> (b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

All parties to this litigation and all courts to consider the question agree that §1367 overturned the result in *Finley*. There is no warrant, however, for assuming that §1367 did no more than to overrule *Finley* and otherwise to codify the existing state of the law of supplemental jurisdiction. We must not give jurisdictional statutes a more expansive interpretation than their text warrants, but it is just as important not to adopt an artificial construction that is narrower than what the text provides. No sound canon of interpretation requires Congress to speak with extraordinary clarity in order to modify the rules of federal jurisdiction within appropriate constitutional bounds. Ordinary principles of statutory construction apply. In order to determine the scope of supplemental jurisdiction authorized by §1367, then, we must examine the statute's text in light of context, structure, and related statutory provisions.

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

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

question whether it has a constitutional and statutory basis for exercising supplemental jurisdiction over the other claims in the action.

Section 1367(a) commences with the direction that §§1367(b) and (c), or other relevant statutes, may provide specific exceptions, but otherwise §1367(a) is a broad jurisdictional grant, with no distinction drawn between pendent-claim and pendent-party cases. In fact, the last sentence of §1367(a) makes clear that the provision grants supplemental jurisdiction over claims involving joinder or intervention of additional parties. . . .

If §1367(a) were the sum total of the relevant statutory language, our holding would rest on that language alone. The statute, of course, instructs us to examine §1367(b) to determine if any of its exceptions apply, so we proceed to that section. While §1367(b) qualifies the broad rule of §1367(a), it does not withdraw supplemental jurisdiction over the claims of the additional parties at issue here. The specific exceptions to §1367(a) contained in §1367(b), moreover, provide additional support for our conclusion that §1367(a) confers supplemental jurisdiction over these claims. Section 1367(b), which applies only to diversity cases, withholds supplemental jurisdiction over the claims of plaintiffs proposed to be joined as indispensable parties under Federal Rule of Civil Procedure 19, or who seek to intervene pursuant to Rule 24. Nothing in the text of §1367(b), however, withholds supplemental jurisdiction over the claims of plaintiffs permissively joined under Rule 20 (like the additional plaintiffs in No. 04-79) or certified as class-action members pursuant to Rule 23 (like the additional plaintiffs in No. 04-70). The natural, indeed the necessary, inference is that §1367 confers supplemental jurisdiction over claims by Rule 20 and Rule 23 plaintiffs. This inference, at least with respect to Rule 20 plaintiffs, is strengthened by the fact that §1367(b) explicitly excludes supplemental jurisdiction over claims against defendants joined under Rule 20.

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

The indivisibility theory is easily dismissed, as it is inconsistent with the whole notion of supplemental jurisdiction. If a district court must have original jurisdiction over every claim in the complaint in order to have "original jurisdiction" over a "civil action," then in *Gibbs* there was no civil action of which the district court could assume original jurisdiction under §1331, and so no basis for exercising supplemental jurisdiction over any of the claims. The indivisibility theory is further belied by our practice — in both federal-question and diversity

cases — of allowing federal courts to cure jurisdictional defects by dismissing the offending parties rather than dismissing the entire action. *Clark*, for example, makes clear that claims that are jurisdictionally defective as to amount in controversy do not destroy original jurisdiction over other claims. If the presence of jurisdictionally problematic claims in the complaint meant the district court was without original jurisdiction over the single, indivisible civil action before it, then the district court would have to dismiss the whole action rather than particular parties.

We also find it unconvincing to say that the definitional indivisibility theory applies in the context of diversity cases but not in the context of federal-question cases. The broad and general language of the statute does not permit this result. . . .

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

It is fallacious to suppose, simply from the proposition that §1332 imposes both the diversity requirement and the amount-in-controversy requirement, that the contamination theory germane to the former is also relevant to the latter. There is no inherent logical connection between the amount-in-controversy requirement and §1332 diversity jurisdiction. After all, federal-question jurisdiction once had an amount-in-controversy requirement as well. If such a requirement were revived under §1331, it is clear beyond peradventure that §1367(a) provides supplemental jurisdiction over federal-question cases where some, but not all, of the federal-law claims involve a sufficient amount in controversy. . . .

Although *College of Surgeons* involved additional claims between the same parties, its interpretation of §1441(a) applies equally to cases involving additional parties whose claims fall short of the jurisdictional amount. If we were to adopt the contrary view that the presence of additional parties means there is no "civil action . . . of which the district courts . . . have original jurisdiction," those cases simply would not be removable. To our knowledge, no court has issued a reasoned opinion adopting this view of the removal statute. It is settled, of course, that absent complete diversity a case is not removable because the district court would lack original jurisdiction. *Caterpillar Inc. v. Lewis* [casebook page 214] (1996). This, however, is altogether consistent with our view of §1441(a). A failure of complete diversity, unlike the failure of some claims to meet the requisite amount in controversy, contaminates every claim in the action.

We also reject the argument, . . . that while the presence of additional claims over which the district court lacks jurisdiction does not mean the civil action is outside the purview of §1367(a), the presence of additional parties does. The basis for this distinction is not altogether clear, and it is in considerable

tension with statutory text. Section 1367(a) applies by its terms to any civil action of which the district courts have original jurisdiction, and the last sentence of §1367(a) expressly contemplates that the court may have supplemental jurisdiction over additional parties. So it cannot be the case that the presence of those parties destroys the court's original jurisdiction, within the meaning of §1367(a), over a civil action otherwise properly before it. Also, §1367(b) expressly withholds supplemental jurisdiction in diversity cases over claims by plaintiffs joined as indispensable parties under Rule 19. If joinder of such parties were sufficient to deprive the district court of original jurisdiction over the civil action within the meaning of §1367(a), this specific limitation on supplemental jurisdiction in §1367(b) would be superfluous. The argument that the presence of additional parties removes the civil action from the scope of §1367(a) also would mean that §1367 left the *Finley* result undisturbed. *Finley*, after all, involved a Federal Tort Claims Act suit against a federal defendant and state-law claims against additional defendants not otherwise subject to federal jurisdiction. Yet all concede that one purpose of §1367 was to change the result reached in *Finley*.

Finally, it is suggested that our interpretation of §1367(a) creates an anomaly regarding the exceptions listed in §1367(b): It is not immediately obvious why Congress would withhold supplemental jurisdiction over plaintiffs joined as parties "needed for just adjudication" under Rule 19 but would allow supplemental jurisdiction over plaintiffs permissively joined under Rule 20. The omission of Rule 20 plaintiffs from the list of exceptions in §1367(b) may have been an "unintentional drafting gap." If that is the case, it is up to Congress rather than the courts to fix it. The omission may seem odd, but it is not absurd. An alternative explanation for the different treatment of Rule 19 and Rule 20 is that Congress was concerned that extending supplemental jurisdiction to Rule 19 plaintiffs would allow circumvention of the complete diversity rule: A nondiverse plaintiff might be omitted intentionally from the original action, but joined later under Rule 19 as a necessary party. The contamination theory described above, if applicable, means this ruse would fail, but Congress may have wanted to make assurance double sure. More generally, Congress may have concluded that federal jurisdiction is only appropriate if the district court would have original jurisdiction over the claims of all those plaintiffs who are so essential to the action that they could be joined under Rule 19.

To the extent that the omission of Rule 20 plaintiffs from the list of §1367(b) exceptions is anomalous, moreover, it is no more anomalous than the inclusion of Rule 19 plaintiffs in that list would be if the alternative view of §1367(a) were to prevail. If the district court lacks original jurisdiction over a civil diversity action where any plaintiff's claims fail to comply with all the requirements of §1332, there is no need for a special §1367(b) exception for Rule 19 plaintiffs who do not meet these requirements. Though the omission of Rule 20 plaintiffs from §1367(b) presents something of a puzzle on our view of the statute, the inclusion of Rule 19 plaintiffs in this section is at least as difficult to explain under the alternative view.

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

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

C

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

D

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

* * *

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

It is so ordered.

Justice STEVENS, with whom Justice BREYER joins, dissenting. [Justice Stevens focused on the legislative history of §1367, which, contended, was relatively clear and which supported a Congressional intent to leave *Zahn* untouched.]

Justice GINSBURG, with whom Justice STEVENS, Justice O'CONNOR, and Justice BREYER join, dissenting.

These cases present the question whether Congress, by enacting 28 U.S.C. §1367, overruled this Court's decisions in *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 589 (1939) and *Zahn v. International Paper Co.*, 414 U.S. 291 (1973). *Clark* held that, when federal-court jurisdiction is predicated on a specified amount in controversy, each plaintiff joined in the litigation must independently meet the jurisdictional amount requirement. *Zahn* confirmed that in class actions governed by Federal Rule of Civil Procedure 23(b)(3), "[e]ach [class member] . . . must satisfy the jurisdictional amount, and any [class member] who does not must be dismissed from the case."

