Computer-Aided Exercises in Civil Procedure

Computer-Aided Exercises in Civil Procedure

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Exercise One - Holding and Dicta in the Context of a Diversity Case

I. OF STARE DECISIS, HOLDING, AND DICTA

A. The Law of *Stare Decisis*

When presented with a case that requires decision on a controlling issue of first impression, a court may look to history, custom, logic, morals, public policy, and justice considerations as guides to decision. When presented with a case that presents a controlling issue the court has already decided in a previous case, the court may look to its previous decision alone. Once a legal question has been decided by a court, the court will follow its decision in subsequent cases presenting the same legal question. That is the legal doctrine known by its Latin name *stare decisis* (*stare decisis et non quieta movere* is translated as stand by precedents and not disturb settled points) or simply as following precedent.

Stare decisis requires that after a ruling on a question of law necessary to decision in a case, the ruling becomes a binding authority in that court and lower courts in future cases in which the same question of law is presented for decision. The earlier decision binds lower courts in the same judicial system, e.g., a decision of the Supreme Court of the United States binds later decisions in federal courts of appeal and district courts. The decision does not bind courts in other judicial systems, such as state courts, although it will be persuasive authority. The court will be bound by its earlier decision simply because it is an earlier decision, even though the court may believe a different result would be better.

Certainly important public policies support application of the doctrine of *stare decisis* instead of *de novo* decision of every case. The doctrine recognizes that law should provide certainty and definiteness both so that judges decide on principle instead of what may appear to be personal whims and so that lawyers can predict the result of future cases. People structure their actions in reliance on the law. The law treats people equally. The courts are able to dispose of cases with efficiency. Even when a court decides to change the law, it will do so only after extended consideration of the prior decision, which helps to ensure that the new law is sound. The Supreme Court has expressed these policies in the following words:

> The doctrine of *stare decisis* imposes a severe burden on the litigant who asks us to disavow one of our precedents. For that doctrine not only plays an important role in orderly adjudication; it also serves the broader societal interests in evenhanded, consistent, and predictable application of legal rules. When rights have been created or modified in reliance on established rules of law, the arguments against their change have special force.

Thomas v. Washington Gas Light Co., 448 U.S. 261, 272, 100 S. Ct. 2647, 2656, 65 L.Ed.2d 757, 767 (1980).

The doctrine of *stare decisis* is not as dominating as it might thus far appear. First, it applies only when the facts of the second case are sufficiently similar to the facts of the precedent case that the second court decides the cases should be treated alike. Oftentimes, the second court will reject the binding effect of the first decision by distinguishing the case on the facts. Second, *stare decisis* does not apply to everything a court might write in a judicial opinion. It applies only to the actual, narrow "holding" of the earlier case. The concept of holding is loosely synonymous with the *ratio decidendi* of the opinion, i.e., the reason the court gives for its result (although a careful reader of an opinion might decide the reason the court gives for its decision is not the actual holding of the case). A comment the court might express during the course of the opinion that does not control the actual result is known as a dictum; the plural of such comments is dicta. The *stare decisis*, or binding effect, of the decision applies only to the holding, or *ratio decidendi*, and not to any dicta the court might have seen fit to mention along the way. A sound statement of this is the following:

> [N]ot every statement made in a judicial decision is an authoritative source to be followed in a later case presenting a similar situation. Only those statements in an earlier decision which may be said to constitute the *ratio decidendi* of that case are held to be binding, as a matter of general principle, in subsequent cases. Propositions not partaking of the character of *ratio decidendi* may be disregarded by the judge deciding the later case. Such nonauthoritative statements are usually referred to as *dicta* or (if they are quite unessential for the determination of the points at issue) *obiter dicta* [1]

The holding of a case is binding. Dicta may be disregarded. Clearly, judges and lawyers must be able to separate the holding from a dictum. Developing that ability to analyze and dissect court opinions is one of the most important tasks for a law student in the first year of law school. The remainder of this exercise assists in that task.

B. The Concepts of Holding and Dictum

We begin with a hypothetical court opinion. Suppose that plaintiff [P] brings a tort suit in federal district court under diversity of citizenship jurisdiction. The governing statute, 28 U.S.C. § 1332(a), requires that the "matter in controversy" must exceed $75,000. P in the complaint asks for $85,000 in compensatory damages. Defendant [D] moves under Federal Rule of Civil Procedure 12(b)(1) to dismiss for lack of subject matter jurisdiction on the ground that P will be unable to convince the jury to award more than $75,000. The district judge denies the motion, writing "The face of the complaint controls the amount in controversy." The opinion also notes "Interest and costs cannot be added." Finally, the judge ruminates about the increasing federal caseload and concludes "The attorney for any plaintiff who files an inadequate amount diversity claim should be subject to Federal Rule 11 sanctions."

These three statements are treated differently. Lawyers would describe the statement about the face of the

1. Edgar Bodenheimer, Jurisprudence: The Philosophy and Method of the Law 432 (Rev. ed. 1974).

complaint as the holding, or the *ratio decidendi*, of the case. The other two statements would be classified as dicta; the last statement about Rule 11, since it is far from the holding of the case–and indeed would be relevant only had the decision been for D instead of for P–might be called an obiter dictum.

Sometime later another federal judge is presented with a similar case. This court distinguishes P's case on its facts and rules that the face of the complaint does not control when to a legal certainty plaintiff's recovery cannot exceed $75,000. Then another federal court interprets P's case to apply only to pleading in good faith, and not to a situation where plaintiff has in bad faith claimed in excess of $75,000. Still another federal court rules that interest can be considered when it is the basis of the claim, such as interest on a loan.

All of these cases add qualifications to the rule announced in P's case without rejecting it on its facts. Does this mean that a lawyer who reads the holding of the case as "The face of the complaint controls the amount in controversy" is wrong?

We answer no, because that is an accurate statement of the decision of the court on the facts of the case before it. Lawyers describe the court's statement about the face of the complaint as holding rather than dictum, even though recognizing that the holding may be qualified in a subsequent case arising in a different factual context. In that subsequent case, the lawyer will wish to state the holding of the first case broadly or narrowly, depending on which interpretation will favor the lawyer's client.[2]

> Applying this two-faced doctrine of precedent to your work in a case class you get, it seems to me, some such result as this: You read each case from the angle of its *maximum* value as a precedent, at least from the angle of its maximum value as a precedent *of the first water.* You will recall that I recommended taking down the ratio decidendi in substantially the court's own words. You see now what I had in mind. Contrariwise, you will also read each case for its *minimum* value as a precedent, to set against the maximum. In doing this you have your eyes out for the narrow issue in the case, the narrower the better. The first question is, how much can this case fairly be made to stand for by a later court to whom the precedent is welcome? You may well add—though this will be slightly flawed authority—the dicta which appear to have been well considered. The second question is, how much is there in this case that cannot be got around, even by a later court that wishes to avoid it?

Karl N. Llewellyn, *The Bramble Bush* 69 (1951).

Some other scholars might answer yes. Because of the expanding and contracting nature of judicial precedent, one scholar has asserted that every statement of a rule of law in a judicial opinion is "mere dictum."[3]

Edward H. Levi, *An Introduction to Legal Reasoning* 2-3 (1964). Another has argued that the holding of a case should be determined from the material facts relied on by the court, not by the rules of law set forth in its opinion.[4] Another has said that the true rule of a case is not what the court said, but what a later court will say the case held.[5]

These views are possibly misleading. Statements of rules of law in an opinion are not mere epiphenomena—not mere bothersome noise that accompanies the business of hammering out facts and a decision. The rule of law stated in P's case tells us what facts the court thought important. The court found jurisdiction over P's case

2. Karl Llewellyn describes the process of extending and narrowing precedent and advises students as follows:
3. The determination of similarity or difference is the function of each judge. Where caselaw is considered and there is no statute, he is not bound by the statement of the rule of law made by the prior judge even in that controlling case. The statement is mere dictum, and this means that the judge in the present case may find irrelevant the existence or absence of facts which prior judges find important.
4. *See* Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case,* 40 Yale L.J. 161, 182 (1930).
5. "[T]he distinction [is] between the ratio decidendi, the court's own version of the rule of the case, and the *true* rule of the case, to wit, what *it will be made to stand for by another later court.*" Karl N. Llewellyn, *The Bramble Bush* 52 (1951).

because the complaint demanded a recovery exceeding $75,000, not because the facts pleaded could be recast into a federal question, even though such a suggestion might appear in the court's opinion. A subsequent court looking at the case would scrutinize the facts and language relating to the jurisdictional amount, not the facts and language relating to a possible federal question. And the rule that "The face of the complaint controls the amount in controversy" might be overruled, modified, distinguished, or refined, but it cannot be ignored with a clear conscience.

The court's statement about the face of the complaint is better described as holding, not dictum, even though we may recognize that any broad statement of holding may be qualified in a subsequent case arising in a somewhat different factual context.

The term holding, as used in this exercise, is not meant to describe a rule of law that will never be qualified or refined in subsequent cases. Rather, holding is used to describe the result reached by the court on the facts of the case before it. Such rules are not immune from subsequent modification, but they are at least partly free from the infirmities of dicta. Rules stated in dicta have diminished significance because they concern matters that probably were not briefed or argued, and so were not carefully considered by the court. Also, the judges of the court are familiar with the uses of precedent and the conventions of the legal profession, so they normally will not expect dicta to be given the same respect as holding. In fact, some of the judges who signed on to the opinion might have disagreed with its dicta, but refrained from explaining their position because of an expectation that the dicta would be lightly treated.

This exercise proceeds on the assumption that a lawyer will distinguish holding from dicta in a fashion that permits a statement of a general rule of law to be characterized as holding. At the same time, you should recognize that whether a rule is a holding or a dictum is only one of many considerations taken into account by subsequent courts in deciding on the weight and scope to be given to the rule. A subsequent court may give full precedential weight to a welcome dictum of an earlier opinion, or, because a broadly stated holding shares some of the infirmities of a dictum, a subsequent court may properly narrow it in factually distinguishable cases.

The following paragraphs set forth definitions of the terms holding and dictum. These definitions are consistent with usage in ordinary discourse among lawyers. You should bear in mind, however, that no set of definitions could possibly embrace all of the different meanings that have been given to these concepts by courts, lawyers, and scholars.

1. A Holding Is a Rule of Law Applied by the Court to the Case Before It

The rule must have been *applied* by the court. That is, the rule must have been applicable to the facts before the court, and the rule must apparently have influenced the court in reaching its result. If a rule meets these requirements, it is holding even if the court would probably have reached the same result had it declined to accept the rule, and even if the same result could have been reached by framing a more narrow rule.

Examples:

(1) An appellate opinion reverses a jury verdict for plaintiff on the ground that the jury instructions were erroneous. The rule stated in the case is holding, even though the court suggests that, had it declined to accept

the defendant's argument on the instructions, it would have reversed the verdict anyway on the ground that the evidence was insufficient to support the verdict.[6]

(2) A wife confesses in confidence to her husband that she committed a crime. At trial of the wife, the husband refuses to testify about the confession. He is held in contempt. The appellate court reverses, declaring that "No one may be compelled to testify against a spouse in any criminal proceeding." The broadly-stated principle is holding, even though the same result could have been reached by adopting a narrower rule that excluded compelled testimony only about confidential communications.

The rule of law need not have been *stated* by the court. All cases have holdings, but in some cases the court does not attempt to state any general rule of law.

Example:

An appellate opinion reviewing a defendant's verdict in a personal injury case begins with a three-page statement of facts pointing out that the defendant's lawyer brought improper evidence to the jury's attention, made an inflammatory closing argument, and engaged in other inappropriate conduct throughout the trial. After its statement of facts, the court closes its opinion by stating simply "In the circumstances of this case, the defense counsel's conduct was so reprehensible that we feel compelled to reverse." A lawyer attempting to summarize the holding of this case in a meaningful fashion would have to generalize; no particular passage from the court's opinion could be quoted as the holding.

2. A Rule of Law Stated in an Opinion is Dictum if the Rule Is Not Applicable to the Facts Before the Court

Example:

In a slander case, the court upholds a verdict against a prosecutor who made untrue statements about a criminal defendant at a press conference. The court opines that the prosecutor's statements would have been privileged had they been made during the course of courtroom proceedings instead of at a press conference. The court's statement about courtroom privilege is dictum, since it does not apply to the facts of the case before it.

3. A Rule of Law Stated in an Opinion Is Dictum if the Rule Does Not Contribute Support to the Result Reached by the Court

This requirement means that an opinion's statement of legal doctrine must not only apply to the facts but also support the result. The holding *must follow the result* in the case. This requirement is often expressed by saying that the holding must be "necessary" to the result, but that seems to be too strict a statement of the requirement, since a person could always conceive of a way in which the court could have reached the same result on another ground or endorsed a narrower rule of decision; no rule of law stated in an opinion is absolutely necessary to the result.[7] The definition set forth here adopts a more permissive test based upon whether the stated rule "supports"

6. *Cf.* Henry Friendly, *In Praise of Erie-and of the New Federal Common Law*, 39 N.Y.U.L.Rev. 383, 385–86 (1964) ("A court's stated and, on its view, necessary basis for deciding does not become dictum because a critic would have decided on another basis").
7. Literal adherence to the necessity principle would lead to the position espoused by Professor Edward Levi in note 3, *supra*, that all statements of rules of law in an opinion are dicta.

the result. It thus sweeps into its category of holding broad statements of law that some lawyers would characterize as dicta on grounds that the statements were not necessary to the result.[8]

Examples:

> (1) An appellate opinion in one paragraph reverses the trial court for failure to grant plaintiff the proper number of peremptory challenges. The opinion then continues for several pages to analyze the tort doctrine of proximate cause "since this case will have to be retried," and concludes that the trial court's application of proximate cause was correct. The holding of the case cannot pertain to proximate cause because the case was reversed, and the result of the proximate cause discussion would have produced an affirmance. The holding lies in the ruling on peremptory challenges.
>
> (2) In a libel case, a jury returns a verdict against a newspaper that had printed an untrue story about a movie star. The trial judge had instructed the jury that since movie stars are public figures, news stories about them are conditionally privileged; therefore, the movie star would recover damages only by establishing that the newspaper either knew the story was false or acted with reckless disregard of whether the story was true or false.

The appellate court agrees with the instruction that stories about movie stars are conditionally privileged, yet it affirms the judgment against the newspaper on grounds that the movie star produced sufficient evidence to justify a verdict that the newspaper knew that the story was false.

The appellate court's statement that stories about movie stars are conditionally privileged is dictum; although applicable to the facts before the court, the statement does not support the result reached. (Had the court reversed on grounds that the evidence was insufficient, the court's statement about privilege may have been holding instead of dictum.)

When a court states more than one ground for its decision, each may be a holding of the court, so long as each contributes support to the result. This is so even though any one of the grounds relied on independently would support the result. Holdings of this nature are often called "alternative holdings."

Example:

> Plaintiff sues the state, claiming benefits provided by state statute for persons who served in the war in Iraq. Plaintiff had enlisted in the Army during the war and served at Fort Benning, Georgia, for five weeks before receiving a medical discharge. The trial judge grants a defense motion for summary judgment, and the appellate court affirms, stating that plaintiff is ineligible for benefits (1) because the statute applies only to persons who serve their entire enlistment period, and (2) because the statute applies only to persons actually stationed in Iraq. Both of the rulings are holdings of the court.

8. Under this holding dictum distinction, by designating a statement of a rule of law as holding, one is merely suggesting that it is entitled to the weight accorded a proposition that was probably argued before the court and given careful consideration by the court. Designation as holding does not mean that all of the particulars of the stated rule will be followed as binding precedent. Even lower courts, which lack the power to overrule the prior decision, may nevertheless narrow it or distinguish it. The broader the holding, the more likely this narrowing will take place. Whether a statement is holding or dictum is only one of many considerations that subsequent courts will take into account in determining what precedential message to draw from it.

C. Stating the Holding of a Case in Class

A question asking you for the holding of a case requests the precedential message. To prepare a satisfactory answer, a student must discard irrelevant facts, separate holding from dicta, and decide what issues were framed for decision in the procedural posture of the case. Then you must summarize the essence of the case. If you cannot do these things, you probably do not really understand the case. Certainly the holding cannot be extemporized on the spot in class: it must be carefully crafted, probably in a case brief, ahead of time.

The following guidelines may be helpful in formulating the holding of a case:

1. Formulate a rule that would be helpful to a lawyer *who has not read the case* and wants to know what the case holds. “The court held that the plaintiff was entitled to damages” is useless. It is not a summary of any rule of law established by the case. It is merely a statement of the procedural result. Even the length of the supposed holding gives away its inadequacy. A holding will seldom be so short; it must contain enough detail so that a person who has not read the case can understand the rule of law the case establishes as a precedent.

2. State the holding that is most relevant to the purpose for which the case is being studied. A case may have multiple holdings. Suppose that a case has been appealed because plaintiff claims the trial judge denied a valid jurisdictional defense, denied an amendment to the complaint, excluded admissible evidence, and erroneously instructed on the law of products liability. Any of these grounds would be sufficient for reversal. When the appellate court determines there was no error, it will necessarily have produced a holding on each one of these issues.

When asked to state the holding of a case, you are expected to choose from among these holdings the one that is most germane to the topic being studied. For example, if you are studying jurisdiction, then you should state the court’s holding on jurisdiction.

3. State the holding at a level of generality that is useful for the purpose for which the case is being studied.

Your goal is to state the holding at a high level of generality so that the precedent can be applied to other cases. At the same time, the holding can be no broader than the rule of law established by the case. Finding the right level of generality/specificity is a skill learned over time. Beginning students often state holdings at such a high level of generality that they fail to show how the case has contributed to the body of precedent being studied.

Examples:

> (1) Suppose that the general law governing personal jurisdiction over a defendant served by a long-arm statute is that the defendant must have minimum contacts so that maintenance of the suit in the state does not offend traditional notions of fair play and substantial justice. This was the holding of a famous Supreme Court decision in 1945.[i] Since that year, thousands of cases have mentioned the minimum contacts language. Your casebook contains a series of cases interpreting this rule. Undoubtedly almost every case contains somewhere in the opinion this language about minimum contacts. Although this rule is one of the holdings of these cases, stating the holding at such a high level of generality is pointless. You do not advance the inquiry at all. You should state a holding that adds some additional content to the basic rule. In a case that applies the language to specific facts, for example, the holding might be “A defendant seller who solicits and purposefully enters a single contract for goods to be shipped into the state has sufficient minimum contacts

to support personal jurisdiction by the state over it in an action to collect damages when the goods shipped into the state are defective." One can be no more general without losing the rule of law established by the holding.

(2) In your first torts class, you read a case in which defendant playfully slaps plaintiff lightly across the face. The appellate court affirms a verdict for plaintiff for the intentional tort of battery. To say the holding is "A battery is an intentional touching of the person that is harmful or offensive" is worth little. It merely restates the law that has existed for hundreds of years prior to this case. Instead the holding should center on what this case adds to the law. It might be "A playful slap to the face is sufficient to establish an offensive touching of the person as an element of a battery."

Although beginning law students tend to err on the side of excessive generality, they also can state a holding at a level that is too specific for the purpose for which the case is being studied. One way of stating a holding is to recite all of the relevant facts and then describe the result that the court reached on those facts; a holding so narrowly tied to the facts of the case will not usually be a useful study aid. You should remember that your first-year courses are survey courses, covering vast areas of doctrine in a short period. Your statement of a holding should be general enough to contribute to a broad doctrinal framework. To achieve a general statement, you must necessarily omit some possibly relevant facts.

4. Use the court's own language from the opinion when possible.

In your attempt to state a holding at a useful level of generality, you may find language you can quote directly from the opinion. Sometimes the court will write "our holding today is" or "we decide the issue of." You may be able simply to lift an entire sentence as your holding, but be careful. Some such statements in opinions precede excellent holdings; others precede language no more valuable than "whether the case should be reversed." Even when the court does not provide such an obvious guide to its holding, you will often be able to–and should–seize on a sentence, phrase, or key words from the opinion that build your holding.

You should construct your holding entirely from your own language only when you conclude that none of the court's phrasing adequately captures its holding. You will be unable to lift language from the opinion in a surprisingly large number of cases.

II. WRITTEN EXERCISE: STATING THE HOLDING OF A CASE

You are attending your first civil procedure class. You have been given an advance assignment to read and brief *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 29 S. Ct. 42, 53 L.Ed. 126 (1908). This case is in a section of your casebook entitled "The General Definition of Federal Question Jurisdiction."

Read the following opinion with an eye to stating the holding. At the end of the opinion, you will be asked to state the holding. You will also be asked to evaluate seven possible statements of the holding.

LOUISVILLE & NASHVILLE RAILROAD CO. v. MOTTLEY
Supreme Court of the United States, 1908.
211 U.S. 149, 29 S. Ct. 42, 53 L.Ed. 126.

The appellees (husband and wife), being residents and citizens of Kentucky, brought this suit in equity in the

Circuit Court of the United States for the Western District of Kentucky against the appellant, a railroad company and a citizen of the same State. The object of the suit was to compel the specific performance of the following contract:

"Louisville, Ky., Oct. 2nd, 1871.

"The Louisville & Nashville Railroad Company in consideration that E.L. Mottley and wife, Annie E. Mottley, have this day released Company from all damages or claims for damages for injuries received by them on the 7th of September, 1871, in consequence of a collision of trains on the railroad of said Company at Randolph's Station, Jefferson County, Kentucky, hereby agrees to issue free passes on said Railroad and branches now existing or to exist, to said E.L. & Annie E. Mottley for the remainder of the present year, and thereafter to renew said passes annually during the lives of said Mottley and wife or either of them."

The bill alleged that in September, 1871, plaintiffs, while passengers upon the defendant railroad, were injured by the defendant's negligence, and released their respective claims for damages in consideration of the agreement for transportation during their lives, expressed in the contract. It is alleged that the contract was performed by the defendant up to January 1, 1907, when the defendant declined to renew the passes. The bill then alleges that the refusal to comply with the contract was based solely upon that part of the act of Congress of June 29, 1906 (34 Stat. at L. 584, Chap. 3591, U.S.Comp.Stat.Supp.1907, p. 892), which forbids the giving of free passes or free transportation. The bill further alleges: First, that the act of Congress referred to does not prohibit the giving of passes under the circumstances of this case; and, second, that, if the law is to be construed as prohibiting such passes, it is in conflict with the 5th Amendment of the Constitution, because it deprives the plaintiffs of their property without due process of law. The defendant demurred to the bill. The judge of the circuit court overruled the demurrer, entered a decree for the relief prayed for, and the defendant appealed directly to this court….

Mr. Justice Moody, after making the foregoing statement, delivered the opinion of the court.

Two questions of law were raised by the demurrer to the bill, were brought here by appeal, and have been argued before us. They are, first, whether that part of the act of Congress of June 29, 1906 (34 Stat. at L. 584, Chap. 3591, U.S.Comp.Stat.Supp.1907, p. 892), which forbids the giving of free passes or the collection of any different compensation for transportation of passengers than that specified in the tariff filed, makes it unlawful to perform a contract for transportation of persons who, in good faith, before the passage of the act, had accepted such contract in satisfaction of a valid cause of action against the railroad; and, second, whether the statute, if it should be construed to render such a contract unlawful, is in violation of the 5th Amendment of the Constitution of the United States. We do not deem it necessary, however, to consider either of these questions, because, in our opinion, the court below was without jurisdiction of the cause. Neither party had questioned that jurisdiction, but it is the duty of this court to see to it that the jurisdiction of the circuit court, which is defined and limited by statute, is not exceeded. This duty we have frequently performed of our own motion. [Citations omitted.]

There was no diversity of citizenship, and it is not and cannot be suggested that there was any ground of jurisdiction, except that the case was a "suit … arising under the Constitution or laws of the United States." Act of August 13, 1888, L. 866, 25 Stat. 433, 434. It is the settled interpretation of these words, as used in this statute, conferring jurisdiction, that a suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution. It is not enough that the plaintiff alleges some anticipated defense to his cause of action, and asserts that the defense is

invalidated by some provision of the Constitution of the United States. Although such allegations show that very likely, in the course of the litigation, a question under the Constitution would arise, they do not show that the suit, that is, the plaintiff's original cause of action, arises under the Constitution…. [I]n Boston & M. Consol. Copper & S. Min. Co. v. Montana Ore Purchasing Co., 188 U.S. 632, 47 L.Ed. 626, 23 Sup. Ct. Rep. 434, the plaintiff brought suit in the circuit court of the United States for the conversion of copper ore and for an injunction against its continuance. The plaintiff then alleged, for the purpose of showing jurisdiction, in substance, that the defendant would set up in defense certain laws of the United States. The cause was held to be beyond the jurisdiction of the circuit court, the court saying, by Mr. Justice Peckham (pp. 638, 639):

"It would be wholly unnecessary and improper, in order to prove complainant's cause of action, to go into any matters of defense which the defendants might possibly set up, and then attempt to reply to such defense, and thus, if possible, to show that a Federal question might or probably would arise in the course of the trial of the case. To allege such defense and then make an answer to it before the defendant has the opportunity to itself plead or prove its own defense is inconsistent with any known rule of pleading, so far as we are aware, and is improper.

"The rule is a reasonable and just one that the complainant in the first instance shall be confined to a statement of its cause of action, leaving to the defendant to set up in his answer what his defense is, and, if anything more than a denial of complainant's cause of action, imposing upon the defendant the burden of proving such defense.

"Conforming itself to that rule, the complainant would not, in the assertion of proof of its cause of action, bring up a single Federal question. The presentation of its cause of action would not show that it was one arising under the Constitution or laws of the United States.

"The only way in which it might be claimed that a Federal question was presented would be in the complainant's statement of what the defense of defendants would be, and complainant's answer to such defense. Under these circumstances the case is brought within the rule laid down in Tennessee v. Union & Planters' Bank, *supra.* That case has been cited and approved many times since…."

It is ordered that

the Judgment be reversed and the case remitted to the Circuit Court with instructions to dismiss the suit for want of jurisdiction.

You anticipate that in class the professor will ask "What is the holding of *Mottley*?" Of course your answer must be prepared ahead of time in your brief. Before proceeding to evaluate the following possible statements of the holding, you will benefit by working out your own statement of the holding in *Mottley.*

Some mistakes in stating a holding are common. See whether any of the "Common Mistakes" listed below apply to your statement of the holding.

COMMON MISTAKES IN STATING A HOLDING

1. Inaccurately describing a rule of law applied by the court.

2. Stating a dictum instead of holding.

3. Stating a rule of law that is one of the holdings of the case, but not the holding most relevant to the purpose for which the case has been read.

4. Stating a rule of law in terms too general to be useful for the purpose for which the case has been read.

5. Stating a rule of law in terms too specific to be useful for the purpose for which the case has been read.

6. Stating the result of the case instead of stating a rule of law.

Assume the professor asks the same question to eight of your classmates. Consider each of the following answers and decide whether it would be satisfactory, or whether it is flawed by one of the above Common Mistakes in Stating a Holding. After making your own evaluations, you can then compare your answers with the authors' evaluations that follow.

> ANSWER 1. Where there is no diversity of citizenship or other basis for federal jurisdiction, a federal court should dismiss the case before it.
>
> Is this a satisfactory statement of the holding? If no, why not? Answer with a number from the Common Mistakes in Stating a Holding.
>
> ANSWER 2. The Supreme Court may consider an issue of subject matter jurisdiction on its own motion, even if the parties did not raise the issue below.
>
> Is this a satisfactory statement of the holding? If no, why not? Answer with a number from the Common Mistakes in Stating a Holding.
>
> ANSWER 3. In a bill demanding specific performance of a contract, allegations that the defendant has based its refusal to perform the contract upon federal law are superfluous.
>
> Is this a satisfactory statement of the holding? If no, why not? Answer with a number from the Common Mistakes in Stating a Holding.
>
> ANSWER 4. Plaintiffs asking for specific performance of a contract cannot create federal question jurisdiction by alleging in the complaint that the defendant has relied on a privilege created by federal law in refusing to perform the contract.
>
> Is this a satisfactory statement of the holding? If no, why not? Answer with a number from the Common Mistakes in Stating a Holding.
>
> ANSWER 5. Federal question jurisdiction does not exist when the federal issue appears in the plaintiff's complaint only as an anticipated defense.

Is this a satisfactory statement of the holding? If no, why not? Answer with a number or numbers from the Common Mistakes in Stating a Holding.

ANSWER 6. A federal question is presented to the court if the pleadings of the parties show that the case will involve an important issue of federal law.

Is this a satisfactory statement of the holding? If no, why not? Answer with a number from the Common Mistakes in Stating a Holding.

ANSWER 7. This case must be dismissed for lack of jurisdiction.

Is this a satisfactory statement of the holding? If no, why not? Answer with a number from the Common Mistakes in Stating a Holding.

ANSWER 8. No diversity of citizenship exists between two plaintiffs and a defendant who are all citizens of the same state.

Is this a satisfactory statement of the holding? If no, why not? Answer with a number from the Common Mistakes in Stating a Holding.

AUTHORS' EVALUATION OF THE STATEMENTS OF THE *MOTTLEY* HOLDING

1. Where there is no diversity of citizenship or other basis for federal jurisdiction, a federal court should dismiss the case before it.

This statement is not satisfactory for reason 4. The statement is accurate and relevant to the purpose for which the case is being studied, but the statement is so general that it does not usefully describe the precedent established by the case. More specificity is needed.

2. The Supreme Court may consider an issue of subject matter jurisdiction on its own motion, even if the parties did not raise the issue below.

This statement is not satisfactory for reason 3. This rule is certainly *one* of the holdings of the case. If a lawyer were arguing a case presenting the issue whether a defense of subject matter jurisdiction had been waived, this statement could properly be described as the holding of the case. On the other hand, the student should never ignore the casebook Table of Contents. The editors' placement of *Mottley* in "The General Definition of Federal Question Jurisdiction" suggests that the case has been assigned because of its definition of federal question jurisdiction, not because of its holding on the waiver issue. Therefore, one might argue that the waiver rule is not the holding because it is not the rule of law most relevant to the purpose for which the case has been read.

3. In a bill demanding specific performance of a contract, allegations that the defendant has based its refusal to perform the contract upon federal law are superfluous.

This statement is not satisfactory for reason 3. This rule is one of the holdings of the case, but it is not the holding most relevant to the purpose for which the case has been assigned. The placement of *Mottley* in the casebook shows that it is meant to be read for its holding about the nature of federal question jurisdiction, not for its holding about superfluity in pleading.

4. Plaintiffs asking for specific performance of a contract cannot create federal question jurisdiction by alleging in the complaint that the defendant has relied on a privilege created by federal law in refusing to perform a contract.

This statement is not satisfactory for reason 5. Even though a reasonable argument can be made that this statement of the holding is satisfactory, the statement is probably too specific to be useful for the purpose for which the case has been read. This might be an appropriate statement of the holding if the case were being studied for a more narrow purpose—for example, by a lawyer doing research for an appellate argument in a contract case in which the plaintiff sought to base federal jurisdiction upon allegations that the defendant had relied upon federal law in failing to perform its promise. The placement of this case in the casebook indicates that it is meant to convey a general rule about federal question jurisdiction rather than a specific rule for contract cases. The holding should be stated with greater generality, so that it applies to cases other than contract cases.

5. Federal question jurisdiction does not exist when the federal issue appears in the plaintiff's complaint only as an anticipated defense.

This is a good statement of the holding. It formulates the relevant holding of the case at the appropriate level of generality. Of course, this statement is not a magic form of words. Other similar formulations would also be acceptable, *e.g.*, "There is no federal question jurisdiction if the facts that give rise to the federal issue should have been pleaded by the defendant instead of the plaintiff," or "There is no federal question jurisdiction unless the facts giving rise to a federal issue are made to appear, without inserting superfluous language, in the plaintiff's initial pleading."

6. A federal question is presented to the court if the pleadings of the parties show that the case will involve an important issue of federal law.

This statement is not satisfactory for reason 1. It is an inaccurate statement of the doctrine of *Mottley.* The opinion states there is no federal question jurisdiction unless the facts giving rise to the federal issue appear, without inserting superfluous language, in the plaintiff's complaint. The fact that defendant's answer reveals the existence of an important federal issue will not suffice to create federal question jurisdiction.

7. This case must be dismissed for lack of jurisdiction.

This statement is not satisfactory for reason 6. It merely describes the result reached, not a rule of law established by the case.

8. No diversity of citizenship exists between two plaintiffs and a defendant who are all citizens of the same state.

This statement is not satisfactory for reason 2. While the court did note there was no diversity of citizenship, the case clearly is decided on the issue of federal question jurisdiction. The discussion of diversity jurisdiction is a dictum.

III. COMPUTER–AIDED EXERCISE: BAKER V. KECK

This written material and the accompanying computer-aided exercise, CALI CIV 05: Analysis of a Diversity Case, explore the nature of holding and dictum in the context of an opinion on diversity of citizenship jurisdiction. The computer will require you to distinguish holding and dicta so that you can state the holding of *Baker v. Keck,* an

opinion that appears following this introductory note. The computer will also ask you other questions to analyze the meaning of passages in the opinion. The exercise is based on the following fact scenario.

You are a new associate working for a law firm in the state of Fraser. One of the firm's partners asks you to do some research on a personal injury action the firm has brought on behalf of Pam Pedestrian against David Driver. Pedestrian's tort claim arises under state law, and the only plausible basis for federal jurisdiction is diversity of citizenship.

Your firm filed Pedestrian's suit in federal district court for Fraser. Driver moved under Federal Rule of Civil Procedure 12(b)(1) to dismiss for lack of subject matter jurisdiction; he asserts that both Pedestrian and Driver are citizens of the same state, Fraser, so there is no diversity of citizenship. The motion has been set for hearing next week and the partner wants to submit to the court a legal memorandum on the issue of diversity of citizenship. She tells you to work with the following set of facts, which have already been developed in the case file.

Pam Pedestrian is without question a citizen of Fraser. She suffered injuries that are serious enough to satisfy the $75,000 jurisdictional amount requirement.

David Driver is a law student, age 25, single, born and reared at his parents' home in Fraser. He graduated from college at Fraser State University, and is now a student at Coffman Law School in the state of Coffman. Driver is living in an apartment in Coffman while finishing the last half of his final year in law school. Driver's parents have continued to support him during his attendance at law school, and he has frequently returned to his parents' home during vacation periods. Driver recently accepted a full-time job with a law firm in a third state, Northrop.

In an affidavit submitted with the motion to dismiss, Driver swore to the following facts:

I went to high school and college while living at home in Fraser. Two and a half years ago I entered law school in Coffman. I have always had a definite intent to leave Coffman immediately after graduation. I voted in Coffman during the last election, but have never participated in politics here in any other way. I have never belonged to any organizations in Coffman or held a job here. I have now accepted a job with a law firm in Northrop. I received the offer by telephone after interviewing in Coffman; I have never been in Northrop. I am living in an apartment in Coffman while finishing my last year of law school. I intend never to come back to Coffman after I leave. During law school my parents have paid my expenses, and I have visited them during vacations at our family home in Fraser; however, I do not plan on going back to Fraser. I have always wanted to go to a populous state like Northrop to practice.

You have started research for the memorandum that will be submitted to the trial court. You quickly found the relevant jurisdictional statute, 28 U.S.C. § 1332:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—

(1) citizens of different states***.

Initial research also revealed that in your federal district, consistent with all other districts, the following two propositions are generally accepted:

1. A United States citizen is also a citizen of the state in which that person is domiciled. [Both Pedestrian and Driver are United States citizens.]

2. A domicile once established endures until a new one is acquired. Consequently, Driver is still domiciled in Fraser unless he has acquired a new domicile in Coffman or Northrup.

Your research also discovered *Baker v. Keck,* 13 F. Supp. 486 (E.D. Ill.1936). Even though the opinion is today three-quarters of a century old, the legal principles it states remain good law. For the purposes of this computer-aided exercise, treat *Baker* as a recent case decided by the district judge who is assigned to your case.

The computer exercise will ask you to participate in a discussion with other associates in your law firm. Your associates will make assertions about *Baker,* and you will be asked to agree or disagree with them. Please study *Baker* carefully, and take the opinion with you to the computer. The opinion is divided into sections, each of which is numbered. Some questions asked by the computer will refer to the sections by number.

BAKER v. KECK
United States District Court, Eastern District of Illinois, 1936.
13 F. Supp. 486.

Lindley, District Judge.

[§ 1]

Plaintiff has filed herein his suit against various individuals and the Progressive Miners of America charging a conspiracy, out of which grew certain events and in the course of which, it is averred, he was attacked by certain of the defendants and his arm shot off. This, it is said, resulted from a controversy between the United States Mine Workers and the Progressive Miners of America.

[§ 2]

Plaintiff avers that he is a citizen of the state of Oklahoma. Defendants filed a motion to dismiss, one ground of which is that plaintiff is not a citizen of the state of Oklahoma, but has a domicile in the state of Illinois, and that therefore there is no diversity of citizenship. To this motion plaintiff filed a response, with certain affidavits in support thereof.

[§ 3]

Upon presentation of the motion, the court set the issue of fact arising upon the averments of the complaint, the motion to dismiss, and the response thereto for hearing. A jury was waived. Affidavits were received and parol evidence offered.

[§ 4]

It appears that plaintiff formerly resided in Saline County, Ill., that he was not a member of United Mine Workers, but was in sympathy with their organization. The averment of the declaration is that he was attacked by members of, or sympathizers with, the Progressive Mine Workers of America. He was a farmer, owning about 100 acres of land. After his injury, he removed to the state of Oklahoma, taking with him his family and all of his household

goods, except two beds and some other small items. His household furniture was carried to Oklahoma by truck, and the truckman was paid $100 for transportation. Near Ulan, Okl. he rented 20 acres and a house for $150 per year, and began occupancy thereof October, 1934. He testified that he had arrangements with another party and his own son, living with him, to cultivate the

[§ 5]

ground, but that farming conditions were not satisfactory, and that it was impossible, therefore, to produce a crop in 1935. He produced potatoes, sweet corn, and other garden products used in the living of the family. He had no horses or other livestock in Oklahoma. He was unable to do any extensive work himself because of the loss of his arm. In the summer of 1935 he leased for the year 1936 the same 20 acres and an additional 20 acres at a rental of $150.

[§ 6]

At the first opportunity to register as a qualified voter in Oklahoma after he went there, he complied with the statute in that respect and was duly registered. This was not until after he had been in the state for over a year, as, under the state statute, a qualified voter must have resided within the state for twelve months prior to registration. He has not voted, but he testified that the only election at which he could have voted after he registered was on a day when he had to be in Illinois to give attention to his lawsuit. He has returned to Illinois for short visits three or four times.

[§ 7]

He testified that he moved to Oklahoma for the purpose of residing there, with the intention of making it his home and that he still intends to reside there. He testified that the family started out to see if they could find a new location in 1934. Upon cross-examination it appeared that the funds for traveling and removal had been paid by the United Mine Workers or their representative; that he left his livestock on the Illinois farm, but no chickens; that he had about 60 chickens on his farm in Oklahoma; that, when he removed to Oklahoma, he rented his Illinois farm for a period of five years; that the tenant has recently defaulted upon the same.

[§ 8]

In the affidavits it appears that plaintiff’s house in Illinois was completely destroyed by fire shortly after he left. It was not insured and was a total loss. Witnesses for the defense testified that he had told them that he intended to move back to Illinois after he got his case settled; that he had told one witness in 1935 that he was going to Oklahoma but did not know for how long. Plaintiff denies that he told these witnesses that he expected to return to Illinois as soon as his litigation was completed.

[§ 9]

I think it is a fair conclusion from all the evidence that at the time plaintiff removed to Oklahoma one of his motives was to create diversity of citizenship so that he might maintain a suit in the United States courts. But that conclusion is not of itself decisive of the question presented. There remains the further question of whether there was at the time this suit was begun an intention upon his part to become a citizen of Oklahoma. One may change his citizenship for the purpose of enabling himself to maintain a suit in the federal court, but the change must

be an actual legal change made with the intention of bringing about actual citizenship in the state to which this removal is made.

[§ 10]

Citizenship and domicile are substantially synonymous. Residency and inhabitance are too often confused with the terms and have not the same significance. Citizenship implies more than residence. It carries with it the idea of identification with the state and a participation in its functions. As a citizen, one sustains social, political, and moral obligation to the state and possesses social and political rights under the Constitution and laws thereof. Harding v. Standard Oil Co. et al. (C.C.) 182 F. 421; Baldwin v. Franks, 120 U.S. 678, 7 S. Ct. 763, 32 L.Ed. 766; Scott v. Sandford, 19 How. 393, 476, 15 L.Ed. 691.

[§ 11]

Accordingly it is commonly held that the exercise of suffrage by a citizen of the United States is conclusive evidence of his citizenship. Foster on Federal Practice, vol. 1 (6th Ed.) p. 159, and cases there cited. Voting in a party primary and membership in a local political party are strong evidence of citizenship. Gaddie v. Mann (C.C.) 147 F. 955. The registration of a man as a voter and the assessment of a poll tax against him are likewise strong evidence of domicile or citizenship, though not conclusive. In re Sedgwick (D.C.) 223 F. 655.

[§ 12]

Change of domicile arises when there is a change of abode with the absence of any present intention not to reside permanently or indefinitely in the new abode. This is the holding of the Supreme Court in Gilbert v. David, 235 U.S. 561, 35 S. Ct. 164, 167, 59 L.Ed. 360, where the court said: "As Judge Story puts it in his work on 'Conflict of Laws' (7th Ed.) § 46, page 41, 'If a person has actually removed to another place, with an intention of remaining there for an indefinite time, and as a place of fixed present domicile, it is to be deemed his place of domicile, notwithstanding he may entertain a floating intention to return at some future period. The requisite animus is the present intention of permanent or indefinite residence in a given place or country, or, negatively expressed, the absence of any present intention of not residing there permanently or indefinitely.' "

[§ 13]

It will be observed that, if there is an intention to remain, even though it be for an indefinite time, but still with the intention of making the location a place of present domicile, this latter intention will control, even though the person entertains a floating intention to return at some indefinite future period. In this respect the court in Gilbert v. David, *supra*, further said: "Plaintiff may have had, and probably did have, some floating intention of returning to Michigan after the determination of certain litigation…. But, as we have seen, a floating intention of that kind was not enough to prevent the new place, under the circumstances shown, from becoming his domicile. It was his place of abode, which he had no present intention of changing; that is the essence of domicile."

[§ 14]

In discussing a similar situation, in McHaney v. Cunningham (D.C.) 4 F.(2d) 725, 726, the court said: "He says he always intended at some indefinite future time, … to return to Arkansas to practice the legal profession; but, when he registered and voted in this state, he must have decided to give up that idea, for I cannot assume that he

intended to commit a fraud upon its laws by claiming and exercising rights such as were given alone to a bona fide citizen. I take it, when these things were done, it was with the intention of identifying himself with the state in a political sense, which is the basis of citizenship." See, also, Reckling v. McKinstry (C.C.) 185 F. 842; Philadelphia & R. Ry. Co. v. Skerman (C.C.A.) 247 F. 269; Collins v. City of Ashland (D.C.) 112 F. 175.

[§ 15]

In Dale v. Irwin, 78 Ill. 170 (1875), the court said, referring to a statutory provision: "The legislature, by this section, sought to establish a criterion of residence, by declaring that a permanent abode shall be such criterion. Now, what is 'a permanent abode?' Must it be held to be an abode which the party does not intend to abandon at any future time? This, it seems to us, would be a definition too stringent for a country whose people and characteristics are ever on a change. No man in active life, in this State, can say, wherever he may be placed, this is and ever shall be my permanent abode. It would be safe to say a permanent abode, in the sense of the statute, means nothing more than a domicile, a home, which the party is at liberty to leave, as interest or whim may dictate, but without any present intention to change it."

[§ 16]

In Kreitz v. Behrensmeyer, 125 Ill. 141, 195, 17 N.E. 232, 8 Am.St.Rep. 349 (1888), the Court said: "A man may acquire a domicile … if he be personally present in a place and select that as his home, even though he does not design to remain there always, but designs at the end of some time to remove and acquire another."

[§ 17]

The statement of the Restatement of the Law, Conflict of Laws, § 15, Domicil of Choice, is as follows:

"(1) A domicil of choice is a domicil acquired, through the exercise of his own will, by a person who is legally capable of changing his domicil.

[§ 18]

"(2) To acquire a domicil of choice, a person must establish a dwelling-place with the intention of making it his home.

[§ 19]

"(3) The fact of physical presence at a dwelling-place and the intention to make it a home must concur; if they do so, even for a moment, the change of domicil takes place."

[§ 20]

In Holt v. Hendee, 248 Ill. 288, 93 N.E. 749, 752, 21 Ann.Cas. 202, the court said: "The intention is not necessarily determined from the statements or declarations of the party but may be inferred from the surrounding circumstances, which may entirely disprove such statements or declarations. On the question of domicile less weight will be given to the party's declaration than to his acts."

[§ 21]

Though it must be confessed that the question is far from free of doubt, I conclude that, under the facts as they appear in the record, despite the fact that one of plaintiff's motives was the establishment of a citizenship so as to create jurisdiction in the federal court, there was at the time of his removal a fixed intention to become a citizen of the state of Oklahoma. He testified that he worked on a community project in that state without compensation. It appears that he registered as a voter; he thus became a participant in the political activities of the state. Such action is inconsistent with any conclusion other than that of citizenship, and, in view of his sworn testimony that it was his intention to reside in Oklahoma and to continue to do so, it follows that the elements constituting the status of citizenship existed.

[§ 22]

True, there is some evidence that he had said he might return to Illinois as soon as his case was settled. The language of the cases above indicates that such a floating intention is insufficient to bar citizenship, where active participation in the obligations and enjoyment of the rights of citizenship exist.

[§ 23]

Defendants contend that the fact that the cost of plaintiff's transportation and maintenance were paid by the United Mine Workers is of decisive weight upon this issue. I cannot agree. It seems to me immaterial what motives may have inspired the United Mine Workers to help him, and the court is not now concerned with their alleged charitable and philanthropic practices.

[§ 24]

I conclude, therefore, that plaintiff was at the time of the commencement of the suit, and is now, a citizen of the state of Oklahoma. The findings herein embraced will be adopted as findings of fact of the court and entered as such. It is ordered that the motion to dismiss because of lack of diversity of citizenship be, and the same is hereby, denied. An exception is allowed to defendants.

[§ 25]

If possible, in view of the expense involved in a trial upon the merits, it is desirable that a review of this decision be had before such trial.

After writing out your statement of the holding in *Baker v. Keck*, you will be ready to do the computer aided exercise, CALI CIV 05: Analysis of a Diversity Case.

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[i]*International Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L.Ed. 95 (1945). (Return to text)

2.

Exercise Three - Pleading a Complaint

This exercise is about pleading, but more specifically, it is about pleading a complaint. Following discussion of the history of pleading under the common law and the codes, the exercise explores the requirements of pleading a complaint under the Federal Rules of Civil Procedure. It does not expand into the general topic of pleading, so subjects such as responses to a complaint, additional pleadings, and amendments to pleadings are not included. The exercise culminates in the pleading of a complaint for defamation, and to that end includes the facts of a hypothetical case plus discussion of the substantive law of defamation.

I. HISTORY OF PLEADING

A. Pleading under the Common Law

1. The Systems of Law and Equity

The judicial system in England developed two separate and distinct types of courts. These two systems of courts–law and equity–were independent of each other: they developed and expanded their jurisdictions separately and not as a complementary system. Even though these courts offered a litigant different types of relief, the litigant was forced to choose the correct court at his peril. A case commenced in one court could not be transferred to another court.

On one side of the divide were the three common law courts. King's Bench originally heard criminal cases and pleas of the crown. Common Pleas originally heard cases between subject and subject; it was held at a fixed place, which came to be Westminster. Exchequer originally heard revenue matters, then expanded its civil jurisdiction with the fiction that a person wronged by another person is less able to pay taxes, so such a case was in reality a revenue matter. The three common law courts contested with each other to expand their civil jurisdiction and eventually came to have essentially concurrent civil jurisdiction.

In these courts, a plaintiff pursued an "action at law" by filing a "claim" or "complaint" before a judge (or in the case of Exchequer, before a baron). The common law courts employed juries to decide questions of fact. The relief that these courts could grant was legal, which meant almost exclusively money damages. The common law courts developed a rigid system of writs that limited the types of actions that could be brought, as discussed in I.A.2, *infra*. These courts also became somewhat hidebound by the accumulation of their precedents.

On the other side of the divide was the court of equity. The court of Chancery became available to prevent individual injustices that could occur through the rigid operation of the common law. This court developed parallel to, and independent of, the common law courts.

In Chancery, a plaintiff pursued a "suit in equity" by filing a "bill" before a chancellor. The court decided cases by the conscience of the chancellor, who would attempt to do justice in the individual case. To that end, Chancery originally refused to create precedents, but as the years passed, an oral tradition arose, and then written precedents developed. The chancellor decided all aspects of the case, including questions of fact. Chancery used no juries. The relief that this court could grant was equitable, which meant forms of relief–such as injunctions, specific performance, and rescission–that were designed to make the plaintiff whole when legal relief was not adequate.

This divided, independent system of law and equity flourished in England in the seventeenth and eighteenth centuries, so the system was imported into the American colonies. It became the legal system of the American states, and endured until the adoption of code practice in the mid-to-late nineteenth century (and in many states that refused the codes for long afterward). The English system itself was transformed in 1873 when Parliament combined all the courts into the Supreme Court of Judicature with both common law and equity jurisdiction.

2. The Writ System in the Common Law Courts

The part of the English common law system of most interest for study of the historical roots of pleading a complaint is the writ system .[i] Originally, a common law court secured jurisdiction over a civil case when the King, or later the Chancellor, issued a writ to the sheriff to arrest the defendant and bring him before the court. As the years passed, these writs took on differing forms that hardened into separate categories that became summaries of the type of case.

The primary contract (*ex contractu*) writs in the common law courts were debt (for a fixed sum of money or specific chattel owed), covenant (for breach of an obligation under seal), assumpsit (for breach of an obligation not under seal), and account (for receipts and disbursements in a continuing relationship). The primary tort (*ex delicto*) writs were trespass (for a direct and immediate injury to person or property),[ii] case (for an indirect injury to person or property),[iii] detinue (to recover a specific chattel), replevin (also to recover specific chattels), and trover (for money damages against a person who converted a chattel).

3. Problems with Common Law Pleading

The primary problem with the common law pleading system was it became more of a game of skill for lawyers than a method of resolving disputes on the merits. First, plaintiff's attorney was required to choose the correct writ to plead the case, for the wrong writ would put plaintiff out of court. In most cases, the choice was easy, but in too many cases the facts lay between writs or in no writ at all. Second, pleadings did all the heavy lifting in cases, at least until the time of trial. Pleadings had the functions of 1) giving the opponent and the judge notice of the nature of the claim (or defense), 2) weeding out groundless claims (or defenses), 3) revealing the facts of the case, and 4) narrowing the issues. Third, because the pleading system had the goal of narrowing the case to a single issue of law or fact, the case might require many pleadings back and forth. For example, a defendant who responded with a plea of confession and avoidance (today an affirmative defense) did not deny plaintiff's complaint, so no issue was joined; plaintiff was required to replead a replication. Should that replication also plead in confession

and avoidance, defendant was required to plead a rejoinder. The string could continue. Also, because the goal was a single issue, the common law severely restricted joinder of claims and parties.

B. Pleading under the Codes

1. Development of Code Pleading

The first great reform of pleading was the code system. The state of New York in 1848 adopted a code of civil procedure based on the work of a committee chaired by David Dudley Field. This Field code was intended and designed to simplify pleading and remove many of the technicalities from civil procedure. To that end, the Field code abolished the common law writs in favor of one form of action to be known as a "civil action," merged the systems of law and equity, simplified pleading and procedure, and allowed broad joinder of claims and parties. *See generally* Jack H. Friedenthal, Mary Kay Kane & Arthur R. Miller, *Civil Procedure* § 5.1 (4th ed. 2005). The primary method by which the Field code accomplished this feat was through its requirement that a party plead only "a plain and concise statement of the facts constituting each cause of action (defense or counterclaim) without unnecessary repetition."

The Field code became a popular model for procedural reform. States over the ensuing years adopted their own codes of civil procedure based on the New York model. By the time of the promulgation of the Federal Rules of Civil Procedure in 1938, a substantial majority of states were code states.

2. Problems with Code Pleading

The codes accomplished the primary goals of simplifying pleading and removing technicalities and traps for the unwary. Problems remained. First, a code by definition was a statute; this made revisions and adjustments difficult because the legislature had to act. Second, the codes still required the pleadings to do the heavy pre-trial lifting of giving notice, weeding out groundless claims, revealing the facts, and narrowing the issues. Third, the most difficult problems grew out of the greatest reform of the codes: the centerpiece of the codes was the seemingly-simple requirement that a plaintiff need plead only "the facts constituting each cause of action." Both "facts" and "cause of action" soon became litigation-generating centers of controversy.

a. Pleading ultimate facts

From the first Field code in New York through all of the code states, the codes required the plaintiff to plead ultimate facts–as contrasted with conclusions of law or evidentiary facts. On the one hand, pleading conclusions of law was deficient. A plaintiff who pleaded only that defendants "trespassed," "assaulted" her, and caused her "to be confined" gave notice to the opponent and the court of theories of trespass, assault, and false imprisonment, but the complaint did nothing to reveal the facts, narrow the issues, or weed out baseless claims. *See, e.g.*, *Gillespie v. Goodyear Serv. Stores*, 258 N.C. 487, 129 S.E.2d 762 (1963). On the other hand, pleading evidentiary facts was deficient. A plaintiff who merely recited the evidence of a real estate transaction failed to plead the ultimate fact of the right of possession. *See, e.g.*, *McCaughy v. Schuette*, 117 Cal. 223, 48 P.2d 1088 (1897). This could result in prolixity, and ambiguity of inference; for example, if plaintiff pleaded a decedent delivered $5000 to defendant, the inference of whether it was to be a loan or a gift was not clear.

A complaint that pleaded conclusions of law could be challenged. A complaint that pleaded only evidentiary facts could be challenged. Since they could be challenged, they often were challenged, especially because an "ultimate"

fact was difficult to identify. Consider this small hypothetical. Plaintiff wishes to sue for slander because at a student government meeting defendant announced that plaintiff stole books from his library carrel. How should the key allegation read? What is the ultimate fact? Here are three candidates:

–Defendant slandered plaintiff.

–Defendant said plaintiff stole books from him.

–Defendant imputed dishonesty to plaintiff.

The first allegation is insufficient as it is a conclusion of law. The second allegation is insufficient as it is an evidentiary fact. The third allegation is sufficient as it is an ultimate fact.

b. Pleading a cause of action

The codes required plaintiff to plead the facts constituting a "cause of action," but did not offer any definition of the term of art. Controversy quickly developed over what a cause of action required. Must the plaintiff state the legal theory of recovery? How many facts must the plaintiff plead? Perhaps even more important, how would a cause of action be defined and bounded for purposes of res judicata? Commentators disagreed vehemently. Courts at all levels, including the Supreme Court of the United States, labored to define a cause of action both in the individual case and in a comprehensive fashion.[iv] Eventually, two major positions on "cause of action" emerged.

One position was the "primary right" theory, as advocated by Professors John Norton Pomeroy and O. W. McCaskill.[v] These advocates argued a cause of action was the intersection of a single legal right in plaintiff with a single legal duty in defendant. For example, when plaintiff and defendant had an auto accident, defendant rushed to plaintiff's car to punch him in the face, and seized plaintiff's wallet as preliminary compensation, plaintiff had three separate and distinct legal theories of recovery: negligence, battery, and conversion. This meant plaintiff had three causes of action, Pomeroy and McCaskill asserted. Essentially, a cause of action was a single legal theory of recovery, and thus was essentially the same as the common law "right of action." Plaintiff's inchoate three rights of action would become embodied in three causes of action when pleaded in the complaint.

The other position was the "transactional" theory, as advocated by Professor Charles A. Clark.[vi] Clark argued a cause of action was a single set of facts without regard to possible legal theories embedded within that set of facts: "The essential thing is that there be chosen a factual unit, whose limits are determined by the time and sequence and unity of the happenings, rather than by some vague guess or prophecy of potential judicial action."[vii] Clark's cause of action was determined from a lay perspective on what facts would constitute a single transaction without regard to any legal theories a lawyer or judge might later apply to those facts. Accordingly, in the hypothetical in the paragraph above, Clark would answer plaintiff had one cause of action arising from a single set of facts, not three causes of action. As can be seen, Clark's cause of action was much broader than Pomeroy's and McCaskill's cause of action. This difference would be manifest in the facts necessary to plead a cause of action and also in unpleaded portions of a cause of action that might be barred by res judicata.

C. Pleading under the Federal Rules of Civil Procedure

1. Development of the Federal Rules

Because of these and other problems with the codes, an impetus developed in the early twentieth century for another round of sweeping reform in civil procedure. Congress passed the Rules Enabling Act in 1934 (28 U.S.C. § 2072), which allowed the Supreme Court to appoint an advisory committee to draft rules of civil procedure for the federal courts. The advisory committee, under the leadership of reporter Charles E. Clark, recommended a set of civil procedure rules to the Court, and the Court promulgated the Federal Rules of Civil Procedure in 1938.

The Federal Rules have been hugely successful. They govern procedure in the federal courts to this day. As were the codes, the federal rules in their turn have been popular in the states. A majority of American states today are rules states with rules patterned after the Federal Rules–yet because several states with large populations retained their codes, the majority of Americans today live in code states.

2. Pleading a Claim under the Federal Rules

The Federal Rules continue the great reforms of the codes: abolishing the common law writs in favor of a "civil action," merging law and equity, allowing broad joinder of claims and parties, and simplifying pleading and procedure. As to the latter, the rules simplify pleading by removing some of its duties. No longer is pleading required to reveal the facts, narrow the issues, or weed out groundless claims. Instead, the function of pleading under the rules is to give notice to the opposing party and the court of the nature of the claim (or defense). The Federal Rules are often called a notice pleading system.

The Federal Rules accomplish the feat of this simple, notice pleading system primarily by requiring plaintiff to plead only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The intended simplicity of pleading a claim is reinforced by other rules.[viii] The other functions of preparing a case for trial are delegated to other portions of the rules, primarily the discovery rules.

By requiring only a short and plain statement of a claim, the rules eliminate the two major sources of pleading litigation the codes generated. The codes required pleading of "facts." That requirement does not appear in Federal Rule 8. The codes required pleading of a "cause of action." That phrase does not appear in Federal Rule 8–or anywhere in the Federal Rules. It has been abolished in the federal courts and rules states. Use of the newly-coined term "claim for relief" in preference to "cause of action" was quite intentional on the part of reporter Clark and the committee–and therefore the Supreme Court–to eliminate these two pleading problems. Two corollaries follow from this choice by the Court: 1) the term cause of action is obsolete and should not be used in federal courts and rules states, and 2) the term claim embodies Clark's view that the proper litigation unit is an operative set of facts instead of a single legal theory.

The transition from cause of action to claim did not–and even today sometimes does not–come easily. Repeated attempts to re-institute fact pleading and the cause of action have been made, and beaten back, in the federal courts. The most famous early case standing for the proposition that Federal Rule 8(a)(2) means what it says is *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944). The district court dismissed plaintiff's hand-drawn, nearly unintelligible complaint for failure "to state facts sufficient to constitute a cause of action." The opinion reversing the dismissal was written by the same man who earlier had drafted the Federal Rules: Judge Charles E. Clark of the Second Circuit. The court decided the complaint stated a claim because it gave basic notice to defendant of the nature of plaintiff's claim. Not long after *Dioguardi*, the Supreme Court stated "all the rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 103, 2 L.Ed.2d 80, 85

(1957). Recent cases confirming the notice pleading approach include *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 113 S. Ct. 1160, 122 L.Ed.2d 517 (1993) rejecting heightened pleading requirements for certain civil rights actions) and *Erickson v. Pardus*, 551 U.S. 89, 127 S. Ct. 2197, 167 L.Ed.2d 1081 (2007) (rejecting heightened pleading requirements in § 1983 cases).

The notice pleading approach that underlies the entire federal rules system has been cast into some doubt by two recent Supreme Court decisions. The opinion in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L.Ed.2d 929 (2007), requires a plaintiff in an antitrust action under the Sherman Act to plead more factual matter than mere notice would require; even more importantly, the opinion disapproves the broad statement of notice pleading in *Conley*. Two years later, the opinion in *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 173 L.Ed.2d 868 (2009), requires that a claim be "plausible" in order to survive a motion to dismiss for failure to state a claim.

The impact of these two decisions is not yet clear. One view is that the opinions are aberrations in the history of federal rules notice pleading, one limited to complicated antitrust cases and the other explained by an unwillingness to allow a plaintiff incarcerated as a terrorist to succeed in a challenge to his confinement conditions. The other view is that the two cases signal a major change in the approach to pleading being wrought by the Supreme Court through case decisions instead of amendment to the federal rules. Which of these views prevails awaits additional decisions.

In sum, the role of pleading under the Federal Rules is much less than it was under the common law or the codes. Pleading is no longer a fine art. A court construing a challenged complaint will not look to see if every jot and tittle is in place, but will ask whether the complaint gives fair notice of the claim.

II. DRAFTING A COMPLAINT UNDER THE FEDERAL RULES

A. Form of the Complaint

The complaint is composed of four major sections: the caption, the body, the demand for relief, and the signature.

The caption. Each complaint must have at the top of the first page an appropriate caption, which is a standardized heading including the name of the court, the names of the parties, the file number, and the designation of the pleading [here, the complaint]. "Every pleading must have a caption with the court's name, a title, a file number, and a Rule 7(a) designation." Fed. R. Civ. P. 10(a). A standard caption would be as follows:

UNITED STATES DISTRICT COURT

DISTRICT OF DAKOTA

_____

PETER SCHULER,

Plaintiff

COMPLAINT

v.

File Number_____

DAVID DOUR,

Defendent

_____

_____

The body. The body must first state "a short and plain statement of the grounds for the court's jurisdiction." Fed. R. Civ. P. 8(a)(1). *See* II.B.1, *infra*. Second, the body must contain separate, numbered paragraphs, Fed. R. Civ. P. 10(b), which state "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). *See* II.B.2, *infra*. The "complaints" at the end of this exercise are examples of the body section of the complaint. An introductory phrase to the body of the complaint, such as "For her complaint against defendant, plaintiff alleges as follows" is commonly used, but is not necessary.

Demand for relief. The complaint must include "a demand for the relief sought." Fed. R. Civ. P. 8(a)(3). This demand is also called the ad damnum clause, or the wherefore clause. The following example is a common form:

WHEREFORE, Plaintiff demands judgment against Defendant in the amount of $100,000, plus interest and costs.

Many attorneys add a phrase such as "and for other relief as the court may deem the plaintiff to be entitled," but Fed. R. Civ. P. 54(c), which provides a judgment "should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings" renders such a phrase superfluous.

Signature. Fed. R. Civ. P. 11(a) requires a manual signature on the copy of the pleading filed with the court, plus information as to the address and telephone number of the attorney. *See* Fed. R. Civ. P., Form 2. A common signature form is as follows:

Lawyer, Argue & Case

by /s/ C.C. Case

Attorneys for Plaintiff

111 Main Street

Capital City, Dakota 11111

(111)111–1111

B. Content of the Complaint

1. Jurisdictional allegations

The first requirement for a complaint in a federal court is that it include "a short and plain statement of the grounds for the court's jurisdiction." Fed. R. Civ. P. 8(a)(1). This statement is required because the federal courts are courts of limited subject matter jurisdiction [*see* Exercise Two, part I.A]. Subject matter jurisdiction of the federal courts is never assumed, as it is in state courts of general subject matter jurisdiction (so a state rules system patterned on the federal rules will likely omit this requirement). An allegation of federal question jurisdiction will cite the federal law provision under which the claim is alleged to arise. An allegation of diversity jurisdiction will allege the citizenship of each of the parties and the amount in controversy. For examples of sufficient jurisdictional allegations, *see* Fed. R. Civ. P., Form 7.

Later in this exercise, section III.D.1 contains several varying allegations of diversity jurisdiction. You will be asked to evaluate each for sufficiency.

2. The claim

The next requirement for a complaint in a federal court is that it include "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). While this sparse requirement, especially as reinforced by decisions of the Supreme Court, allows plaintiff to plead the facts of the case with generality (*see* I.C.2, *supra*), it should not be taken as license to authorize sloppy pleading practices. An attorney who attempts to draft a complaint without having first thought through the elements of the claim and the facts necessary to establish those elements will draft a poor complaint. Even should the complaint survive a challenge to its sufficiency, damage will result in unnecessary time and effort defending that challenge, possible later complications in the litigation, and impairment of the attorney's reputation.

In order to draft a good complaint, plaintiff's attorney still must investigate the case, research the law, and then plead the facts necessary to place plaintiff's claim under that law. "The Rules didn't abolish the necessity for clear thinking." *Plastino v. Mills*, 236 F.2d 32, 34 (9th Cir. 1956). In the absence of thinking through the legal nature of the claim to be pleaded, the plaintiff's attorney may well omit important facts, include irrelevant allegations,

or even plead a defense to the claim. One treatise suggests pleaders under the Federal Rules should still continue to "make statements of claim that provide the opposing party and the court with a fairly definite picture of the transaction sued on and the legal theories implicitly used. This is the most that can be expected of pleadings." Fleming James, Jr., Geoffrey C. Hazard, Jr. & John Leubsdorf, *Civil Procedure* § 3.6, at 191 (5th ed. 2001).

Pleading can be thought of as a syllogism. The form of a classic syllogism is this.

> All men are mortal. [major premise]
>
> Socrates is a man. [minor premise]
>
> [Therefore] Socrates is mortal. [conclusion]

The applicable substantive law is the major premise. The facts of the case that fit the law are the minor premise. The conclusion follows that plaintiff wins. Traditionally, plaintiff need not plead the major premise since the court is presumed to know the law. Plaintiff need plead only the minor premise. Even so, a careful pleader will not leave the court to guesswork. For example, Fed. R. Civ. P. Form 11 identifies the nature of plaintiff's claim as "defendant negligently drove." The allegations of the official form do not recite the elements of the law of negligence, but they do notify the opposing party and the court that the claim is for negligence.

Later in this exercise, section III.D.2 contains several alternatives for allegations of the body of a complaint for defamation. You will be asked to evaluate each for sufficiency.

3. *Federal Rule 11 and ethical considerations in good faith pleading*

Prior to 1983, Fed. R. Civ. P. 11 required only a good faith certification that the attorney had "read the pleading," that it was on "good ground," and that it was "not interposed for delay." While this imposed an ethical requirement on the attorney filing a pleading, the rule provided no real means of enforcement. From the adoption of the Federal Rules in 1938 until 1983, few Rule 11 sanctions were sought, and fewer were granted.

This situation changed dramatically with amendment of Rule 11 in 1983. Responding to a burgeoning federal caseload and claims of abusive litigation practices, the Supreme Court rewrote Rule 11 in several ways. First, application of the rule was expanded beyond pleadings to include also motions and other papers. Second, any pleading, motion, or other paper not signed was to be stricken. Third, the rule expanded improper purposes of pleading from delay alone to include harassment or needless expense. Fourth, violation of the rule would result in a mandatory sanction ("shall impose"). Finally, and most importantly, the rule required that the paper be signed only "after reasonable inquiry." That meant an attorney could no longer accept a client's story at face value, at least without some minimal level of additional investigation, as a basis for pleading. The Court summarized the obligations of Rule 11 in this fashion: "A signature certifies to the court that the signer has read the document, has conducted a reasonable inquiry into the facts and the law and is satisfied that the document is well-grounded in both, and is acting without any improper motive." *Business Guides, Inc. v. Chromatic Comm'ns Enter., Inc.*, 498 U.S. 533, 542, 111 S. Ct. 922, 929, 112 L.Ed.2d 1140, 1153 (1991).

Some litigants and attorneys sought to avoid sanctions by claiming good faith, but the good faith defense was rejected. Rule 11 applied an objective, not a subjective, standard. *Business Guides*, 498 U.S. at 542, 111 S. Ct. at 922, 112 L.Ed.2d at 1140. An attorney was required to meet the standard of a reasonable attorney. Failure to meet that standard resulted in a variety of sanctions, which commonly included reimbursement of attorney's fees to the opposing party who had been required to defend the objectively unreasonable pleading or other paper.

Ten years of controversy followed. Many thought Rule 11 had swung from the extreme of toothlessness to the extreme of excessively sharp fangs. This controversy induced the Supreme Court to revisit Rule 11 in 1993. The rule was both contracted and expanded.

On the contraction side, the new rule provides procedures for Rule 11 sanctions motions. First, a party seeking a Rule 11 sanction must make the request in a separate motion. Fed. R. Civ. P. 11(c)(2). Second, the party seeking a sanction must serve the motion on the offending party and then allow 21 days for withdrawal or correction of the offending material before filing the motion for sanctions with the court. Fed. R. Civ. P. 11(c)(2). Third, the rule makes clear that the purpose of a sanction is deterrence, not compensation: "A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated." Fed. R. Civ. P. 11(c)(4). The sanction may be in the form of "nonmonetary directives," or if monetary, the sanction will ordinarily be paid into court, not to the moving party. Fed. R. Civ. P. 11(c)(4). This major change from the 1983 version of the rule certainly eliminates much of the incentive for seeking a sanction.

On the expansion side, the new rule places a continuing obligation on a pleader in later stages of the case: "[b]y presenting to the court a pleading, written motion, or other paper– whether by signing, filing, submitting, or later advocating it." Fed. R. Civ. P. 11(b). In other words, a Rule 11 violation occurs when an attorney advocates a position in violation of the rule even though the position had been justified by the law and facts at the time it was first asserted. For example, an allegation in a complaint might be proved untenable by later discovery, so it cannot be relied on in a motion for summary judgment. A second expansion is to fix liability on law firms for the violations of their attorneys. Finally, the representations made are expanded:

Representations to the Court.

> By presenting to the court a pleading, written motion, or other paper–whether by signing, filing, submitting, or later advocating it–an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
>
> (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
>
> (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

Fed. R. Civ. P. 11(b).

The objective standard for evaluation remains.[ix] An attorney's subjective good faith belief is not a defense against sanctions when an objective, reasonable attorney would not have held such a belief or would have undertaken a more thorough investigation.[x]

Similar concerns underlie Rule 3.1 of the Model Rules of Professional Conduct:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law * * *.

As with Fed. R. Civ. P. 11, the test of the Model Rule is objective. Consequently, a subjective, good faith belief in the truth of a pleading will not save the attorney who files an objectively false or frivolous pleading from professional discipline.

III. AN EXERCISE IN DRAFTING A COMPLAINT FOR DEFAMATION UNDER THE FEDERAL RULES: CALI CIV 01

This exercise includes the facts of a hypothetical case of defamation, discussion of the substantive law of the tort of defamation, and discussion of the procedural law of pleading a defamation complaint. Please read these materials carefully and answer the preliminary questions asked in section III.D. You will then be ready to go to the computer terminal to work through CALI CIV 01: Drafting a Complaint. Take the facts of the case and a copy of the Federal Rules of Civil Procedure with you.

A. Facts of the Case

You are an attorney practicing with a law firm in Capital City, Dakota. One of the partners in your firm has just received a statement from a client, Peter Schuler. The partner hands you the statement, in which Schuler gives the following account:

"Until this past May, I was a student at Dakota College in College Town, Dakota. On April 30, one of the proctors caught me watching television in the dorm with my girlfriend. The college is strict and old-fashioned. Women aren't allowed in the mens' dorms after 8 p.m.

"The proctor turned me in. They scheduled a hearing before the Dakota College Disciplinary Board, which has the job of punishing student misbehavior. All of its members are faculty members. Dean William Roberts is always on the Board. The other professors take turns, two at a time. This time the other members were Professor Mary Trueblood and Professor David Dour.

"Professor Trueblood is a nice person. But having Professor Dour on the Board was a stroke of bad luck for me. He's always hated me.

"I went before the Board in Room 215 of Old Main on May 10 and apologized. They said that they would let me know what their decision was the next morning.

"The next morning Dean Roberts told me that the board had voted to suspend me from school for a year because

I had violated the visiting hours rules. I have never heard of anyone else getting such heavy treatment. Even Dean Roberts admitted it was heavy.

"So I looked at the records that the student council keeps of all disciplinary hearings. Out of 50 cases in the last ten years, only three students have been suspended. The others have all received social probation or something less. The council records don't show the reasons for the suspensions, but I talked to five alumni who went to the hearings on those three suspensions when they were students. All three suspensions were given after the same hearing seven years ago. Four out of the five alumni told me definitely that the students were suspended for cheating on an exam.

"I couldn't figure out why I got that treatment. I went in to see Professor Trueblood. I knew her from field trips in geology and always thought she was O.K. She didn't want to talk to me at first, but after beating around the bush for a while she finally told me confidentially that the Dean had been very much influenced by what Professor Dour said after I left. According to Trueblood, Professor Dour said, 'Peter is a heavy user of crack cocaine.' Trueblood said that those were Dour's exact words. I don't know where Dour got the idea that I am a drug user. It's absolutely untrue and I can't think of anyone who would say that about me. Maybe he made it up. He must have known that Dean Roberts is paranoid about drugs. Anyway, Trueblood said that they suspended me because they thought I was a drug user.

"I had this great part-time job in a bank in College Town and I was planning on going into its management training program after I graduated. When I went in to work the week after the Disciplinary Board meeting, my boss, John Thompson, told me I was fired. At first he wouldn't say why, but eventually he admitted that he had heard I had a 'personal reputation incompatible with the banking industry.' I asked him if he was talking about gossip that I had been using drugs and he said 'All I can say to that is if such were the case, that would be incompatible with the best interests of banking.'

"I asked him if he knew Professor Dour and he said 'Yes, but he has nothing to do with this. He didn't tell me anything.' I think Thompson was lying and that either Dour told him the phony story about crack, or that somehow he heard about what was said at the disciplinary hearing.

"I don't want to go back to Dakota College—ever! I'm disgusted with the place. Anyway, everyone there thinks I'm weird. I'm now back home, where my dad is letting me work in his furniture store."

Your partner asks you to draft a complaint for Peter Schuler against David Dour. The case will be filed in federal district court in Dakota, since the backlog there is considerably shorter than in state court. One drawback to Dakota federal court is that the judge is quite punctilious about pleading, having been trained many years ago in a code pleading state. Accordingly, you should compose a complaint to survive close scrutiny, and it should be able to survive probable defense motions to require a more definite statement under Fed. R. Civ. P. 12(e), or to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6).

B. Substantive Law of Defamation

1. State Law

The *Erie* doctrine[xi] requires the federal court in Dakota to follow state law concerning the elements of defamation, except where federal constitutional issues are involved.

Dakota law provides that a defendant who communicates a disparaging, damaging falsehood about plaintiff to a third person is liable in an action for defamation (slander).[xii]

Under the decisional law of the state of Dakota, the elements of slander are as follows:

> (1) **Publication.** The slanderous words must have been spoken by the defendant so that a third person could hear them. A purely private statement, heard only by the plaintiff, is not slander. (No court of record in Dakota has specifically ruled on the issue of whether publication to a third person is an element of the tort of slander, but commentators have assumed that the Dakota courts would follow the law of other jurisdictions and require this element.)
>
> (2) **Falsity.** The words must have been false.
>
> (3) **Disparagement.** The words must have been disparaging, that is, they must have been words that would tend to cause a person to be disliked, shunned, ridiculed, or held in contempt by others. "Joan is a thief" would clearly be disparaging. On the other hand, "Joan is a taxpayer" is not disparaging, and there would be no recovery even though Joan might have been offended by the words.
>
> (4) **Pecuniary Damage/Slander per se.** In many slander cases, the words must have caused some specific pecuniary damage, such as loss of business customers, loss of a contract, or discharge from employment. Recovery cannot be based on humiliation, damage to reputation, illness, or mental distress alone.
>
> The requirement of pecuniary damage does not apply to words that are slanderous *per se.* Words are slanderous *per se* if they (1) charge the person with a serious crime involving moral turpitude, (2) indicate the person has a loathsome disease, or (3) derogate the person's ability or honesty in the person's trade, business, or profession.
>
> Dakota courts have not to this date been called on to decide whether suspension from college causes "pecuniary damage." Similarly open questions are whether the use of crack is a "serious crime involving moral turpitude" or whether use of crack is sufficiently analogous to a "loathsome disease" to justify classifying a statement charging use of crack as slanderous *per se.*
>
> (5) **Privilege.** In some contexts the free exchange of information has been considered to be so important that the Dakota caselaw confers an absolute privilege upon false statements. The absolute privilege applies, for example, to statements made by legislators on the floor of the state legislature. As to such statements, an action for slander can be defeated by the defense of privilege even if the person making the statement knew it was false.
>
> In other contexts, the free exchange of information has been considered sufficiently important to justify conferring a conditional privilege. For example, there is a conditional privilege in Dakota for statements made in giving a reference to a prospective employer of a person. Another conditional privilege exists for persons reporting crimes to the police. The existence of a conditional privilege will defeat a claim for slander unless the person making the statement acted in bad faith, with spite or ill will, toward the person defamed.
>
> Whether a statement made by a college professor to another disciplinary board member about a student is covered by an absolute privilege, a conditional privilege, or no privilege at all is an open question of law in the state of Dakota.

2. Federal Constitutional Law

Although state law generally governs the elements of slander, federal constitutional doctrine must also be taken into account, and the law in this area is uncertain and changing. A dictum in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L.Ed.2d 789 (1974), seems to indicate that the First Amendment prohibits states

from imposing liability without fault in defamation cases, *i.e.,* the defendant must have been at least negligent in publication of a false statement. Arguably, the Supreme Court's decision means that a state cannot constitutionally impose liability for making a false statement when the defendant reasonably believed the statement to be true.

Such a conclusion was unsettled by the decision eleven years later in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 105 S. Ct. 2939, 86 L.Ed.2d 593 (1985), which can be read to say that cases involving a plaintiff who is a private figure (not a public figure) concerning a matter of private concern do not require a showing of defendant's fault for liability. *Gertz* involved a private figure in a matter of public concern. No additional guidance has been provided by the Court.

C. Procedural Law: the Burden of Pleading

The court of appeals in your circuit has announced that under its interpretation of the *Erie* doctrine, Dakota law should be followed on substantive issues in a defamation case, but federal law should be followed on pleading issues, including the allocation of the burden of pleading. A party who has the burden of pleading an issue must raise that issue in the pleadings, or the issue will be resolved against that party.

One question to be answered is who has the burden of pleading privilege: is it an element of the claim that must be pleaded by plaintiff, or is it an affirmative defense that must be pleaded by defendant? While Fed. R. Civ. P. 8(c)(1) does not include privilege in its list of 19 examples of affirmative defenses, the rule provides "any avoidance or affirmative defense." Your research on federal caselaw on the pleading of slander has led you to conclude that privilege is an affirmative defense.

On the subject of pleading a defamation case in general, you have also found the following passage in a treatise on federal practice:

Although special pleading requirements have not been set out in the federal rules for libel and slander actions, the standard for successfully pleading defamation tends to be more stringent than that applicable to most other substantive claims because of the historically unfavored nature of this type of action, the First Amendment implications of many of these cases, and the desire to discourage what some believe to be all too frequently vexatious litigation. Thus, many of the somewhat inhibiting traditional attitudes toward pleading in the context of defamation have survived the adoption of the federal rules.

Of course, all the plaintiff technically is required to do is state a claim for which relief may be granted, and many federal courts have demanded no more than that. This theoretically means providing a short and plain statement indicating that the elements of a libel or slander claim are present. Contrary to the common law and the generally accepted code approach, some courts have held that it is not necessary to include in the complaint the exact statements upon which the action is based, which seems consistent with Rule 8, although some federal courts have held to the contrary and others have indicated that the substance of the actionable words should be pleaded. It also has been held by at least one court that an allegation of falsity is required. A general allegation of publication and the place where the libel circulated will suffice in most instances. However, if the defendant does seek by a motion for a more definite statement under Rule 12(e) to have the plaintiff fix the situs of the alleged tort, the motion may well be granted, although this seems to represent a technically improper use of that motion.

If the defamatory character of the statement rests on extrinsic facts, those facts should be pleaded. And if the libelous character of the statement depends upon an interpretation of the words other than a meaning that usually is given to the statement, the special meaning should be specifically pleaded by way of innuendo, explanation, or colloquium. It also is necessary to allege that the defamation pertained to the plaintiff.

A complaint indicating that the uttered statements are not actionable per se has been held not sufficient to state a claim for relief in the absence of an allegation of special damages, as is discussed under Rule 9(g); conversely, if a writing contains material that is libelous per se, allegations in the complaint of special damages under Rule 9(g) are not necessary.

Although some courts tend to be unwilling to construe the statement of the claim for relief liberally in a libel or slander action and require that all elements of the substantive cause of action be specially pleaded, nothing in Rule 8 imposes a special burden on the pleader in these classes of cases. A number of federal courts have not insisted that each element of the underlying cause be specifically pleaded. In *Garcia v. Hilton Hotels International, Inc.*, for example, the plaintiff failed to allege in so many words that there had been a publication and the defendant challenged the complaint under Rules 12(b)(6), 12(e), and 12(f). Although the court in Garcia inferred the existence of publication and denied the motion to dismiss, as is discussed in another section, it did grant the defendant's motion for a more definite statement, inter alia, because of the vagueness resulting from the plaintiff's failure to set out the substance of the utterance alleged to have been made slanderously or the facts relied upon to establish that it had been published to anyone else. Thus, despite the fact that the Garcia case represents a liberal attitude toward the pleading requirements of the federal rules, it also indicates that traces of disfavor for defamation actions still exist. There is little doubt that because of the unfavored status of libel and slander actions, it is advisable for the pleader to set forth the claim for relief as clearly as possible, and that all the elements of the claim at least should be inferable from the allegations in the complaint.

5 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure: Civil 3d* § 1245 (2004).

D. Preliminary Questions

Please answer the following questions before going to the computer to begin CALI CIV 01: Drafting a Complaint. [Note: if you want to omit the section on jurisdictional allegations, skip to section III.D.2, *infra*, and when you begin the computer exercise, tell the computer to start on Question 3.]

1. Jurisdictional allegations

Since every complaint filed in federal court must allege federal subject matter jurisdiction [Fed. R. Civ. P. 8(a)(1)], we review the relevant part of the diversity statute, and then examine nine possible jurisdictional allegations. The statute reads as follows:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

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

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

28 U.S.C. § 1332(a).

_____

Which of the following jurisdictional allegations would be deemed completely satisfactory by the most punctilious judge? (The computer will ask you to list *all* of the completely satisfactory allegations.)

1. Plaintiff is a citizen of the state of Minnesota and defendant is a citizen of the state of Dakota. The amount in controversy exceeds, exclusive of interest and costs, the sum of seventy-five thousand dollars.

2. This action arises under the laws of the United States, as hereinafter more fully appears.

3. Plaintiff is a resident of the state of Minnesota and defendant is a resident of the state of Dakota. The amount in controversy exceeds, exclusive of interest and costs, the sum of

seventy-five thousand dollars.

4. Plaintiff is a citizen of the state of Minnesota. Defendant's citizenship is unknown to plaintiff. The amount in controversy exceeds, exclusive of interest and costs, the sum of seventy-five thousand dollars.

5. Jurisdiction in this action is based on diversity of citizenship and jurisdictional amount, in accordance with the requirements of 28 U.S.C. § 1332(a).

6. Plaintiff is domiciled in the state of Minnesota and defendant is domiciled in the state of Dakota. The amount in controversy exceeds, exclusive of interest and costs, the sum of seventy-five thousand dollars.

7. Plaintiff is a citizen of Minneapolis, Minnesota and defendant is a citizen of College Town, Dakota. The amount in controversy exceeds, exclusive of interest and costs, the sum of seventy-five thousand dollars.

8. Plaintiff is a citizen of the state of Minnesota and defendant is not a citizen of the state of Minnesota. The amount in controversy exceeds, exclusive of interest and costs, the sum of seventy-five thousand dollars.

9. Plaintiff is a citizen of the state of Minnesota and defendant is a citizen of the state of Dakota.

2. Substantive allegations

Before proceeding, you may wish to try your hand at drafting a complaint from scratch. You can then compare your draft to the model drafts that follow. [The computer will not ask for your complaint, so if you wish, you may skip to the next paragraph.] Your draft complaint should be in the proper form, including a caption, a body, a demand for relief, and a signature (*see* II.A, *supra*). When drafting the body of the complaint, plead all of the

necessary elements of defamation (*see* III.B.1, *supra*). Keep in mind that defamation (slander) may require the pleading of special damages, and Fed. R. Civ. P. 9(g) requires "If an item of special damage is claimed, it must be specifically stated."

For the computer exercise, the caption, the demand for judgment, and the signature sections of the complaint will be omitted. You will be asked to frame the allegations only for the body of the complaint. Please frame the body of your complaint either by (a) choosing one of the six complaints set forth on the following pages or (b) composing a complaint by using paragraph two of one of the complaints and paragraph three of another.

In assessing complaints one through six, you should remember that you do not want a complaint only minimally acceptable under the Federal Rules. You want a complaint that is as nearly perfect as possible, so defendant's attorney will have no basis for attacking it on pleading grounds. Therefore, you want to compose a complaint that does not even arguably commit any of the following pleading errors:

Error 1: The complaint fails to allege an element of the claim. Example: Plaintiff sues defendant alleging that defendant negligently drove his automobile in such a fashion as to endanger plaintiff. She fails to allege any injuries. Plaintiff has omitted the fourth element of the tort of negligence (duty, breach, causation, damages), and since the burden of pleading on this issue is on plaintiff, this complaint would be subject to attack under Fed. R. Civ. P. 12(b)(6) for failure to state a claim.

You need plead only a "short and plain statement of the claim." Fed. R. Civ. P. 8(a)(2). At the same time, you want to make sure that your complaint alleges facts establishing all of the elements of slander (*see* III.B., *supra*). Otherwise, a punctilious judge might dismiss under Fed. R. Civ. P. 12(b)(6).

Error 2: The complaint fails to give the defendant information necessary to frame an answer. Fed. R. Civ. P. 12(e) provides "A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. * * *" You should avoid a complaint that—though it technically states a claim—omits facts the other party needs to know in order to determine what defenses to raise in the answer. Because a motion for more definite statement is proper only when defendant cannot reasonably respond and is not to be used to force discovery out of plaintiff, the motion is rarely made and rarely granted. Even so, you should not give the defendant's attorney cause, or even an opening, to make the motion.

Error 3: The complaint raises an affirmative defense and fails to avoid it. A plaintiff need not anticipate affirmative defenses in the complaint, but should the plaintiff allege facts establishing an affirmative defense, she must go further and allege other facts that avoid the defense. Example: Suppose that the statute of limitations for slander is three years, but the statute is tolled when the plaintiff is mentally incompetent. Under Fed. R. Civ. P. 8(c)(1), the statute of limitations is an affirmative defense. Plaintiff alleges in the complaint a slander by defendant four years previously, but fails to allege she was mentally incompetent for two of the four intervening years. Plaintiff has raised an affirmative defense in the complaint without avoiding it, and her complaint is subject to dismissal under Fed. R. Civ. P. 12(b)(6).

Normally, of course, a district judge will allow plaintiff to amend the complaint, but the 12(b)(6) motion might cause unwelcome delay. Filing and decision on the motion postpones the date upon which defendant must file the answer [*see* Fed. R. Civ. P. 12(a)(4)].

Error 4: The complaint contains superfluous matter. A small amount of superfluity is usually nothing to worry about. Under Fed. R. Civ. P. 12(f), courts may order stricken from a pleading any "redundant, immaterial, impertinent, or scandalous matter," but a motion to strike is not favored and would certainly not be granted against a complaint as short as the ones set forth in this exercise. Even so, a careful pleader will not frame a complaint containing superfluous matter. The inclusion of unnecessary matter will seem amateurish, and may impair the pleader's effectiveness in persuading the court about other matters. Furthermore, the superfluous language may provide information to the opposing party that will help in preparation of the case.

Error 5: The complaint violates standards of professional responsibility. As discussed in section II.B.3, *supra*, Fed. R. Civ. P. 11 requires an attorney to sign the complaint and provides that the signature certifies several matters, including that the claim is warranted by both law and fact. Violation of the rule can subject both the lawyer and the client to sanctions.

Rule 3.1 of the Model Rules of Professional Responsibility [*see* II.B.3, *supra*] imposes a similar requirement of objective good faith on the attorney signing a pleading. Violation of Model Rule 3.1 could subject the lawyer to professional discipline.

_____

Each of the six "complaints" below contains three paragraphs for the body of the complaint. Assume that the date left blank is the most recent year. Before going to the computer to work through CALI CIV 01, please read the complaints and answer the questions that follow them.

_____

COMPLAINT ONE

> 1. [Jurisdictional allegation]
>
> 2. On May 10, 20__, in Room 215 of Old Main on the campus of Dakota College, in College Town, Dakota, defendant slandered the plaintiff.
>
> 3. As a result, plaintiff has been injured in his reputation and career, and has suffered great pain and mental anguish, to his damage in the sum of $100,000.

COMPLAINT TWO

> 1. [Jurisdictional allegation]

2. On May 10, 20__, in Room 215 of Old Main on the campus of Dakota College in College Town, Dakota, defendant falsely stated "Peter (referring to plaintiff) is a heavy user of crack cocaine." Defendant knew this statement to be false at the time that he made it, or acted in reckless disregard of the truth.

3. As a result, plaintiff has been injured in his reputation, suspended from college, has been unable to obtain any employment, and has suffered great mental anguish, all to his damage in the sum of $100,000.

COMPLAINT THREE

1. [Jurisdictional allegation]

2. On May 10, 20__, in Room 215 of Old Main on the campus of Dakota College, in College Town, Dakota, defendant slandered the plaintiff by falsely stating to William Roberts and Mary Trueblood, "Peter (referring to plaintiff) is a heavy user of crack cocaine." These false and defamatory statements were reported to plaintiff by Mary Trueblood, who was present at the meeting.

3. As a result, plaintiff's reputation has been damaged, he has suffered great humiliation, he has been suspended from college for one year, and he has been discharged from employment by the First National Bank, all to his damage in the amount of $100,000.

COMPLAINT FOUR

1. [Jurisdictional allegation]

2. Defendant was a professor, and plaintiff a student, at Dakota College in College Town, Dakota, on May 10, 20__. On that date defendant stated falsely that "Peter (referring to plaintiff) is a heavy user of crack cocaine." Said statement was made to William Roberts and Mary Trueblood. These persons were faculty members attending a Dakota College Disciplinary Committee meeting which had been called in Room 215 of Old Main for the purpose of disposing of a disciplinary action against the plaintiff. Defendant failed to exercise due care in ascertaining whether the statement was true before making it.

3. Plaintiff has been suspended from college; has suffered damage to his reputation, as well as great mental anguish; and was discharged from employment by the First National Bank; all to his damage in the amount of $100,000.

COMPLAINT FIVE

1. [Jurisdictional allegation]

2. Defendant slandered the plaintiff by falsely stating to third persons, including John Thompson of the First National Bank, that "Peter (referring to plaintiff) is a heavy user of crack cocaine." Defendant knew this

statement to be false when it was made, or he acted with reckless disregard for the truth, or he failed to exercise due care in determining whether it was true.

3. As a result of defendant's false statement, the plaintiff has suffered great mental anguish and has been injured in his reputation, and there is evidence that, as a result of defendant's false statement, plaintiff was suspended from college and discharged from employment by the First National Bank, all to his damage in the amount of $100,000.

COMPLAINT SIX

1. [Jurisdictional allegation]

2. On May 10, 20__, in Room 215 of Old Main on the campus of Dakota College, in College Town, Dakota, defendant falsely stated to William Roberts and Mary Trueblood, "Peter (referring to plaintiff) is a heavy user of crack cocaine." Defendant knew these words to be false, or he spoke them in reckless disregard of the truth, or he failed to exercise due care in determining whether they were true.

3. Defendant's false statement was made by him to other members of the College Disciplinary Board while the Board was deliberating about whether to punish plaintiff for violating college visiting hours rules. The Board ultimately decided to suspend plaintiff from college. This penalty was ostensibly imposed because of a violation of visiting hours rules, but actually was the result of defendant's slanderous statement. The student council records indicate that only three of the fifty students disciplined in the past ten years have been punished by suspension, and those three students were all suspended in one hearing. Four out of the five witnesses to that hearing have stated definitely that the students involved were suspended for cheating. Another result of defendant's slanderous statement was that plaintiff was discharged from his employment at the First National Bank. The aforesaid suspension from school, discharge from employment, and attendant humiliation and mental anguish, caused plaintiff to suffer damages in the amount of $100,000.

_____

In preparing for the computer exercise, answer these questions by referring to the Pleading Defects Display at the end of the questions.

(a) In composing a complaint, I would use the second paragraph of Complaint ___ and the third paragraph of Complaint ___.

(b) Is Complaint One fully satisfactory?

Answer yes or no.

(c) If you answered that Complaint One is not fully satisfactory, then identify the defect(s) in Complaint One by choosing in a number or numbers from the Pleading Defects Display.

(d) Is Complaint Two fully satisfactory?

Answer yes or no.

(e) If you answered that Complaint Two is not fully satisfactory, then identify the defect(s) in Complaint Two by choosing in a number or numbers from the Pleading Defects Display.

(f) Is Complaint Three fully satisfactory?

Answer yes or no.

(g) If you answered that Complaint Three is not fully satisfactory, then identify the defect(s) in Complaint Three by choosing in a number or numbers from the Pleading Defects Display.

(h) Is Complaint Four fully satisfactory?

Answer yes or no.

(i) If you answered that Complaint Four is not fully satisfactory, then identify the defect(s) in Complaint Four by choosing in a number or numbers from the Pleading Defects Display.

(j) Is Complaint Five fully satisfactory?

Answer yes or no.

(k) If you answered that Complaint Five is not fully satisfactory, then identify the defect(s) in Complaint Five by choosing in a number or numbers from the Pleading Defects Display.

(l) Is Complaint Six fully satisfactory?

Answer yes or no.

(m) If you answered that Complaint Six is not fully satisfactory, then identify the defect(s) in Complaint Six by choosing in a number or numbers from the Pleading Defects Display.

PLEADING DEFECTS DISPLAY

(The computer will ask you to use this multiple choice display to identify defects in the allegations of the above six complaints.)

1. *Omission of an element.* The complaint arguably fails to allege an element of the claim.

2.
Rule 12(e) vulnerability. The complaint is subject to a motion for a more definite statement because it arguably fails to give the defendant information necessary to frame an answer.

3. *Unavoided defense.* The complaint arguably raises an affirmative defense and fails to avoid it.
4. *Superfluity.* The complaint contains damaging superfluous matter that should be omitted for tactical or other reasons.5. *Violation of rules of professional responsibility.* The complaint violates Fed. R. Civ. P. 11 and Model Rule of Professional Responsibility 3.1.

You are now ready to go to the computer to work through CALI CIV 01: Drafting a Complaint. The estimated completion time is two hours, although this exercise can be divided into segments to be completed in separate sittings.

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[i]*See generally* Frederic W. Maitland, *The Forms of Action at Common Law* (1948); George B. Adams, *The Origin of English Equity*, 16 Colum. L. Rev. 87 (1916).(Return to text)

[ii]The writ of trespass was originally criminal, which developed to prevent breaches of the King's peace. The writ later further divided into trespass quare clausum fregit (q.c.t.) for injury to land, trespass de bonis asportatis (d.b.a.) for injury to chattels, and trespass vi et armis (with force and arms) for injury to person.(Return to text)

[iii]The distinction between the writ of trespass and the writ of (trespass on the) case was the direct or indirect nature of the injury to plaintiff. It had nothing to do with intent of the defendant. For example, "[i]f a man throws a log into the highway, and in that act hits me, I may maintain trespass because it is an immediate wrong; but if as it lies there I tumble over it, and receive an injury, I must bring an action upon the case; because it is

only prejudicial in consequence." *Reynolds v. Clarke*, 93 Eng. Rep. 747, 748 (K.B. 1726). Similarly, trespass lies against a defendant who feeds a dog poison; case lies against a defendant who leaves poison for a dog to find.(Return to text)

[iv]*Compare Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 321, 47 S. Ct. 600, 602, 71 L.Ed. 1069, 1072 (1927) ("A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show.") *with United States v. Memphis Cotton Oil Co.*, 288 U.S. 62, 67-68, 53 S. Ct. 278, 280, 77 L.Ed. 619, 623 (1933) ("[A cause of action is] something separate from writs and remedies, the group of operative facts out of which a grievance has developed.").(Return to text)

[v]John Norton Pomeroy, *Code Remedies* § 347 (Thomas A. Boyle ed., 4th ed. 1904); O. W. McCaskill, *Actions and Cause of Action*, 34 Yale L.J. 614, 638 (1925). McCaskill defined cause of action as "that group of operative facts which, standing alone, would show a single right in the plaintiff and a single delict to that right giving cause for the state, through its courts, to afford relief to the party or parties whose right is invaded."(Return to text)

[vi]Charles E. Clark, *The Code Cause of Action*, 33 Yale L.J. 817, 837 (1924). Clark defined cause of actrion as "an aggregate of operative facts which give rise to one or more relations of right-duty between two or more persons. The size of such aggregate should be worked out in each case pragmatically with an idea of securing convenient and efficient dispatch of trial business."(Return to text)

[vii]Charles E. Clark, *Code Pleading* 143 (2d ed. 1947).(Return to text)

[viii] Fed. R. Civ. P. 8(d)(1) instructs the pleader "[e]ach allegation must be simple, concise, and direct. No technical form is required." Fed. R. Civ. P. 8(e) instructs the court "[p]leadings must be construed as to do justice." Fed. R. Civ. P. 84 instructs that "[t]he forms in the appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate." For example, the allegation in form 11 for negligence that "defendant negligently drove a motor vehicle against the plaintiff" states a claim for relief, but would not have stated a cause of action under the codes.(Return to text)

[ix]Perhaps the most difficult area to evaluate is Fed. R. Civ. P. 11(b)(2), which covers arguments for modification of existing law. One guide is the following:

> Argument for extensions, modifications, or reversals of existing law or for creation of new law do not violate subdivision (b)(2) provided they are "nonfrivolous." This establishes an objective standard, intended to eliminate any "empty head pure heart" justification for patently frivolous arguments. However, the extent to which a litigant has researched the issues and found some support for its theories even in minority opinions, in law review articles, or through consultation with other attorneys should certainly be taken into account in determining whether paragraph (2) has been violated.

Advisory Committee Note to 1993 Amendments to Fed. R. Civ. P. 11, 146 F.R.D. 586–87 (1993).(Return to text)

[x]Many examples of reasonable, and unreasonable, investigations are collected in 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure: Civil 3d* § 1335 (2004).(Return to text)

[xi]The *Erie* doctrine is based on *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed. 1188 (1938). Under *Erie*, state law provides the rule of decision for certain issues that arise in cases tried in federal court. For

purposes of this exercise, you need only remember that state law defines the substantive elements of defamation, while federal law determines which party must plead the elements of the claim and the degree of particularity with which they must be pleaded.(Return to text)

[xii]The term *defamation* encompasses both *libel* and *slander.* In a general sense, libel is defamation communicated in writing or other durable form, and slander is defamation communicated orally. Since the defendant made his communications orally, the action might be characterized as either for the tort of defamation or for the tort of slander. Both terms will be used in this exercise. On the tort of defamation, *see generally* Dan B. Dobbs, *The Law of Torts* §§ 400-23 (2000).(Return to text)

3.

Exercise Five - Motions to Dismiss and Waiver Under Federal Rule 12

I. RAISING, AND WAIVING, RULE 12 DEFENSES

Exercise Three explored pleading a complaint. This exercise explores one type of response to a complaint: a preliminary motion to dismiss under Federal Rule of Civil Procedure 12. Consequently, this exercise is narrower than Exercise Three. We do not explore the requirements of, or drafting, an answer, which is the responsive pleading to the complaint. We do not discuss other possible preliminary motions, such as a motion for more definite statement or a motion to strike. We discuss the assertion–and possible waiver–of the seven grounds found in Federal Rule 12(b) for dismissal of a complaint.

A. The Federal Rule 12(b) Defenses

1. Abandonment of the Special Appearance

The common law provided a plea in abatement to attack jurisdiction and a demurrer to attack the legal sufficiency of a complaint. The codes provided a demurrer to handle both tasks. In both systems, the defendant could make a *special appearance* to challenge jurisdiction. This can be seen in some older decisions that refer to defendant having "appeared specially."

Special appearance was a term of art. Defendant appeared in the court for the sole purpose of challenging personal jurisdiction, and no other purpose. That was why the appearance was special. A defendant who attempted to present other defenses or motions before the court made a general appearance, and a general appearance amounted to a consent to personal jurisdiction. A defendant who challenged jurisdiction and at the same time pleaded to the merits of the complaint obviously called on the power of the court; this was a general appearance. A defendant could also consent, or waive objection, to personal jurisdiction more subtly. For example, a defendant made a general appearance by such actions as opposing plaintiff's motion to amend the complaint, engaging in discovery, challenging the legal sufficiency of the complaint, or possibly even informing the court that it chose not to appear.

Consequently, a defendant wishing to challenge personal jurisdiction had to be careful; the challenge must have been to personal jurisdiction and nothing else.

When the special appearance was successful, the case was dismissed and defendant went home happy. When the special appearance was unsuccessful, the case proceeded. At that point, defendant might have a choice to make. Some states allowed defendant to proceed to defend on the merits while preserving the jurisdictional objection. Other states provided that a defendant who proceeded to defend on the merits waived the jurisdictional objection.

All of this has been swept aside in practice in federal courts and in state court systems patterned after the Federal Rules. Federal Rule 12(b) has abolished the special appearance: “No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.”

2. Assertion of Rule 12(b) Defenses

A defendant is required to serve an answer on plaintiff within “20 days after being served with the summons and complaint.” Fed. R. Civ. P. 12(a)(1)(A)(i). [A defendant waiving service is allowed a response time of 60 days (90 days if defendant was addressed outside any federal judicial district). Fed. R. Civ. P. 12(a)(1)(A(ii)]. Instead of answering within that 20-day period, defendant may choose to make a preliminary Rule 12(b) motion to dismiss.[i] . Should defendant choose that course of defense, and the motion prove unsuccessful, defendant is allowed 10 days after service of the court’s unfavorable decision on the motion to answer. Fed. R. Civ. P. 12(a)(4)(A).

The seven challenges that Federal Rule 12(b) specifically allows to be made by preliminary motion are the following:

–(1) lack of subject-matter jurisdiction;

–(2) lack of personal jurisdiction;

–(3) improper venue;

–(4) insufficient process;

–(5) insufficient service of process;

–(6) failure to state a claim upon which relief can be granted; and

–(7) failure to join a party under Rule 19.

A defendant wishing to raise any one of these seven challenges has two options. Option one is to raise any and all of the defenses in the answer. “Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required.” Fed. R. Civ. P. 12(b). The answer is the responsive pleading required to the complaint. Fed. R. Civ. P. 7(a). Option two is to raise any and all of these defenses in a preliminary motion, one made before the answer is pleaded. “But a party may assert the following defenses by motion: [listing the seven defenses]. A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed.” Fed. R. Civ. P. 12(b). The party may join all motions under Rule 12 into a single motion. Fed. R. Civ. P. 12(g)(1).

Those are the only two options. A defendant who brings a preliminary motion to dismiss that asserts fewer than all of the defenses and later attempts to assert an additional Rule 12(b) defense for the first time in the answer will in most instances waive it, as discussed in I.A.3, *infra*. Similarly, a defendant cannot make successive preliminary motions to dismiss; one is the quota allowed:

> Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.

Fed. R. Civ. P. 12(g)(2).

The reason the rules limit defendant to one preliminary motion is rather obvious. That is the efficient method to dispose of all the threshold jurisdictional motions. Without that limitation, defendant could delay the proceeding for a long time by doling out the motions. For example, defendant could move to dismiss for insufficient service of process; following denial of that motion, defendant could move to dismiss for improper venue. The string could continue through multiple preliminary motions.

All of the seven grounds for dismissal found in Federal Rule 12(b) are threshold issues that can and should be disposed of before the parties and the court proceed to the work of deciding the merits of the case.[ii] . With the exception of dismissal for failure to state a claim upon which relief can be granted, all of the grounds for dismissal are separable from the merits. With the exceptions of dismissal for failure to join a Rule 19 party and failure to state a claim, all of the grounds for dismissal render the court powerless to act in the case because of a defect in jurisdiction, venue, or service of process. By requiring defendant to assert these defenses early–either in preliminary motion or no later than the answer–the rules prevent defendant from laying in the weeds and springing such a ground for dismissal on plaintiff later should progress in the litigation not be favorable to defendant.

3. Waiving Rule 12(b) Defenses

While Fed. R. Civ. P. 12(g)(2) requires a defendant who makes a preliminary motion under Rule 12 to consolidate all of its Rule 12(b) defenses into that motion, the enforcement provision is found in Fed. R. Civ. P. 12(h):

> **(1) When Some Are Waived.** A party waives any defense listed in Rule 12(b)(2)-(5) by:
>
> > **(A)**omitting it from a motion in the circumstances described in Rule 12(g)(2); or
> >
> > **(B)**failing to either:

> **(i)**make it by motion under this rule; or
>
> **(ii)**include it in a responsive pleading or in an amendment allowed by rule 15(a)(1) as a matter of course.

> **(2) When to Raise Others.**
> Failure to state a claim upon which relief can be granted, to join a person required by Rule 19(b), or to state a legal defense to a claim may be raised:

> **(A)**in any pleading allowed or ordered under Rule 7(a);
>
> **(B)**by a motion under Rule 12(c); or
>
> **(C)**at trial.

> **(3) Lack of Subject-Matter Jurisdiction.** If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.

Fed. R. Civ. P. 12(h).

Since this exercise concerns waiver of defenses, we will work from back to front in this rule. First, Fed. R. Civ. P. 12(h)(3) provides that the defense of lack of subject matter jurisdiction [Fed. R. Civ. P. 12(b)(1)] cannot be waived. This of course follows from the fact that jurisdiction over the subject matter is granted by constitution and statutes, not by action of the parties. [*See* Exercise Two, part I.A]. Second, Fed. R. Civ. P. 12(h)(2) provides that the defenses of failure to state a claim [Fed. R. Civ. P. 12(b)(6)] and failure to join a person required by Rule 19(b) [Fed. R. Civ. P. 12(b)(7)] may be made later: in a pleading, in a motion for judgment on the pleadings, or even at trial. In other words, these two rule 12 defenses are not waived by failure to consolidate them into a preliminary motion.

That leaves four rule 12 defenses that by the express provision of Fed. R. Civ. P. 12(h)(1) are waived if omitted from a preliminary motion to dismiss made "under this rule." These four waivable defenses are lack of personal jurisdiction [Fed. R. Civ. P. 12(b)(2)],[iii] . improper venue [Fed. R. Civ. P. 12(b)(3)], insufficient process [Fed. R. Civ. P. 12(b)(4)], and insufficient service of process [Fed. R. Civ. P. 12(b)(5)].[iv] .These defenses must be consolidated into any preliminary motion brought under rule 12 [Fed. R. Civ. P. 12(g)(2)]; in the absence of a preliminary motion to dismiss, these defenses must be consolidated into the answer; or these defenses must be consolidated into an amendment to the answer that is allowed to be made as a matter of course.[v] . Failure of defendant to assert one or more of these defenses in one of the preceding manners results in waiver of the defense(s).

II. WRITTEN EXERCISE

The following pages–and the accompanying computer-aided exercise CALI CIV 09–contain several questions to probe your understanding of the interrelationships of the federal rules and federal statutes involved in questions of waiver of defenses under Federal Rule 12. You will be required to exercise close scrutiny and interpretation of a complex set of interrelated provisions. The rules are Fed. R. Civ. P. 6(b), 7, 11, 12, and 15(a). The statutes are 28 U.S.C. §§ 1391(a) [venue] and 1404(a) [transfer of venue]. You will need your rulebook with these rules and statutes for both the following written exercise and CALI CIV 09. The questions in the written exercise and the computer-assisted lesson examine these rules and statutes, consider the reasons for special treatment of Rule 12 defenses, and analyze the waiver provisions of the rule.

Instructions. This section contains questions for you to answer to test and strengthen your knowledge of waiver of Rule 12 defenses. Use your scrolling feature so that the screen shows only the question. Answer the question, then scroll down to compare your answer to the authors' answer.

Q–1. Federal Rule of Civil Procedure 12(b) lists seven defenses that may be raised by the defendant prior to answering the complaint. A preliminary motion raising one of the Rule 12(b) defenses postpones the time for filing the answer until after the court has ruled on the motion. Fed. R. Civ. P. 12(a)(4)(A). The following questions are designed to probe why these defenses receive special treatment.

Q–1(a). Do the seven defenses in Rule 12(b) all involve matters that can be determined by the court on the face of the pleadings, without the necessity for testimony or findings of fact?

Answer to Q–1(a).

No. With the exception of the motion to dismiss for failure to state a claim [Rule 12(b)(6)], all of the listed defenses require findings of fact if the factual basis for them is contested. For example, the motion to dismiss for insufficient service of process, if contested, would require the trial court to make a finding about whether

process was served upon an appropriate person. In a diversity case, the motion to dismiss for lack of subject-matter jurisdiction can turn on whether a party acquired citizenship by moving to a new state, a matter that requires a finding of fact about the party's actions and intent. Under Fed. R. Civ. P. 43(c), the trial court could base factual findings on affidavits submitted by the parties, but would have the discretion to hear oral testimony or require depositions.

Q–1(b). Is there a need to decide the seven defenses before the rest of the lawsuit because they raise especially important issues?

Answer to Q–1(b).

No. Not all of the issues are important. For example, the defense of insufficient process can involve the mere assertion that plaintiff omitted the summons or the complaint from otherwise proper process—a matter that cannot have much importance to a defendant who obviously knows of the lawsuit or she would not be making the motion. Similarly, the defense of insufficient service of process can be raised successfully if the plaintiff served an employee of a corporation who was not an officer, managing or general agent, or process agent within the meaning of Rule 4(h)(1)(B). The sole purpose of allowing such motions seems to be to encourage parties to mind their formalities. The motions rarely terminate a lawsuit; instead, absent a statute of limitations problem, they merely result in a re-service of process.

Q–1(c). Are the seven defenses suitable for early disposition because they involve trivial matters of form that should be corrected early in the lawsuit?

Answer to Q–1(c).

No. Some of the defenses are trivial, and some are highly important. The defense of lack of subject-matter jurisdiction is considered near-sacred because it protects the division of powers between federal courts and state courts inherent in federalism. *See* Charles A. Wright & Mary Kay Kane, The Law of Federal Courts § 7 (6th ed. 2002).

Q–1(d). Do the seven defenses involve matters that can be severed for separate determination because they do not go to the merits of the lawsuit?

Answer to Q–1(d).

Yes, with minor qualifications. None of the defenses go to the merits, except the defense of failure to state a claim upon which relief can be granted. A Rule 12(b)(6) defense goes to the merits in the sense that it involves determination of whether the allegations, if true, present a meritorious claim. That defense, however, does not require or allow the court to look beyond the face of the complaint, and hence is a good defense to sever and consider early. Surely the lawsuit should not proceed if the plaintiff's own statement of the claim, considered as true, provides no grounds for relief.

The other Rule 12(b) defenses have nothing to do with the merits of the case, so they are easy to separate and rule on prior to proceeding with the main lawsuit. Early disposition will promote judicial economy. When a defendant has a defense of improper venue or lack of jurisdiction, the court should rule on that defense before the parties develop the merits of the case, which may later be dismissed because it was brought in the wrong court. Finally, the defenses concerning process and service of process might just as well be disposed of earlier as later; the possibility that separate treatment of these defenses will result in delay may not be too high a price to pay in order to encourage plaintiffs to adhere to the proper formalities, which after all have the significant purpose of making sure that defendants are given proper notice.

Q–2. Sally filed a complaint against George and process was served on Day 1. On Day 4, prior to his answer, George filed a motion raising the defenses of lack of subject-matter jurisdiction, lack of personal jurisdiction, improper venue, insufficient service of process, and failure to state a claim upon which relief can be granted. Can George raise all of these defenses at the same time in the same motion?

Answer to Q–2.

Yes. The defenses can be consolidated in the motion. Fed. R. Civ. P. 12(g)(1). Under some prior systems of pleading, the defendant was required to raise defenses in sequence, a time-consuming and inefficient procedure.

Q–3. Sally filed a complaint against George and process was served on Day 1. On Day 4, prior to his answer, George filed a motion under Rule 12(b)(1) to dismiss for lack of subject-matter jurisdiction. The next day, George filed a motion under Rule 12(b)(3) to dismiss for improper venue. Has George waived his venue defense?

Answer to Q–3.

Yes. Rule 12(h)(1)(A) provides for waiver of the venue defense if it is omitted "from a motion in the circumstances described in Rule 12(g)(2)." Rule 12(g)(2) provides for consolidation of all Rule 12 motions that were "available" to the movant. The purpose of these waiver provisions is to require that pre-answer motions be brought together, thereby preventing the delay that might arise from hearing the motions sequentially.

Q–4. Sally filed a complaint against George and process was served on Day 1. On Day 4, prior to his answer, George filed a motion under Rule 12(b)(2) to dismiss for lack of personal jurisdiction. The next day, George filed a motion under Rule 12(b)(1) to dismiss for lack of subject matter jurisdiction. Has George waived his subject matter jurisdiction defense?

Answer to Q–4.

No. Rule 12(h)(3) provides that the defense of subject-matter jurisdiction may be raised "at any time." It may also be raised by the court on its own motion. Subject matter jurisdiction is granted by constitution and statutes, not by action of the parties. The federal subject matter jurisdiction defense is considered to be particularly consequential, since erroneous assertion of federal jurisdiction would be usurpation of state power. Hence, the defense is not waivable; the interests of speed and economy must yield to federalism.

Q–5. Sally filed a complaint against George and process was served on Day 1. On Day 19, prior to his answer, George filed a motion under Rule 12(f) to strike impertinent matter from the complaint. The next day, George filed a motion under Rule 12(b)(2) to dismiss for lack of personal jurisdiction. Has George waived his personal jurisdiction defense?

Answer to Q–5.

Yes. Rule 12(h)(1)(A) provides that a defense of lack of personal jurisdiction is waived by "omitting it from a motion in the circumstances described in Rule 12(g)(2)." Rule 12(g)(2) provides "a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion." Since a personal jurisdiction defense was "available," and a Rule 12(f) motion is a "motion under this rule [Rule 12]," the defense of personal jurisdiction was waived.

Q–6. Sally filed a complaint against George and process was served on Day 1. Without filing any preliminary motions, George filed an answer on Day 10 in which, in addition to responding to allegations in Sally's complaint, he raised the defenses of lack of personal jurisdiction, lack of subject-matter jurisdiction, failure to state a claim upon which relief could be granted, improper venue, and expiration of the statute of limitations. Does George have the right to raise all of these defenses in his answer without making any prior motions?

Answer to Q–6.

Yes. Rule 12(b) provides "a party may assert the following defenses by motion." The defendant has two options: 1) raise the defenses in a preliminary motion, or 2) raise the defenses in the answer, provided that they have not been waived by omission from a preliminary motion. Since George made no preliminary motion, he did not waive any defenses by failing to join them with other defenses. They may all be consolidated in the answer, along with admissions, denials, and affirmative defenses.

Q–7. Sally filed a complaint against George and process was served on Day 1. On Day 10, George filed a Rule 12(b)(1) motion raising the defense of lack of subject-matter jurisdiction. On Day 40, the trial court held a hearing on the Rule 12(b)(1) motion and ruled in favor of Sally. On Day 45, George filed his answer, which was timely because the Rule 12(b)(1) motion extended the time for filing the answer until 10 days after notice of the court's action on the motion. [Fed. R. Civ. P. 12(a)(4)(A).] In his answer, George responded to the allegations in Sally's complaint and also raised the defenses of failure to state a claim upon which relief could be granted, lack of personal jurisdiction, expiration of the statute of limitations, res judicata, and improper venue.

Q–7(a). Has George waived the defense of failure to state a claim upon which relief could be granted?

Answer to Q–7(a).

No. The defense of failure to state a claim has not been waived. Rule 12(h)(2) preserves the defense and allows it to be asserted in a pleading, on a motion for judgment on the pleadings, or at trial. The defense is considered too important to allow it to be waived by mistake.

Q–7(b). Has George waived the defense of lack of personal jurisdiction?

Answer to Q–7(b).

Yes. The defense of personal jurisdiction was waived by failure to join it in the Rule 12 motion. *See* Rule 12(h)(1)(A).

Q–7(c). Has George waived the defense of the statute of limitations?

Answer to Q–7(c).

No. The statute of limitations defense has not been waived because it is not a Rule 12 defense. This affirmative

defense [*see* Fed. R. Civ. P 8(c)(1)] could not have been raised in the Rule 12 motion, and therefore cannot be waived by omission from the motion.

Q–7(d). Has George waived the venue defense?

Answer to Q–7(d).

Yes. The defense of improper venue has been waived by the provisions of Rule 12(h)(1)(A).

Q–8. Sally filed and served a summons and complaint, and a set of interrogatories, on George on Day 1. On Day 10, George made a Rule 26(c) motion for a protective order, claiming that the interrogatories were burdensome and vexatious. On Day 15, George filed an answer responding to the allegations in Sally's complaint and raising the defense of improper venue. Has George waived the defense of improper venue?

Answer to Q–8.

No. Rule 12(h)(1)(A) provides for waiver of a venue defense omitted from a Rule 12 motion in circumstances in which Rule 12 requires joinder. The operative language is in Rule 12(g)(2), which requires consolidation when a motion has been made "under this rule," *i.e.*, under Rule 12. The Rule 26(c) motion for a protective order was not a Rule 12 motion, so omission of a venue defense did not trigger the waiver provisions of Rule 12(h)(1).

Q–9. Sally filed and served a complaint against George on Day 1. George did not file any preliminary motions. On Day 10, he served and filed an answer that denied all of the material allegations of Sally's complaint and raised the defenses of lack of subject matter jurisdiction and contributory negligence. Neither the parties nor the court took any further action until Day 25, when George attempted to amend his answer to include the defense of improper venue. Will this amendment save the venue defense?

Answer to Q–9.

Yes. George may amend the answer and save the venue defense. Rule 12(h)(1)(B) provides that the venue defense is waived if it is omitted from a Rule 12 motion, or no motion having been made, if it is omitted from a "responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course." Here the amendment is permitted

"as a matter of course" because no responsive pleading is normally permitted to an answer [*see* Fed. R. Civ. P. 7(a)], and 20 days have not passed since the answer was served [*see* Rule 15(a)(1)(B)].

Q–10. Sally commenced an action alleging that George had defamed her by telling third persons that she is a drug addict. Process was served on Day 1. George did not make any preliminary motions. On Day 10, he filed an answer denying that he had ever said that Sally is a drug addict, and admitting all of the other allegations of Sally's complaint. On Day 35, George attempted to amend his answer to assert the defense of lack of personal jurisdiction. Will this amendment save the personal jurisdiction defense?

Answer to Q–10.

No. Here, the period during which the answer could be amended as a matter of course has elapsed, since no responsive pleading is normally permitted to an answer [*see* Fed. R. Civ. P. 7(a)] and more than 20 days have passed since service of the answer [*see* Fed. R. Civ. P. 15(a)(a)(B)]. Therefore, under Rule 12(h)(1)(B), the defense of lack of personal jurisdiction has been waived.

III. COMPUTER EXERCISE: CALI CIV 09

You are now ready for additional work in applying Rule 12 in CALI CIV 09: Waiver Under Rule 12. Be sure to take your Federal Rules rulebook with you to the computer. The estimated completion time for this computer-assisted exercise is one hour; it can be done in more than one sitting.

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[i]Actually, defendant is not the only party who can raise these defenses. The plaintiff, for example, can raise the defenses in response to a counterclaim. The language of Fed. R. Civ. P. 12 is carefully drawn to cover any party

responding to a claim, whether defendant, plaintiff, or third party defendant. For convenience, this exercise will use the terms “plaintiff” and “defendant” in the usual context of a simple two-party action with no counterclaim. (Return to text)

[ii] “If a party so moves, any defense listed in Rule 12(b)(1)-(7)–whether made in a pleading or by motion–and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial.” Fed. R. Civ. P. 12(i). (Return to text)

[iii] While the rule refers to lack of jurisdiction over the person, this is understood to include all bases of personal jurisdiction, including *in personam*, *in rem*, and *quasi in rem* jurisdiction. [*See* Exercise Two, part I.A]. (Return to text)

[iv] A motion to dismiss for insufficient process is properly brought only when the form of the process is defective. A motion to dismiss for insufficient service of process is properly brought to challenge the method of serving the process.(Return to text)

[v] Fed. R. Civ. P. 12(h)(1)(B)(ii) allows a defense omitted from the answer to be saved by amendment of the pleading made as a matter of course. Fed. R. Civ. P. 15(a)(1)(A) allows the complaint to be amended once as a matter of course “before being served with a responsive pleading.” While the answer is the responsive pleading to the complaint, no responsive pleading to the answer is usually permitted [unless the court orders a reply pursuant to Fed. R. Civ. P. 7(a)(7)], Fed. R. Civ. P. 15(a)(1)(B) gives defendant 20 days after serving the answer on the plaintiff to amend the answer as a matter of course. Later amendment of the answer, as by consent of the parties or by leave of court, does not save the omitted defense.(Return to text)

4.

Exercise Seven - Discovery

I. DISCOVERY UNDER THE FEDERAL RULES

A. Philosophy

Prior to the effective date of the Federal Rules of Civil Procedure in 1938, common law and code procedures generally assigned pleadings the tasks of giving notice of the nature of the case, narrowing issues for trial, weeding out groundless claims, and revealing the facts of the case. *See* Exercise Three, parts I.A-B. Beyond the pleadings, the attorney had few or no formal devices for investigation of the opponent's case. Effective advocacy relied on keeping the opponent in the dark about the details of the case and items of evidence until the attorney could spring surprises at trial. This system was called the "sporting theory of justice" in *Tiedman v. American Pigment Corp.*, 253 F.2d 803, 808 (4th Cir.1958).

The drafters of the Federal Rules intended to narrow the function of the pleadings to notice-giving only, and to allow the discovery devices to handle the other work of shaping the case for trial. *See* Exercise Three, part I.C. Consequently, discovery today under the Federal Rules has three purposes:

> (1) To narrow the issues, in order that at the trial it may be necessary to produce evidence only on a residue of matters that are found to be actually disputed and controverted.
>
> (2) To obtain evidence for use at the trial.
>
> (3) To secure information about the existence of evidence that may be used at the trial and to ascertain how and from whom it may be procured, as for instance, the existence, custody, and location of pertinent documents or the names and addresses of persons having knowledge of relevant facts.

8 Charles A. Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice and Procedure: Civil 2d § 2001, at 18 (2010)

In order to promote the general goal of the Federal Rules of trial and decision of cases on the merits, the discovery devices are designed to reduce the ability to keep the opponent in the dark and to spring surprises at trial. Of

course, discovery is self-starting and self-propelled, except for certain required initial disclosures. *See* I.C., *infra*. Some attorneys do not engage in extensive discovery in some cases, and some may not ask the correct discovery questions, so surprises still occur at trial, but the adoption of the discovery devices has given the careful, thorough attorney the ability to minimize or even eliminate such tactics by the opponent.

The philosophy of discovery of the Federal Rules has earned high praise:

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

Hickman v. Taylor, 329 U.S. 495, 500–501, 67 S. Ct. 385, 388–389, 91 L.Ed. 451, 457 (1947).

While the discovery system of the Federal Rules remains popular, some critics have always existed. In the past three decades, the critics have primarily pointed to the spiraling costs of litigation. The heavy costs of discovery can lead to the abuse of discovery to prevent the pursuit of meritorious claims,[i] to force nuisance settlements of nonmeritorious claims,[ii] or to delay the processing and termination of litigation through the courts.[iii] In general, say the critics, discovery as now practiced burdens society with unnecessary, nonproductive expense.

This perception of abuses resulted in substantive amendments to the discovery rules in 1970, 1980, 1983, 1993, 2000, and 2006. Some of these changes were designed to give federal judges additional control over discovery, especially in complex cases, through pretrial conferences and discovery orders. The 1993 amendments for the first time required initial disclosure of information without any discovery request. *See* I.C, *infra*. The 2000 amendments narrowed the scope of discovery. *See* I.B, *infra*. The 2006 amendments attempted to make discovery of electronically-stored information easier.

By and large, however, despite these criticisms and adjustments, the basic philosophy of discovery under the Federal Rules has not been substantially altered since 1938. The rules are intended to allow free and open discovery so that each side can become completely informed about the opponent's case to the end of informed settlement or decision on the merits.

B. Scope of Discovery

The broad scope of discovery is set forth in Federal Rule 26(b)(1):

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense–including the existence, description, nature, custody, condition, and location of any documents or

> other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).

Note the rule restricts the scope of discovery to matters that are relevant to any party's claim or defense. Prior to amendment in 2000, the rule allowed discovery of matters relevant "to the subject matter involved in the pending action." This broader scope of discovery is now allowed by the rule only on order of the court for good cause shown. This amendment too responded to concerns of overly broad discovery and possible abuse, specifically to disallow discovery to develop new claims or defenses not already pleaded.

On the one hand, the rule specifically eliminates some possible objections to discovery. The attorney may discover material either to explore the opponent's case or to support the attorney's own case. The names of persons having knowledge–typically, witnesses to the occurrence in question–must be revealed. An opponent cannot object that the material to be discovered would be inadmissible at trial, *e.g.*, hearsay, if the information is itself relevant and will likely lead to admissible evidence.

On the other hand, the scope of discovery is not unlimited. Federal Rule 26 places several limits on discovery. Rule 26(b)(1) provides matters that are privileged or irrelevant are not discoverable. Rule 26(b)(2)(A) gives the court broad authority to alter the rules. Rule 26(b)(2)(C)(i) authorizes the court to limit discovery that is "unreasonably cumulative or duplicative," or that "can be obtained from some other source that is more convenient, less burdensome, or less expensive." Rule 26(b)(3) gives protection to "work product." Rule 26(b)(4) governs discovery from experts. Rule 26(c), dealing with protective orders, also contains general limits designed to keep discovery from becoming burdensome or oppressive

1. Privilege

Privileged matter is outside the scope of discovery. The law of evidence provides privileges, and the law of the state where the federal court sits must be consulted to determine privileges the state law recognizes, at least in federal court cases founded on diversity of citizenship. *See* Fed. R. Evid. 501. Commonly accepted privileges include attorney-client, spousal, clergy-penitent, doctor-patient, governmental secrets, and informers. Less common privileges include psychotherapist-patient, accountant-client, and journalist-source. Some few states recognize other privileges, including dentist-patient, chiropractor-patient, nurse-patient, social worker-client, and others.

A common occurrence in a deposition is that an attorney will object to a question and then tell the witness to answer. Such an objection, perhaps to the form of the question or to material that will be inadmissible at trial, is then on the record. Should the deposition be utilized at trial, the judge can then rule on the objection. When a question calls for privileged material, the attorney may properly object and instruct the witness not to answer, for the material sought is beyond the scope of discovery.

2. Relevancy

Irrelevant material is outside the scope of discovery. Again the law of evidence supplies our guide:

'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Fed. R. Evid. 401. The definition of relevant evidence in the federal rule combines two common law evidence concepts: materiality and relevancy.

Materiality is the portion of the rule that says "any fact that is of consequence to the determination of the action." In other words, the fact to be proved must be raised in the case by the pleadings. For example, assume in a tort case, plaintiff's attorney by interrogatory asks defendant to reveal the location and amount of its bank accounts. Certainly, the answer sought has nothing to do with the issues of liability or compensatory damages. Whether a defendant may be able to pay a judgment is not "of consequence" to whether the defendant is liable for damages. Accordingly, the fact is "immaterial" under the common law, and therefore "irrelevant" under Federal Evidence Rule 401. The result depends on whether the pleadings have raised an issue of punitive damages. With no such issue, the question is irrelevant and outside the scope of discovery. With a demand for punitive damages made in the pleadings, the plaintiff will be entitled at trial to inform the jury members of the amount of defendant's wealth so they will know how much money will be required to punish defendant adequately. The size of defendant's bank account would be relevant and so within the scope of discovery.

Relevance is the portion of the rule that refers to "more probable or less probable than it would be without the evidence." In other words, the evidence has a tendency in logic to prove what it is offered to prove. For example, in a fender-bender case, plaintiff attempts to prove that defendant was negligent in failure to keep a proper lookout by offering evidence that defendant three days prior to the accident had made a purchase from a pornographic book store. That evidence tends to prove defendant made the purchase but the purchase in no way relates to the accident; after hearing the evidence, the jury will not have its assessment of the probabilities of whether defendant kept proper lookout changed a whit. A similar result follows when a party attempts to prove the lessor caused damage to leased property by showing the lessor has a lot of money and previously obtained a lucrative government contract. *See City of Cleveland v. Peter Kiewit Sons' Co.*, 624 F.2d 749 (6th Cir.1980).

Such examples are rare, however. In general, consistent with the policy of a broad scope of discovery, the courts have interpreted relevance generously, "to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351, 98 S. Ct. 2380, 2389, 57 L.Ed. 253, 265 (1978). Of course, this statement was made prior to the 2000 amendment to Federal Rule 26(b) narrowing the scope of discovery by restricting it to matters relevant to the parties' claims or defenses [*see* I.B., *supra*], but the amendment does not change the definition of relevance.

One other question of relevance is specifically answered by Rule 26(a)(1)(A)(iv): the existence and contents of any insurance agreement that may possibly cover damages awarded in the action must be revealed–as a required initial disclosure.

3. Trial Preparation: Materials

An immunity from discovery of litigation materials "prepared or formed by an adverse party's counsel in the course of his legal duties" was created by the Supreme Court in *Hickman v. Taylor*, 329 U.S. 495, 510, 67 S. Ct. 385, 393, 91 L.Ed. 451, 462 (1947). This "work product" immunity is qualified, not absolute, and can be overcome by a showing by the adversary that "production of those facts is essential to the preparation of one's

case." *Hickman*, 329 U.S. at 511, 67 S. Ct. at 394, 91 L.Ed. at 462. Oral statements are even more difficult to obtain, since they embody even more of the lawyer's thought processes. The purposes of the work product doctrine, as envisioned by the Court, prevent a free ride on the opponent's investigation and protect the adversary system.

Federal Rule 26(b)(3) now codifies the work product immunity:

> **(A)***Documents and Tangible Things.* Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:
>
> **(i)**they are otherwise discoverable under Rule 26(b)(1); and
>
> **(ii)**the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.
>
> **(B)***Protection Against Disclosure.* If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.
>
> **(C)***Previous Statement.* Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. * * *

Several points might be highlighted about the rule. First, protection is afforded only for material prepared in anticipation of litigation or for trial; materials created not in anticipation of litigation or for trial are not protected. Second, even though the immunity is sometimes called attorney work product, the materials need not be produced by an attorney; any representative of the party is covered so long as that person prepared the materials in anticipation of litigation or for trial. Third, this qualified immunity can be overcome by a showing of "substantial need" for the materials; the party seeking discovery and showing such need will be able to discover the materials. Fourth, the "mental impressions, conclusions, opinions, or legal theories" of the attorney or other representative are protected, and as a practical matter are absolutely immune. Fifth, a person who gave a statement in anticipation of litigation can obtain as of right a copy of that statement. Finally, the second sentence of the rule subordinates it to Rule 26(b)(4), which governs discovery of trial preparation materials involving experts; expert witnesses and their reports discoverable under Rule 26(b)(4) cannot be resisted as trial preparation materials under Rule 26(b)(3).

4. Trial Preparation: Experts

Properly stated, there is no additional limit on the scope of discovery for expert witnesses, but the Federal Rules do place special limits on the methods that may be used to discover expert testimony. Rule 26(b)(4) differentiates between experts who may be called to testify at trial and experts employed only for trial preparation. The latter type of expert's opinion is discoverable only "upon showing exceptional circumstances under which it is impracticable for the party [seeking discovery] to obtain facts or opinions on the same subject by other means." Fed. R. Civ. P. 26(b)(4)(D)(ii).

The opinion of an expert who may testify is more readily available. Prior to 1993, the opinion of a trial expert

could be obtained only by interrogatory to the opposing party, possibly supplemented by other discovery as agreed to by stipulation or as ordered by the court. After the 1993 amendments, the name and a detailed report of the expert, including the expert's opinion, supporting information, exhibits, qualifications, and prior testimony, are part of the initial disclosures required to be made to the opponent without request. Fed. R. Civ. P. 26(a)(2)(B). *See* I.C., *infra*. Subsequent to receipt of the report, the opponent may take the expert's deposition. Fed. R. Civ. P. 26(b)(4)(A).

Of course, as with other areas of discovery, the parties are allowed to stipulate to modify procedures governing or limiting discovery. *See* Fed. R. Civ. P. 29.

5. Protective Orders

The court has power to make a protective order to limit discovery "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense * * *." Fed. R. Civ. P. 26(c). The rule then suggests eight ways in which the court may limit discovery. Some of the protections ordered by courts under this rule include designating a time or place for discovery, requiring a certain method of discovery, prohibiting inquiry into certain matters, limiting the amount of discovery, and protecting the confidentiality of material discovered.[iv]

C. Required Disclosures

From adoption of the Federal Rules in 1938 until 1993, discovery was always self–starting. A party could do as much discovery as the Rules allowed, or little or nothing. No party was required to reveal anything except in response to a proper discovery request. This procedure changed with the adoption of "required disclosures" by amendment to Rule 26 in 1993.[v] Now, Federal Rule 26(a) requires parties to disclose certain categories of information without request and by a definite timetable. The idea is that this basic information will be subject to request anyway and requiring disclosure saves time and expense both to the parties and to the court. Additional discovery proceeds by request, as it always has.

Three categories of information must be disclosed. Each has its own timing provision.

First, within 14 days after a meeting of the parties to discuss claims and defenses, possible settlement, required disclosures, and discovery necessary in the litigation [Fed.R.Civ.P. 26(f)], each party must disclose

> — name, address, and telephone number of persons who are "likely to have discoverable information" the disclosing party may use to support its claim or defense (except by impeachment);
>
> — documents the disclosing party may use to support its claim or defense (except by impeachment);
>
> — a computation of damages claimed; and
>
> — insurance agreements.

Fed.R.Civ.P. 26(a)(1)(A)(i)-(iv). Nine categories of proceedings, such as habeas corpus petitions and student loan collections, are exempted from the required disclosures by Fed. R. Civ. P. 26(a)(1)(B).

Second, within the time specified by the court, each party must disclose the name and a report of each expert to be called to testify at trial. Fed. R. Civ. P. 26(a)(2). *See* I.B.4, *supra*.

Third, at least 30 days before trial, each party must disclose the name, address, and telephone number of each witness who may be called; the designation of any witness whose testimony is to be presented by deposition; and an identification of each document or other exhibit that it may offer. Fed. R. Civ. P. 26(a)(3).

D. Discovery Devices

Any or all of the discovery devices may be employed by the attorney in any litigation. The careful attorney will develop a discovery strategy early in the litigation; decisions must be made as to which devices are appropriate, what information is necessary, and what sequence of discovery should be used.

The most popular discovery device is the *oral deposition.* Fed. R. Civ. P. 27-28, 30. A witness is called before a court reporter, who administers an oath. The attorney noticing the deposition then takes the testimony of the witness; the attorney opposing the deposition may then also examine. The deposition allows discovery of new information and identifies controverted facts. The deposition of a party may narrow issues by obtaining admissions. A deposition may be taken from any person, and is not limited to parties.

The huge advantage of the deposition is flexibility. The attorney taking the testimony can follow up with questions about new information or areas where the witness seems hesitant. The deposition also allows the attorney to evaluate both the opponent's witness and the opposing attorney before trial. Should the deponent become unavailable at the time of trial, the deposition may be read into the trial record as former testimony. Fed. R. Civ. P. 32; Fed. R. Evid. 804(b)(1). The primary disadvantage of the deposition is cost, which includes both the expense of the court reporter and the fees of the attorneys taking the deposition.

A little-used device is the *deposition upon written questions.* