in the litigation). Additionally, where a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants, as for example in bankruptcy or probate, legal proceedings may terminate pre-existing rights if the scheme is otherwise consistent with due process. See *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 529-530, n.10 (1984) ("proof of claim must be presented to the Bankruptcy Court...or be lost"); *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478 (1988) (nonclaim statute terminating unsubmitted claims against the estate). Neither of these exceptions, however, applies in this case.

\* [At the time of the decision, the relevant portions of Rule 19(a) and (b) read, respectively, "Upon timely application anyone shall be permitted to intervene" and "Upon timely application anyone may be permitted to intervene."—EDS.]

6. The dissent argues on the one hand that respondents have not been "bound" by the decree but rather, that they are only suffering practical adverse affects from the consent decree. On the other hand, the dissent characterizes respondents' suit not as an assertion of their own independent rights, but as a collateral attack on the consent decree which, it is said, can only proceed on very limited grounds. Respondents in their suit have alleged that they are being racially discriminated against by their employer in violation of Title VII: either the fact that the disputed employment decisions are being made pursuant to a consent decree is a defense to respondents' Title VII claims or it is not. If it is a defense to challenges to employment practices which would otherwise violate Title VII, it is very difficult to see why respondents are not being "bound" by the decree.

\* The former comment comes from Pomerantz, *New Developments in Class Actions—Has Their Death Knell Been Sounded?*, 25 Bus. Law. 1259 (1970); the latter characterization appears in Handler, *The Shift from Substantive to Procedural Innovations in Anti-Trust Suits*, 71 Colum. L. Rev. 1, 9 (1971).

2. Petitioner places emphasis on the fact that absent class members might be subject to discovery, counterclaims, cross-claims or court costs. Petitioner cites no cases involving any such imposition upon plaintiffs, however. We are convinced that such burdens are rarely imposed upon plaintiff class members, and that the disposition of these issues is best left to a case which presents them in a more concrete way.

3. Our holding today is limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominantly for money judgments. We intimate no view concerning other types of class-action lawsuits, such

as those seeking equitable relief. Nor, of course, does our discussion of personal jurisdiction address class actions where the jurisdiction is asserted against a defendant class.

\* The colorfully named Supreme Tribe was a fraternal organization whose life insurance program was the subject of the lawsuit.

5. We have previously stated in this context that “[t]he commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff’s claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. Those requirements therefore also tend to merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about the competency of class counsel and conflicts of interest.” In light of our disposition of the commonality question, however, it is unnecessary to resolve whether respondents have satisfied the typicality and adequate-representation requirements of Rule 23(a).

6. A statement in one of our prior cases, *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974), is sometimes mistakenly cited to the contrary: “We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.” But in that case, the judge had conducted a preliminary inquiry into the merits of a suit, not in order to determine the propriety of certification under Rules 23(a) and (b) (he had already done that), but in order to shift the cost of notice required by Rule 23(c)(2) from the plaintiff to the defendants. To the extent the quoted statement goes beyond the permissibility of a merits inquiry for any other pretrial purpose, it is the purest dictum and is contradicted by our other cases....

7. In a pattern-or-practice case, the plaintiff tries to “establish by a preponderance of the evidence that... discrimination was the company’s standard operating procedure[,] the regular rather than the unusual practice.” If he succeeds, that showing will support a rebuttable inference that all class members were victims of the discriminatory practice, and will justify “an award of prospective relief,” such as “an injunctive order against the continuation of the discriminatory practice.”

1. The plaintiffs requested Rule 23(b)(3) certification as an alternative, should their request for (b)(2) certification fail.

\* [As the opinion elsewhere explained, the steering committees referred to persons who had already filed claims as “inventory plaintiffs,” distinguishing them from those who had not yet experienced illness or filed any claim, to whom they referred as “exposure-only” cases.—EDS.]

3. It is basic to comprehension of this proceeding to notice that no transferred case is included in the settlement at issue, and no case covered by the settlement existed as a civil action at the time of the MDL transfer.

16. Portions of the opinion dissenting in part appear to assume that settlement counts only one way—in favor of certification. To the extent that is the dissent’s meaning, we disagree. Settlement, though a relevant factor, does not inevitably signal that class action certification should be granted more readily than it would be were the case to be litigated. For reasons the Third Circuit aired, proposed settlement classes sometimes warrant more, not less caution on the question of certification.