Section 1367, all agree, was designed to overturn this Court's decision in *Finley v. United States*, 490 U.S. 545 (1989). *Finley* concerned not diversity-of-citizenship jurisdiction (28 U.S.C. §1332), but original federal-court jurisdiction in cases arising under federal law (28 U.S.C. §1331). . . .

What more §1367 wrought is an issue on which courts of appeals have sharply divided. . . . The Court today holds that §1367, although prompted by *Finley*, a case in which original access to federal court was predicated on a federal question, notably enlarges federal diversity jurisdiction. The Court reads §1367 to overrule *Clark* and *Zahn*, thereby allowing access to federal court by co-plaintiffs or class members who do not meet the now in excess of $75,000 amount-in-controversy requirement, so long as at least one co-plaintiff, or the named class representative, has a jurisdictionally sufficient claim.

The Court adopts a plausibly broad reading of §1367, a measure that is hardly a model of the careful drafter's art. There is another plausible reading, however, one less disruptive of our jurisprudence regarding supplemental jurisdiction. If one reads §1367(a) to instruct, as the statute's text suggests, that the district court must first have "original jurisdiction" over a "civil action" before supplemental jurisdiction can attach, then *Clark* and *Zahn* are preserved, and supplemental jurisdiction does not open the way for joinder of plaintiffs, or inclusion of class members, who do not independently meet the amount-in-controversy requirement. For the reasons that follow, I conclude that this narrower construction is the better reading of §1367.

[Justice Ginsburg reviewed the history of pendent and ancillary jurisdiction, the terms used in the cased that preceded §1367.]

B

Shortly before the Court decided *Finley*, Congress had established the Federal Courts Study Committee to take up issues relating to "the federal courts' congestion, delay, expense, and expansion." Judicial Conference of the United States, Report of the Federal Courts Study Committee 3 (Apr. 2, 1990) (hereinafter Committee Report). The Committee's charge was to conduct a study addressing the "crisis" in federal courts caused by the "rapidly growing" caseload.

Among recommendations, the Committee urged Congress to "authorize federal courts to assert pendent jurisdiction over parties without an independent federal jurisdictional base." If adopted, this recommendation would overrule *Finley*. Earlier, a subcommittee had recommended that Congress overrule both *Finley* and *Zahn*. Report of the Subcommittee on the Role of the Federal Courts and Their Relationship to the States 547, 561, n. 33 (Mar. 12, 1990), reprinted in 1 Judicial Conference of the United States, Federal Courts Study Committee, Working Papers and Subcommittee Reports (July 1, 1990) (hereinafter Subcommittee Report). In the subcommittee's view, "[f]rom a policy standpoint," *Zahn* "ma[de] little sense." Subcommittee Report 561, n. 33.[3] The full Committee, however, urged only the overruling of *Finley* and did not adopt the recommendation to overrule *Zahn*. Committee Report 47-48. . . .

While §1367's enigmatic text[12] defies flawless interpretation,[13] the precedent-preservative reading, I am persuaded, better accords with the historical and legal context of Congress' enactment of the supplemental jurisdiction statute,

3. Anomalously, in holding that each class member "must satisfy the jurisdictional amount," *Zahn v. International Paper Co.*, 414 U.S. 291, 301, (1973), the *Zahn* Court did not refer to *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 366, (1921), which established that in a class action, the citizenship of the named plaintiff is controlling. But see *Zahn*, 414 U.S., at 309-310, 94 S.Ct. 505 (Brennan, J., dissenting) (urging *Zahn's* inconsistency with *Ben-Hur*).

12. The Court notes the passage this year of the Class Action Fairness Act (CAFA), Pub.L. 109-2, 119 Stat. 4, ante, at 2627-2628, only to dismiss that legislation as irrelevant. Subject to several exceptions and qualifications, CAFA provides for federal-court adjudication of state-law-based class actions in which diversity is "minimal" (one plaintiff's diversity from one defendant suffices), and the "matter in controversy" is an aggregate amount in excess of $5,000,000. Significant here, CAFA's enlargement of federal-court diversity jurisdiction was accomplished, "clearly and conspicuously," by amending §1332.

13. If §1367(a) itself renders unnecessary the listing of Rule 20 plaintiffs and Rule 23 class actions in §1367(b), then it is similarly unnecessary to refer, as §1367(b) does, to "persons proposed to be joined as plaintiffs under Rule 19." On one account, Congress bracketed such persons with persons "seeking to intervene as plaintiffs under Rule 24" to modify pre-§1367 practice. Before enactment of §1367, courts entertained, under the heading ancillary jurisdiction, claims of Rule 24(a) intervenors "of right," see *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 375, n. 18 (1978), but denied ancillary jurisdiction over claims of "necessary" Rule 19 plaintiffs, see 13 Wright & Miller §3523, p. 127 (2d ed. Supp. 2005). Congress may have sought simply to underscore that those seeking to join as plaintiffs, whether under Rule 19 or Rule 24, should be treated alike, *i.e.*, denied joinder when "inconsistent with the jurisdictional requirements of section 1332." See *Ortega*, 370 F.3d, at 140, and n. 15 (internal quotation marks omitted); H.R. Rep., at 29 ("Subsection (b) makes one small change in pre-*Finley* practice," *i.e., it eliminates the Rule 19/ Rule 24 anomaly.)*

and the established limits on pendent and ancillary jurisdiction. It does not attribute to Congress a jurisdictional enlargement broader than the one to which the legislators adverted, cf. *Finley*, 490 U.S., at 549, and it follows the sound counsel that "close questions of [statutory] construction should be resolved in favor of continuity and against change." Shapiro, Continuity and Change in Statutory Interpretation, 67 N.Y.U.L.Rev. 921, 925 (1992).[14]

* * *

For the reasons stated, I would hold that §1367 does not overrule *Clark* and *Zahn*. I would therefore affirm the judgment of the Court of Appeals for the First Circuit and reverse the judgment of the Court of Appeals for the Eleventh Circuit.

NOTES AND PROBLEMS

1. State the holding: under what conditions can those who do not meet the amount in controversy requirement of §1332(b) get into federal court under the provisions of §1367?

2. If a party who does not meet the amount in controversy requirement can take advantage of supplemental jurisdiction, can a non-diverse party whose claim arises out of the same case or controversy join the suit under supplemental jurisdiction?

a. *Allapattah* answers this question: no.

b. Less certain is why that is the correct answer. Consider two statements in the majority opinion (neither may be necessary to the decision of the case itself):

> A failure of complete diversity, unlike the failure of some claims to meet the requisite amount in controversy, contaminates every claim in the action.

> Though the special nature and purpose of the diversity requirement mean that a single nondiverse party can contaminate every other claim in the lawsuit, the contamination does not occur with respect to jurisdictional defects that go only to the substantive importance of individual claims.

c. Does the Court believe that the amount in controversy requirement is less central to the idea of diversity than is the requirement of diversity itself? Historically, the diversity statute has always had an amount in controversy requirement; the only question has been size of the amount, which began at $500 in 1789 and moved in fits and starts to the present value.

d. One justification for treating the amount in controversy differently would be the view that the purpose of the requirement was to identify "big" cases. If so, and a connected "big" case was already in federal court, do considerations of efficiency suggest allowing smaller fry to join in?

14. While the interpretation of §1367 described in this opinion does not rely on the measure's legislative history, that history, as Justice STEVENS has shown (dissenting opinion), is corroborative of the statutory reading set out above.

e. But why not apply the same approach to diversity itself? The opinion repeats the established understanding that the complete diversity rule is statutory rather than Constitutional. Why treat that rule with more deference than the amount in controversy provision?

3. The majority's second theme — and its response to the question posed in note 2e — concerns the purpose of diversity jurisdiction. A passage early in the opinion bears examination:

> The Court, nonetheless, has adhered to the complete diversity rule in light of the purpose of the diversity requirement, which is to provide a federal forum for important disputes where state courts might favor, or be perceived as favoring, home-state litigants. The presence of parties from the same State on both sides of a case dispels this concern, eliminating a principal reason for conferring §1332 jurisdiction over any of the claims in the action.

a. The majority here accepts the "biased state forum" theory of diversity jurisdiction. The idea seems to be that a state court will apply its law unfairly against an out-of-state party. To prevent such an occurrence, Congress offers diversity jurisdiction and a presumably more neutral federal forum. But once a party from a single state appears on both sides of the controversy, the passage further implies, it will become impossible for a state trier of fact to favor its own against the outsiders — because in harming the outsider it will necessarily harm its own. Hence the complete diversity requirement: the need for diversity jurisdiction disappears once complete diversity lapses.

b. One can challenge the implications of this passage. Among other things, under modern substantive law, which emphasizes, for example, comparative fault and partial contribution, one can easily imagine a suit in which there are parties from State A on both sides of the suit, but in which a trier of fact could render a decision that favored the plaintiff (from State A) while shielding a co-defendant (also from State A) from any liability — shifting all the liability to the outsider defendant from State B.

c. Implicit in this passage, as well as in Strawbridge v. Curtis, lies the rejection of a different notion of diversity jurisdiction — that of the "national" case. According to such a notion, diversity would bring to a national forum cases that seemed to stretch beyond state boundaries, whether because of the number of parties, the multiplicity of different states' laws that might apply, the place of the controversy in the national economy, among other factors. The complete-diversity rule rejects such a vision of diversity jurisdiction.

Remarkably, in the same year the Court handed down *Allapattah*, Congress headed in the opposite direction with the Class Action Fairness Act of 2005. That Act, whatever its motivations and possible flaws, represents an alternative model of diversity jurisdiction. If one reads through the often convoluted language of 28 U.S.C. §1332(d), one can find Congress's efforts to define lawsuits that fall within this "national case" conception of diversity jurisdiction. The principal ingredients are a minimal diversity requirement (so long as any plaintiff and any defendant are from different states, diversity is satisfied) and an explicit instruction to the courts to aggregate damages on a classwide basis.

E. Removal

Page 217. Before note 4 insert:

If you think you can distinguish *Capron* from *Caterpillar*, try your hand at the following case, which the five-person majority (but not the dissent) believes is distinguishable from *Caterpillar*.

Grupo Dataflux v. Atlas Global Group, L.P.

124 S.Ct. 1920 (2004)

Justice SCALIA delivered the opinion of the Court.

This case presents the question whether a party's post-filing change in citizenship can cure a lack of subject-matter jurisdiction that existed at the time of filing in an action premised upon diversity of citizenship. See 28 U. S. C. §1332.

I.

Respondent Atlas Global Group, L. P., is a limited partnership created under Texas law. In November 1997, Atlas filed a state-law suit against petitioner Grupo Dataflux, a Mexican corporation, in the United States District Court for the Southern District of Texas. The complaint contained claims for breach of contract and *in quantum meruit*, seeking over $1.3 million in damages. It alleged that "[f]ederal jurisdiction is proper based upon diversity jurisdiction pursuant to 28 U. S. C. §1332(a), as this suit is between a Texas citizen [Atlas] and a citizen or subject of Mexico [Grupo Dataflux]." Pretrial motions and discovery consumed almost three years. In October 2000, the parties consented to a jury trial presided over by a Magistrate Judge. On October 27, after a 6-day trial, the jury returned a verdict in favor of Atlas awarding $750,000 in damages.

On November 18, before entry of the judgment, Dataflux filed a motion to dismiss for lack of subject-matter jurisdiction because the parties were not diverse at the time the complaint was filed. See Fed. Rules Civ. Proc. 12(b)(1), (h)(3). The Magistrate Judge granted the motion. The dismissal was based upon the accepted rule that, as a partnership, Atlas is a citizen of each state or foreign country of which any of its partners is a citizen. Because Atlas had two partners who were Mexican citizens at the time of filing, the partnership was a Mexican citizen. (It was also a citizen of Delaware and Texas based on the citizenship of its other partners.) And because the defendant, Dataflux, was a Mexican corporation, aliens were on both sides of the case, and the requisite diversity was therefore absent. See *Mossman v. Higginson*, 4 Dall. 12, 14 (1800).

On appeal, Atlas did not dispute the finding of no diversity at the time of filing. It urged the Court of Appeals to disregard this failure and reverse dismissal because the Mexican partners had left the partnership in a transaction consummated the month before trial began. Atlas argued that, since diversity existed when the jury rendered its verdict, dismissal was inappropriate. The Fifth Circuit agreed. It acknowledged the general rule that, for purposes of determining the existence of diversity jurisdiction, the citizenship of the parties is to be determined with reference to the facts as they existed at the time of filing. However, relying on our decision in *Caterpillar Inc. v. Lewis*, it held that the conclusiveness of citizenship at the time of filing was subject to exception when the following conditions are satisfied:

> (1) [A]n action is filed or removed when constitutional and/or statutory jurisdictional requirements are not met, (2) neither the parties nor the judge raise the error until after a jury verdict has been rendered, or a dispositive ruling has been made by the court, and (3) before the verdict is rendered, or ruling is issued, the jurisdictional defect is cured. . . .

II.

It has long been the case that "the jurisdiction of the Court depends upon the state of things at the time of the action brought." *Mollan v. Torrance*, 9 Wheat. 537, 539 (1824). This time-of-filing rule is hornbook law . . . taught to first-year law students in any basic course on federal civil procedure. It measures all challenges to subject-matter jurisdiction premised upon diversity of citizenship against the state of facts that existed at the time of filing — whether the challenge be brought shortly after filing, after the trial, or even for the first time on appeal. (Challenges to subject-matter jurisdiction can of course be raised at any time prior to final judgment. See *Capron v. Van Noorden*, 2 Cranch 126 (1804).)

We have adhered to the time-of-filing rule regardless of the costs it imposes. . . .

It is uncontested that application of the time-of-filing rule to this case would require dismissal, but Atlas contends that this Court "should accept the very limited exception created by the Fifth Circuit to the time-of-filing principle." The Fifth Circuit and Atlas rely on our statement in *Caterpillar* that "[o]nce a diversity case has been tried in federal court . . . considerations of finality, efficiency, and economy become overwhelming." This statement unquestionably provided the *ratio decidendi* in *Caterpillar*, but it did not augur a new approach to deciding whether a jurisdictional defect has been cured.

Caterpillar broke no new ground, because the jurisdictional defect it addressed had been cured by the dismissal of the party that had destroyed diversity. That method of curing a jurisdictional defect had long been an exception to the time-of-filing rule. . . .

Caterpillar involved an unremarkable application of this established exception. Complete diversity had been lacking at the time of removal to federal court, because one of the plaintiffs shared Kentucky citizenship with one of the defendants. Almost three years after the District Court denied a motion to remand, but before trial, the diversity-destroying defendant settled out of the case and was dismissed. The case proceeded to a 6-day jury trial, resulting in judgment for the defendant, Caterpillar, against Lewis. This Court unanimously held that the lack of complete diversity at the time of removal did not require dismissal of the case. . . .

While recognizing that *Caterpillar* is "technically" distinguishable because the defect was cured by the dismissal of a diversity-destroying party, the Fifth Circuit reasoned that "this factor was not at the heart of the Supreme Court's analysis . . . ." The crux of the analysis, according to the Fifth Circuit, was *Caterpillar*'s statement that "[o]nce a diversity case has been tried in federal court . . . considerations of finality, efficiency, and economy become overwhelming." This was indeed the crux of analysis in *Caterpillar*, but analysis of a different issue. It related not to cure of the *jurisdictional* defect, but to cure of a *statutory* defect, namely failure to comply with the requirement of the removal statute, 28 U. S. C. §1441(a), that there be complete diversity at the time of removal. . . .

III.

To our knowledge, the Court has never approved a deviation from the rule articulated by Chief Justice Marshall in 1829 that "[w]here there is *no* change of party, a jurisdiction depending on the condition of the party is governed by that condition, as it was at the commencement of the suit." . . . We decline to do today what the Court has refused to do for the past 175 years.

Apart from breaking with our longstanding precedent, holding that "finality, efficiency, and judicial economy" can justify suspension of the time-of-filing rule would create an exception of indeterminate scope. . . .

It is unsound in principle because there is no basis in reason or logic to dismiss preverdict if in fact the change in citizenship has eliminated the jurisdictional defect. . . .

Only two escapes from this dilemma come to mind, neither of which is satisfactory. First, one might say that it is not *any* change in party citizenship that cures the jurisdictional defect, but only a change that remains unnoticed until the end of trial. That is not so much a logical explanation as a restatement of the illogic that produces the dilemma. There is no conceivable reason why the jurisdictional deficiency which continues despite the citizenship change should suddenly disappear upon the rendering of a verdict. Second, one might say that there never was a cure, but that the party who failed to object before the end of trial forfeited his objection. This is logical enough, but comes up against the established principle, reaffirmed earlier this Term, that "a court's

subject-matter jurisdiction cannot be expanded to account for the parties' litigation conduct.". . . .

And principled or not, the Fifth Circuit's artificial limitation is sure to be discarded in practice. Only 8% of diversity cases concluded in 2003 actually went to trial, and the median time from filing to trial disposition was nearly two years. . . .

IV.

The dissenting opinion rests on two principal propositions: (1) the jurisdictional defect in this case was cured by a change in the composition of the partnership; and (2) refusing to recognize an exception to the time-of-filing rule in this case wastes judicial resources, while creating an exception does not. We discuss each in turn.

A.

. . . The incompatibility with prior law of the dissent's attempt to treat a change in partners like a change in parties is revealed by a curious anomaly: It would produce a case unlike every other case in which dropping a party has cured a jurisdictional defect, in that no judicial action (such as granting a motion to dismiss) was necessary to get the jurisdictional spoilers out of the case. Indeed, judicial action to that end was not even *possible*: The court could hardly have "dismissed" the partners from the partnership to save jurisdiction.

B.

We now turn from consideration of the conceptual difficulties with the dissent's disposition to consideration of its practical consequences. The time-of-filing rule is what it is precisely because the facts determining jurisdiction are subject to change, and because constant litigation in response to that change would be wasteful. . . .

Looked at in its overall effect, and not merely in its application to the sunk costs of the present case, it is the dissent's proposed rule that is wasteful. Absent uncertainty about jurisdiction (which the dissent's readiness to change settled law would preserve for the future), the obvious course, for a litigant whose suit was dismissed as Atlas's was, would have been immediately to file a new action. That is in fact what Atlas did, though it later dismissed the new case without prejudice. Had that second suit been pursued instead of this one, there is little doubt that the dispute would have been resolved on the merits by now. Putting aside the time that has passed between the Fifth Circuit's decision and today, there were two years of wasted time between dismissal of the action and the Fifth Circuit's reversal of that dismissal — time that the parties could have spent litigating the merits (or engaging in serious settlement talks) instead of litigating jurisdiction.

Atlas and Dataflux have thus far litigated this case for more than 6½ years, including 3½ years over a conceded jurisdictional defect. Compared with the *one month* it took the Magistrate Judge to apply the time-of-filing rule and *Carden* when the jurisdictional problem was brought to her attention, this waste counsels strongly against any course that would impair the certainty of our jurisdictional rules and thereby encourage similar jurisdictional litigation.

***

We decline to endorse a new exception to a time-of-filing rule that has a pedigree of almost two centuries. Uncertainty regarding the question of jurisdiction is particularly undesirable and collateral litigation on the point particularly wasteful. The stability provided by our time-tested rule weighs heavily against the approval of any new deviation. The judgment of the Fifth Circuit is reversed.

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

When this lawsuit was filed in the United States District Court for the Southern District of Texas in 1997, diversity of citizenship was incomplete among the adverse parties. . . . In a transaction completed in September 2000 unrelated to this lawsuit, all Mexican-citizen partners withdrew from Atlas. Thus, before trial commenced in October 2000, complete diversity existed. Only after the jury returned a verdict favorable to Atlas did Dataflux, by moving to dismiss the case, draw the initial jurisdictional flaw to the District Court's attention. The Court today holds that the initial flaw "still burden[s] and run[s] with the case," consequently, the entire trial and jury verdict must be nullified. In my view, the initial defect here — the original absence of complete diversity — "is not fatal to the ensuing adjudication." In accord with the Court of Appeals for the Fifth Circuit, I would leave intact the results of the six-day trial between completely diverse citizens, and would not expose Atlas and the courts to the "exorbitant cost" of relitigation. . . .

NOTES AND PROBLEMS

1. There are two disagreements here.

a. Can one sensibly distinguish *Caterpillar* from *Grupo Dataflux*?

b. How strongly should the "time of filing" rule for testing jurisdiction be enforced?

c. Who has the best of which argument?

2. Subsection (c) of §1441 poses unexpected difficulties. Until 1990 this subsection contained a snarl of statutory construction (involving its application to diversity cases) so tangled that we shall not try to describe it. Congress cut

this knot by specifying that subsection (c) applies only to federal question cases. But when can §1441(c) apply to a federal question case? Consider two possible constructions:

a. In a suit in which the parties are not of diverse citizenship, plaintiff brings a pair of claims, one based on federal law, the other on state law. Defendant seeks to remove. If the two claims are closely related, defendant can remove without regard to subsection (c); the two claims are part of the same constitutionally related "case or controversy." Recall 28 U.S.C. §1367, which says that a federal court has jurisdiction over state law claims that are closely related to federal claims. In that situation the entire case would be removable under §1441 (b) because it would be "a civil action of which the district courts have original jurisdiction." If, however, the two claims are entirely unrelated, they will not be part of the same case or controversy and therefore will be beyond the constitutional reach of the federal courts' jurisdiction. If jurisdiction under those circumstances is unconstitutional, a mere statute cannot alter the situation. Under this analysis §1441(c) is either unnecessary or unconstitutional.

b. Now imagine the same situation, with the two claims unrelated to each other. But imagine that one of the claims contains a federal element; for example, a fired employee sues, invoking a state law barring religious discrimination and, in addition, a federal law claim for alleged violations of the federal pension laws. The pension claim, let us imagine, arises directly under federal law and would thus be removable if brought alone; the state law discrimination claim is not removable, however. Nor are the two claims sufficiently related to be removable under 28 U.S.C. §1367. Does §1441(c) give the courts jurisdiction over a "separate and independent" claim with a federal ingredient, even if that ingredient would not suffice for federal jurisdiction if brought separately? See Wisconsin Dept. of Corrections v. Schacht, 524 U.S. 381 (1998) (federal court retains jurisdiction over remaining claim).

c. One can cut this Gordian knot by supposing that the federal court will promptly determine that the unrelated state claim should be remanded to the state courts. At a pragmatic level this solves the problem; at a conceptual level the statute still appears to give federal courts temporary jurisdiction over cases they cannot constitutionally hear.

3. In addition to 28 U.S.C. §1441, which is the general removal statute, there are statutes permitting removal in specific cases.

a. For example, §1442 permits removal of suits by federal officers or agencies sued for the performance of their duties. By contrast, some actions that otherwise would be removable under §1441 are made specifically nonremovable by §1445. Examine that statute and consider why Congress might have made such actions nonremovable and thus allowed plaintiffs to dictate the choice between state and federal court.

b. One portion of the Class Action Fairness Act of 2005 allows any defendant to remove to federal court a class actions where more than $5 million is in

controversy so long as minimal diversity exists. 28 U.S.C. §1453(b). Such removal is possible even if not all the defendants consent and may be sought without regard to the one-year limit on removal imposed on other diversity cases by §1446(b). Another section of the same Act allows a district court to decline to exercise jurisdiction where more than one-third but less than two-thirds of the plaintiff class are residents of the state where the claim was brought, based on several factors involving that state's interests in the case. 28 U.S.C. §1332(d)(3). Still another section says that the district court *shall* decline to exercise jurisdiction (and thus presumably remand) where more than two-thirds of the class members come from the state from which the case was removed. Similar removal provisions apply to "mass actions," a term used by the Act to describe numerous individual claims (e.g., those that might arise from an air crash or similar disaster) which occurred in a state other than the one where the suit was filed.

4. Finally, consider an interesting use of removal that takes us full circle back to the premises of *Mottley*, with which this chapter began. The Securities Litigation Uniform Standards Act of 1998 does three things. First, it preempts state securities class actions alleging fraud in the sales of securities; it provides, in other words, that in such cases federal law displaces otherwise applicable state law. 15 U.S.C. §77p(b). Second, it provides that securities fraud class actions based entirely on state law "shall be removable to the federal district court for the district in which the action is pending." 15 U.S.C. §77p(c). Finally, it orders dismissal of the removed class actions. This three-step process provides a review of much of this chapter.

a. The first step is substantive and takes us beyond the boundaries of procedure. Without going into great detail, one can conclude that Congress could constitutionally displace — preempt — all state securities law. If Congress can do that, can it take a half-way step — of allowing state law to continue to exist in suits brought by individual plaintiffs but preempting state law in securities class actions?

b. If one assumes that Congress has the power suggested in (a), one reaches the procedural curiosity. The Securities Litigation Act has created a federal defense to a state law claim — the defense of preemption. Ordinarily the system relies on state courts to recognize federal defenses. If state courts err, the remedy — the only remedy — is review by the U.S. Supreme Court. One can think of *Mottley* in these terms: The Supreme Court dismissed the case, requiring the Mottleys to refile in state court and to await review by the Supreme Court as the only way to get a federal court to pass on the federal question involved. Notice that this scheme creates some slippage; if the U.S. Supreme Court had not reviewed the case the second time around, the Mottleys would have hung onto their free pass even though federal law outlawed it.

c. The Securities Litigation Uniform Standards Act eliminates this slippage. The statute does two things: It creates a federal defense to certain state law claims, and then it creates removal based on that defense. Recall from the start of the

chapter that the well-pleaded complaint rule as interpreted in *Mottley* is a statutory rather than a constitutional matter and that Congress can statutorily create a broader jurisdiction for the federal courts under removal than under original jurisdiction. It has done so here. As a consequence, one can expect that all such claims will be removed — and dismissed — by federal district courts.

d. Should Congress use this technique more widely? For all federal defenses? Should Congress use it at all?

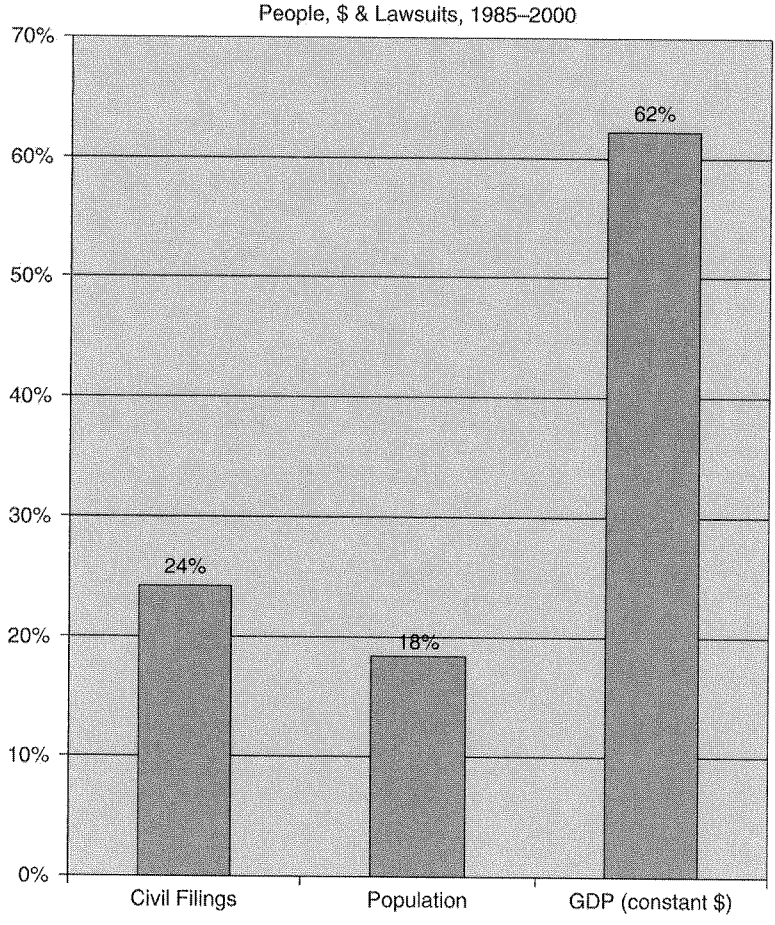
INCENTIVES TO LITIGATE

V

A. Litigation in the United States at the Start of the 21st Century

1. How Much Litigation?

Page 261. Replace the chart at the bottom of the page with:



PLEADING

VI

A. The Story of Pleading

3. Ethical Limitations

Page 355. Before note 2 insert:

c. Suppose a lawyer making a motion for reconsideration of a ruling misquotes from two judicial opinions in ways that change the meaning of the quotations. May she be sanctioned under Rule 11(b)(2)?

Page 359. In place of note 4 insert:

4. The preceding cases deal primarily with inadequate knowledge concerning well-established law. Probably the most common Rule 11 violation involves the failure to conduct adequate factual investigation. The next case displays that problem. Before reading it, consider the incentives created by the current Rule. Party files a groundless paper. Opponent challenges it, giving Party the required notice and 21-day period before filing the Rule 11 motion; Party perseveres in groundless paper. Opponent makes the necessary substantive motion to defeat the groundless paper (12(b)(1) motion, Rule 56 motion, etc.). Ideally, Opponent would also like to be able to collect its legal fees for opposing the groundless paper. But the court need not impose any sanction at all; if it does, that sanction may not require any payment to Opponent. Even if awarded, monetary sanctions are presumptively to be paid to the court — like a criminal fine — rather than to the adversary — like a civil damage award. See Rule 11(c)(2). Moreover, Opponent cannot combine its Rule 11 motion with the substantive motion because of the separate-motion requirement. Under those circumstances, if Opponent has already won the underlying lawsuit, when is it worth the effort to bring a separate Rule 11 motion?

4. Special Claims: Requiring and Forbidding Specificity in Pleading

Page 368. Before note 5 insert:

c. Judge Richard Posner has explicated his court's understanding of the particularity requirement:

> The purpose of requiring that fraud be pleaded with particularity is not, as it might seem and the cases still sometimes say, to give the defendant in such a case enough information to prepare his defense. A charge of fraud is no more opaque than any other charge. The defendant can get all the information he needs to meet it by filing a contention interrogatory. The purpose (the defensible purpose, anyway) of the heightened pleading requirement in fraud cases is to force the plaintiff to do more than the usual investigation before filing his complaint.
>
> Greater precomplaint investigation is warranted in fraud cases because public charges of fraud can do great harm to the reputation of a business firm or other enterprise (or individual), because fraud is frequently charged irresponsibly by people who have suffered a loss and want to find someone to blame for it, and because charges of fraud (and also mistake, the other charge that Rule 9(b) requires be pleaded with particularity) frequently ask courts in effect to rewrite the parties' contract or otherwise disrupt established relationships. By requiring the plaintiff to allege the who, what, where, and when of the alleged fraud, the rule requires the plaintiff to conduct a precomplaint investigation in sufficient depth to assure that the charge of fraud is responsible and supported, rather than defamatory and extortionate. Similar reasons explain why fraud plaintiffs are frequently required to prove their case by clear and convincing evidence rather than the usual mere preponderance, but it is important to note that the heightened pleading and heightened proof requirements do not move in lockstep with each other. Rule 9(b) requires heightened pleading of fraud claims in all civil cases brought in the federal courts, whether or not the applicable state or federal law requires a higher standard of proving fraud, which sometimes it does and sometimes it does not.

Ackerman v. Northwestern Mutual Life Ins. Co., 172 F3d. 467, 470 (7th Cir. 1999).

DISCOVERY

VII

C. Surveying Discovery: Procedures and Methods

1. Required Disclosures

Page 418. Replace note 3 with:

3. Disclosure will not occur in all cases. The 2000 revisions made disclosure mandatory in all federal court cases but at the same time suggested that very small and very large cases will be exempted from disclosure. Rule 26(a)(1)(E) lists a number of exempt categories — smaller claims and those in which either a well-developed record or the absence of counsel make disclosure unnecessary or potentially unfair. The advisory committee notes suggest that very large cases, in which one imagines that close judicial supervision will displace the Rules, may also be exempted.

Page 427. Before D. Discovery and Privacy insert:

6. E-Discovery

The digitization of many aspects of contemporary life has had ripple effects on the system of discovery. Designed for a world in which records were on paper, the discovery system now confronts problems both of scale and concept. As to scale, large modern computer networks measure their capacity in tetrabytes, with each tetrabyte holding the equivalent of 500 billion pages of typewritten text. A report of the Civil Rules Advisory Committee suggested some of the conceptual challenges:

> Electronically stored information may exist in dynamic databases that do not correspond to hard-copy materials. Electronic information, unlike words on paper, is dynamic. The ordinary operation of computers — including the simple act of turning a computer on or off or accessing a particular file — can alter or destroy electronically stored information, and computer systems automatically discard or overwrite data as a part of their routine operation. Computers often automatically create information without the operator's direction or awareness, a feature with no

> direct counterpart in hard-copy materials. Electronically stored information may be "deleted" yet continue to exist, but in forms difficult to locate, retrieve, or search. Electronic data, unlike paper, may be incomprehensible when separated from the system that created it. The distinctive features of electronic discovery often increase the expense and burden of discovery. Uncertainty as to how to treat these distinctive features under the present rules exacerbates the problems. Case law is emerging, but it is not consistent and discovery disputes are rarely the subject of appellate review. Although the federal discovery rules are well drafted to be flexible, it is becoming increasingly clear that they do not adequately accommodate the new forms of information technology. If the rules do not change, they risk becoming increasingly removed from practice.

Transmission letter, Civil Rules Advisory Committee to the Standing Committee on Rules of Practice & Procedure, August 3, 2004.

To respond to these challenges, the Committee is circulating for comment a set of proposed changes to the Rules. Its report summarizes these changes:

> The proposed amendments address five related areas: (a) early attention to issues relating to electronic discovery, including the form of production, preservation of electronically stored information, and problems of reviewing electronically stored information for privilege; (b) discovery of electronically stored information that is not reasonably accessible; (c) the assertion of privilege after production; (d) the application of Rules 33 and 34 to electronically stored information; and (e) a limit on sanctions under Rule 37 for the loss of electronically stored information as a result of the routine operation of computer systems. In addition, amendments to Rule 45 are made to correspond to the proposed changes in Rules 26–37 . . .
>
> The proposals focus on three particularly troublesome aspects of discovery of electronically stored information. One is preserving electronically stored information. As the Note to proposed Rule 26(f) points out, the volume and dynamic nature of electronically stored information may complicate preservation obligations. The ordinary operation of computers involves both the automatic creation and the automatic deletion or overwriting of certain information. Suspension of all or a significant part of that activity could paralyze a party's operations. An overbroad approach to preservation may be prohibitively expensive and unduly burdensome for parties dependent on computer systems for their operations. In Rule 26(f), the parties are directed to discuss preservation of discoverable information during their conference to develop the discovery plan. Although this provision applies to all discoverable information, it is particularly important with regard to electronically stored information. The Note emphasizes that the parties should be specific, balancing preservation needs with the need to continue ordinary operations of computer systems. Rule 16(b)(5) states that the scheduling order should include provisions relating to discovery of electronic information that emerge from the parties' conference and that the court approves, which may include preservation of electronic information.
>
> The second area is privilege review and waiver. The Committee has repeatedly been told that the burden, costs, and difficulties of privilege review are compounded

with electronically stored information. The volume of such information and the informality of certain kinds of electronic communications, such as e-mails, make privilege review more difficult, time-consuming, and expensive. Materials subject to a claim of privilege are often difficult to identify, in part because computers may retain information that is not apparent to the reader. Such information may include embedded data (earlier edits that may be hidden from a "paper" view of the material or the image displayed on a computer monitor) and metadata (automatically created identifying information about the history or management of an electronic file). Parties frequently attempt to minimize the cost and delay of an exhaustive privilege review by agreeing to protocols that minimize the risk of waiver. Such protocols may include so-called quick peek or claw back arrangements, which allow production without a complete prior privilege review and an agreement that production of privileged documents will not waive the privilege. . . .

The third area of focus is the form of production. Unlike conventional discovery, in which there is essentially one option for the form in which information is provided — paper — electronic discovery presents a number of options. These options include the choice between production in hard-copy or electronic form, as well as choices among different electronic formats. The proposed amendments to Rules 16(b) and 26(f)(3) and to Form 35 direct the parties to consider, and the court to include in the scheduling order, provisions for discovery of electronically stored information, which could include arrangements for the form of production.

Id.

NOTES AND PROBLEMS

1. Both the tone and the substance of these introductory remarks in the Advisory Committee's transmittal letter are somewhat unusual.

a. One of the causes is likely generational: Many, perhaps most, of the members of the Advisory Committee entered the profession in a world where third graders could not speak knowledgeably of the difference between Macs and PCs, and are expressing understandable uncertainty about how to address the issues.

b. But part of the problem is conceptual. The Rules assume a discovery universe in which information exists either in the form of records (whether paper, analog, or digital) that may decay over long periods of time but do not constantly shift their content. The exception to this proposition is of course the human memory, but over several millennia of developed legal systems, we have come to terms with that notoriously tricky electronic/chemical storage mechanism.

2. Note the five areas addressed by the draft Rules. Can you think of others? How should they be dealt with?

3. Suppose that you represent one of two medium-sized organizations — a small college and a vendor of dormitory furniture — in a dispute over alleged failure to deliver goods on a timely basis. Both organizations use digital technology in the usual ways — for internal and external communications, and for record-keeping and financial analysis; both operate internal networks, using servers to drive

desk-top computers. College backs up the system weekly and recycles its back up tapes quarterly. Manufacturer does not use a formal back-up protocol; it simply stores data permanently on its hard drive, periodically backing up particularly sensitive accounting records.

a. One of the questions is likely to be how soon Supplier and Buyer knew of likely delivery problems. The question will matter because the law of contract requires a party harmed by a breach to make efforts to "cover" by finding another source of the goods; during the time in question the price of the goods increased substantially. Buyer will be entitled to much smaller damages if it unreasonably delayed in finding a substitute. Whether Buyer's delay was unreasonable will turn in part on how soon Supplier notified it of a problem.

b. A second issue that may arise is claims and waivers of privilege. Communications between lawyer and client for the purpose of seeking legal counsel are privileged and thus not discoverable. But privileges can be waived in several ways, including by disclosure of privileged communications to the opposing party. For example, if in responding to a request for relevant documents, one party inadvertently turned over letters to or from counsel — communications that would be privileged — many courts would say that the privilege was waived. Assume that both organizations consulted their lawyers as it became clear that the delivery would not be timely. Further assume that both organizations have concerns that some of their communications might be misconstrued to suggest that they were "gaming" the transaction — trying to maneuver the other side into a position of maximum legal exposure without risking liability themselves.

c. Think of how the proposed Rules below might affect the dispute. (New material is underlined; deleted material is ~~struck through.~~)

Rule 16. Pretrial Conferences; Scheduling; Management

*****

(b) Scheduling and Planning. Except in categories of actions exempted by district court rule as inappropriate, the district judge, or a magistrate judge when authorized by district court rule, shall, after receiving the report from the parties under Rule 26(f) or after consulting with the attorneys for the parties and any unrepresented parties by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time

(1) to join other parties and to amend the pleadings;

(2) to file motions; and

(3) to complete discovery.

The scheduling order may also include

(4) modifications of the times for disclosures under Rule 26(a) and 26(e)(1) and of the extent of discovery to be permitted;

(5) provisions for disclosure or discovery of electronically stored information;

(6) adoption of the parties' agreement for protection against waiving privilege;

(7~~5~~) the date or dates for conferences before trial, a final pretrial conference, and trial; and

(8~~6~~) any other matters appropriate in the circumstances of the case.

The order shall issue as soon as practicable but in any event within 90 days after the appearance of a defendant and within 120 days after the complaint has been served on a defendant . . . .

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

*****

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

*****

(2) **Limitations.** By order, the court may alter the limits in these rules on the number of depositions and interrogatories or the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36. The frequency or extent of use, of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Rule 26(c). A party need not provide discovery of electronically stored information that the party identifies as not reasonably accessible. On motion by the requesting part the he responding party must show that the information is not reasonably accessible. If that showing is made, the court may order discovery of the information for good cause and may specify terms and conditions for such discovery.

*****

(5) Claims of Privilege or Protection of Trial Preparation Materials.

(A) Privileged information withheld. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(B) Privileged information produced. When a party produces information without intending to waive a claim of privilege it may, within a reasonable time, notify any party that received the information of its claim of privilege. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies. The producing party must comply with Rule 26(b)(5)(A) with regard to the information and preserve it pending a ruling by the court.

NOTES AND PROBLEMS

1. Recall from the preceding section the Case of the Missing Dorm Furniture. Suppose Supplier has turned over a batch of digitally stored materials, including e-mails among those dealing with College on the furniture order. None of the e-mails themselves contains any privileged material. But an attachment (unnoticed by the lawyer who screened the materials before complying with the discovery request) contains a letter from Supplier's lawyer. That letter cautions Supplier to take immediate steps to notify College that the furniture could not be shipped on time, so as not to incur added liability if College had to place a rush order at a higher price. Supplier, still hoping that it could ship at least a partial order on time, didn't take the lawyer's advice. In the meantime, furniture prices rose substantially. Can Supplier get the letter back? Can Supplier prevent Buyer from introducing the letter into evidence?

2. In the same dispute between Buyer-College and Supplier-Furniture Manufacturer, Supplier has requested "all records pertaining to [College's] knowledge of Manufacturer's likely delay in shipping." The information is relevant because the time when Buyer knew that Manufacturer could not supply the goods will bear on whether Buyer made timely efforts to cover. Recall that College backs up its system weekly, saves the backup tapes for three months, then recycles them as new records are backed up. Supplier fails to deliver the furniture on the promised date of August 1 (in time for the approaching academic year); College files suit on September 1. Supplier files its initial discovery request on December 1. College informs Supplier that it can produce some records, but that the routine back-up tapes have been recycled and are thus unavailable. Supplier seeks sanctions for failure to discover — in the form of various stipulations concerning liability. Read the draft of proposed Rule 37 and consider what issues these facts will raise.

Rule 37. Failure to Make Disclosure or Cooperate in Discovery; Sanctions

(f) **Electronically Stored Information.** Unless a party violated an order in the action requiring it to preserve electronically stored information, a court may not impose sanctions under these rules on the party for failing to provide such information if:

(1) the party took reasonable steps to preserve the information after it knew or should have known the information was discoverable in the action; and

(2) the failure resulted from loss of the information because of the routine operation of the party's electronic information system.**

** The Committee is continuing to examine the degree of culpability that will preclude eligibility for a safe harbor from sanctions in this narrow area, where electronically stored information is lost or destroyed as a result of the routine operation of a party's computer system. Some have voiced concerns that the formulation set out above is inadequate to address the uncertainties created by the dynamic nature of computer systems and the information they generate and store. Comments from the bench and bar on whether the culpability or fault that takes a party outside any safe harbor should be something higher than negligence are important to a full understanding of the issues. An example of a version of Rule 37(f) framed in terms of intentional or reckless failure to preserve information lost as a result of the ordinary operation of a party's computer system is set out below, as a way to focus comment and suggestions:

(f) Electronically Stored Information. A court may not impose sanctions under these rules on a party for failing to provide electronically stored information deleted or lost as a result of the routine operation of the party's electronic information system unless:

(1) The party intentionally or recklessly failed to preserve the information; or
(2) the party violated an order issued in the action requiring the preservation of the information.

RESOLUTION WITHOUT TRIAL

VIII

A. The Pressure to Choose Adjudication or an Alternative

1. Default and Default Judgments

Page 470. Replace note 2e with:

e. Consider the contortions of the Ninth Circuit in Community Dental Services, Inc. v. Tani, 282 F.3d 1164 (9th Cir. 2002). One dentist sued another for allegedly infringing his trademark, "SmileCare." The defendant's lawyer made some early appearances but repeatedly failed to file and serve an answer or otherwise comply with court orders; eventually the court entered a $2 million default judgment against Dr. Tani, who had been assured by his lawyers that the case was proceeding smoothly. With a new lawyer, Tani invoked Rule 60(b)(6) to have the judgment reopened. Tani conceded that his lawyers' actions were beyond the range of "excusable neglect" that would warrant reopening under Rule 60(b)(1). Instead, he argued that they constituted gross neglect, thus falling within the "other reason[s']" language of Rule 60(b)(6). A divided panel of the Ninth Circuit agreed, parting company with other circuits that take a harder line. A footnote in the case tells us that Tani's original lawyer — the one who failed to answer the complaint — resigned from the state bar with charges pending against him; it's a fair guess that he carried no malpractice insurance. Suppose Tani's lawyer had been a member of a prosperous and well-insured firm; would the court have come to the same result?

IDENTIFYING THE TRIER

IX

B. Judge or Jury: The Right to a Civil Jury Trial

3. Applying the Historical Test to New Procedures

Page 563. In the first full paragraph, replace the last sentence in the bracketed summary with:

The parties disagreed about whether an Amoco representative had ever promised the defendants would be accepted as franchisees and whether they met the stated qualifications for franchisees.]

4. The Jury's Integrity: Size, Rules of Decision, and the Reexamination Clause

Page 581. Before note 8d insert:

In spite of *Purkett* the Supreme Court has demonstrated that it is prepared to enforce *Batson* if the parties present sufficiently rich evidence of discriminatory use of peremptory challenges. In Miller-El v. Dretke, 125 S. Ct. 2317 (2005), the Court reversed the conviction of a defendant on what it held to be a convincing showing of the use of race in peremptory challenges in a capital murder case. The Court's summary of the facts suggests both that *Batson* retains doctrinal vitality and that it will require very powerful evidence for an appellate court to find that lower courts have abused their discretion:

> In the course of drawing a jury to try a black defendant, 10 of the 11 qualified black venire panel members were peremptorily struck. At least two of them, Fields and Warren, were ostensibly acceptable to prosecutors seeking a death verdict, and Fields was ideal. The prosecutors' chosen race-neutral reasons for the strikes do not hold up and are so far at odds with the evidence that pretext is the fair conclusion, indicating the very discrimination the explanations were meant to deny.
>
> The strikes that drew these incredible explanations occurred in a selection process replete with evidence that the prosecutors were selecting and rejecting potential jurors because of race. At least two of the jury shuffles conducted by the State make no sense except as efforts to delay consideration of black jury panelists to the end of the week, when they might not even be reached. The State has in

> fact never offered any other explanation. Nor has the State denied that disparate lines of questioning were pursued: 53% of black panelists but only 3% of nonblacks were questioned with a graphic script meant to induce qualms about applying the death penalty (and thus explain a strike), and 100% of blacks but only 27% of nonblacks were subjected to a trick question about the minimum acceptable penalty for murder, meant to induce a disqualifying answer. The State's attempts to explain the prosecutors' questioning of particular witnesses on nonracial grounds fit the evidence less well than the racially discriminatory hypothesis.
>
> If anything more is needed for an undeniable explanation of what was going on, history supplies it. The prosecutors took their cues from a 20-year old manual of tips on jury selection, as shown by their notes of the race of each potential juror. By the time a jury was chosen, the State had peremptorily challenged 12% of qualified nonblack panel members, but eliminated 91% of the black ones.
>
> It blinks reality to deny that the State struck Fields and Warren, included in that 91%, because they were black. The strikes correlate with no fact as well as they correlate with race, and they occurred during a selection infected by shuffling and disparate questioning that race explains better than any race-neutral reason advanced by the State. The State's pretextual positions confirm Miller-El's claim, and the prosecutors' own notes proclaim that the Sparling Manual's emphasis on race was on their minds when they considered every potential juror.
>
> The state court's conclusion that the prosecutors' strikes of Fields and Warren were not racially determined is shown up as wrong to a clear and convincing degree; the state court's conclusion was unreasonable as well as erroneous. The judgment of the Court of Appeals is reversed, and the case is remanded for entry of judgment for petitioner together with orders of appropriate relief.

Id. at 2339-40. Justice Breyer's concurrence argued for the elimination of all peremptory challenges. Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, dissented on the grounds that the Supreme Court had based its decision on evidence never considered by the Texas courts.

RESPECT FOR JUDGMENTS

XII

A. Claim Preclusion

Page 658. In place of the first paragraph insert:

Claim preclusion has several goals: efficiency, finality, and the avoidance of inconsistency. Efficiency comes most strongly into play when a party that should have raised a claim in previous litigation failed to do so. The exact point at which one claim stops and another begins is not always clear; thus this section pays close attention to the scope of a cause of action.

JOINDER

XIII

B. Joinder of Parties

4. Compulsory Joinder

Page 762. Replace the paragraph preceding Temple v. Synthes with:

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 often 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 required courts in every case to consider the most efficient and effective party structure for a lawsuit. That is not how courts have interpreted it.

E. Class Actions

2. Statutory Requirements

Page 806. Before 3. The Class Action and the Constitution insert:

5. In *Heaven* and *Ballard* the courts are exercising their discretion in weighing against each other two aspects of the prospective classes — their common question and the separate issues that may be presented by some of the class members. An analogous form of weighing — but with jurisdictional rather than class certification at stake — is now required by parts of the Class Action Fairness Act of 2005. As the following section will describe, that Act "nationalizes" many class actions in which minimal diversity exists — but allows federal courts to weigh balance the weight of national and state interests in making a decision whether to remand to state courts.

3. The Class Action and the Constitution

Page 818. Replace Note: Class Actions in Federal Courts with:

4. The Class Action and the Federal Courts

As *Hansberry* and *Shutts* indicate, the federal courts have no monopoly on class actions, but the federal courts have played a particularly important role in the development of the modern class action. That role is about to become even more significant with the passage of the Class Action Fairness Act of 2005. A brief background on the jurisdictional aspects of class actions will provide context for this legislation.

The original Federal Rules of Civil Procedure provided for class actions but did so in a Rule so opaque and confusing that the device was little used before the 1966 revision to Rule 23, in which that Rule took essentially the shape it now has. That revision brought the class action into modern prominence, and since that time the courts and Congress have debated whether the class action is an entirely good thing.

The federal courts have seemed uncertain about how to think about jurisdiction over the class action. Well before the Federal Rules, Supreme Tribe of Ben-Hur* v. Cauble, 255 U.S. 356 (1921), held that for purposes of complete diversity, courts should look to the citizenship only of the class representatives and ignore the class members. *Supreme Tribe* thus lowers jurisdictional barriers to the class action. By contrast, on the issue of the amount in controversy, the Court has proved much less accommodating. Cases decided in the wake of the 1966 revision of Rule 23 held that in cases resting on diversity jurisdiction not just named plaintiffs but each member of the class must satisfy the amount in controversy. Appellate courts disagreed about this question until the Supreme Court addressed it in Exxon Corp. v. Allapattah Services, Inc., reproduced above at page 398 of this supplement, allowing limited use of supplemental jurisdiction to satisfy the jurisdictional amount in such cases.

Meanwhile, Congress has tacked in the opposite direction, enacting legislation that is as expansive in its use of diversity jurisdiction as the judicial decisions have thus far been narrow. The Class Action Fairness Act of 2005 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 (all contained in this statutory supplement). 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 a hefty amount in controversy — $5 million in aggregate. 28 U.S.C. §1332(d)(2). Such suits may be

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

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.

These provisions use diversity jurisdiction to "federalize" many class actions theretofore 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," what 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.

The following section delineates the circumstances in which a federal court must decline jurisdiction. 28 U.S.C. §1332(d)(4). The list of factors in this section is a stronger version of the "may decline" factors: if more than two-thirds of the class members are in-state, and at least one significant defendant is also from in-state, the injuries giving right to the claim occurred in in-state.

NOTES AND PROBLEMS

1. Look back on the facts of Phillips Petroleum v. Shutts, imagining that a state law class action identical in all substantial respects was filed in 2005, after the passage of the legislation just described.

a. Suppose Phillips Petroleum wishes to remove to federal court. Can it?

b. Suppose the class consisted not of the 33,000 persons in *Shutts* but only of the 1,000 persons who were residents of Kansas. Further suppose that the only defendant is Phillips, which is not a citizen of Kansas for diversity purposes and that in spite of the reduced size of the class the case still satisfies the $5 million amount in controversy requirement. Phillips seeks to remove, and the plaintiffs challenge removal under 28 U.S.C. §§1332(d)(3) and (4). What additional facts would you want to know? What outcome?

2. A class action is filed in Mississippi state court, against a large poultry producer in that state which is incorporated in Delaware. The suit alleges unlawful waste discharges into the Mississippi River, which forms the border between Mississippi and Louisiana. The complaint alleges that the discharges violate state law. The members of the class are the citizens of Mississippi who live or work within ten miles of the banks of the River. The complaint seeks $7 million in damages and injunctive relief.

a. The defendant seeks to remove to federal district court 28 U.S.C. §1453; may it?

b. The plaintiffs seek to remand to state court, invoking §1332(d)(3) and (d)(4); what facts would plaintiffs want to develop in support of that motion?

c. Suppose in the same action that the federal court denies the motions to remand and then proceeds to consider whether to certify the removed class action under the standards of Rule 23. The court finds that there is insufficient commonality of interest among the members of the class to meet the standards of Rule 23(a) and on that basis denies class certification. At that point there is the individual claim of the named plaintiff before the federal court, but it will presumably be well under the jurisdictional amount in §1332(a), and should therefore be remanded to state court.

d. What if the plaintiff, back in state court, seeks to add class allegations and to certify the class under state law standards, which, let us suppose, differ from those of the federal courts. What does the defendant do now?

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 casebook, page 229). As the Class Action Fairness Act made its way through Congress, some proposed amendments would have specified how federal courts should approach choice of law problems in multistate class actions like *Shutts*. Those amendments did not become part of the statute as enacted. So, if the contemporary version of *Shutts* appeared in a federal court today, that court would have to decide whether and how Kansas would apply its choice of law principles to a class action in which the great majority of members came from outside that state. You will recall that Kansas applied its own law, a decision the Supreme Court questioned but did not hold unconstitutional. How should a federal court approach such a question?

None of these cases or legislation affects class actions based on federal law. (Thus, for example, the Class Action Fairness Act exempts from its coverage any action involving a federally registered security.) Congress, however, has spoken sharply in one such area in which state and federal law intersect. For several years class actions based on alleged violations of federal securities laws have proved controversial. In 1995 Congress, believing that some of these suits lacked merit, acted to tighten pleading requirements for claims alleging violations of federal securities laws. 15 U.S.C. §78u4(b)(1)(B).

Three years later, citing evidence that plaintiffs had reacted to this change by alleging violations not of federal but of state securities laws and bringing their suits in state courts, Congress enacted the Uniform Securities Litigation Standards Act of 1998, 15 U.S.C. §77p(c). That Act uses an interesting repertory of procedural devices to restrict state law securities class actions. First, it states that federal law preempts state securities laws, but only in class actions alleging fraud

in the purchase and sale of securities. Second, it provides that all class actions filed in state courts and alleging securities fraud shall be removable to federal district courts without regard to diversity or amount in controversy. Once removed, they should be dismissed unless they fall into a narrow range of permitted claims. The result of this two-step procedure — removal followed by dismissal — essentially eliminates all class actions based on violations of state securities laws.

The student of procedure will find several features of the statute remarkable. Congress has undoubted power to preempt state securities laws. Here, however, Congress has achieved both more and less than preemption. The Act achieves less than preemption because it applies only to class actions rather than to all state law securities claims. It achieves more than ordinary preemption because it assures that all "preempted" claims will be dismissed. With ordinary substantive preemption, Congress relies on state courts to recognize and enforce the preemptive effect of federal law. The Supreme Court acts as the only federal enforcer of preemptive federal law by granting certiorari if state courts fail to recognize federal preemption. But the Supreme Court can hear only about 100 cases a year and thus allows for considerable slippage in the enforcement of preemptive federal laws. In the Act's scheme, removal solves this slippage problem. The federal district courts, not the Supreme Court, enforce federal preemption. Every class action involving state securities laws is removable, thus assuring a federal forum for this federal "defense." The Act demonstrates both the significance of the class action and the use of federal jurisdiction to control it.

Considered as a pair, the Uniform Securities Litigation Reform Act and the Class Action Fairness Act deploy federal judicial jurisdiction in interesting, innovative — and controversial — ways. Together, they funnel selected categories of civil suits from state to federal courts. Both involve areas where Congress might legislative substantively under its Commerce Clause and related powers. But Congress hasn't, relying instead on the federal courts to achieve Congressional aims. This use of federal judicial power is particularly interesting because by statutory definition, it applies only to cases involving substantial numbers of people — at least enough to constitute a class.

Page 819. Replace 4. Settlement of Class Actions and the "Settlement Class" with:

5. Settlement of Class Actions

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 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 the relief, if any.

Two bodies of law address these problems. Rule 23 (e) requires court approval of "any settlement" of a class action. To order such approval, the judge must conduct a hearing — after notice to the class members — and make findings that the settlement is "fair, reasonable, and adequate." Recall that no such approval is required of most ordinary settlements; consider why the Rules require it here. The Class Action Fairness Act of 2005 adds an additional feature. "CAFA," as the Act is sometimes called, 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. 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 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.

NOTES AND PROBLEMS

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 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 posed special health problems for women. The court certifies a class. The parties work out a proposed settlement, involving some additional job opportunities for women and some changes manufacturing practices.

a. To whom does Rule 23 require that notice be sent?

b. To whom does 28 U.S.C. §1715 require that notice be sent?

2. In the event, the parties sent a notice of the proposed settlement to the Attorney General of the United States. The court approved the settlement entering a judgment embodying the settlement. Thereafter a woman who had been a class member filed an individual lawsuit, alleging violations of similar state and federal laws barring employment discrimination. Manufacturer invokes claim preclusion as an affirmative defense to this second suit, citing Hansberry v. Lee and the line of cases holding that an adequately represented class member is bound by a class judgment.

a. In reply, the plaintiff invokes 28 U.S. C. §1715(e). How should the motion to dismiss be decided?

b. Same case, but with two factual changes: The notice of the proposed settlement was sent to both to the U.S. Attorney General and to the Arizona Attorney General on July 1. On September 1 the court entered judgment approving the motion. What result on defendant's motion to dismiss on grounds of former adjudication?

a. Fees

In most litigation the client pays the lawyer's fee because she has agreed to do so. 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 at casebook pages 299-300. 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 holds 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 plaintiff 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 separately from the relief going to the class members, lawyers for the plaintiff and the defendant may be tempted to put more dollars into the fees than into relief for the class, thus "buying-off" the plaintiff's 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, which cannot directly instruct or monitor the lawyers' actions.

The law addresses these problems in two ways. For all class actions, Rule 26(e) requires notice to the absent class members and a hearing and judicial finding that the proposed settlement is "fair, reasonable, and adequate." 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 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. 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 problems should be solved.

NOTES AND PROBLEMS

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 two hundred 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 a lower number of 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. Should such separately negotiated attorneys' fees be ethical?

b. If they are, 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 $10,000,000.

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 $1,000,000. How should the court value the injunctive relief for fee-setting purposes?

4. A few courts have approached the fee problem in a novel way — by putting the legal work in class actions out to bid. In this system, which has several variations, the district court certifies a class and announces that the court will take bids from firms interested in taking on the representation. See, e.g., Sherleigh Assoc. LLC v. Sherleigh Associates, Inc., Profit-Sharing Plan, 186 F.R.D. 669 (S.D. Fla. 1999). Should this be a requirement of Rule 23?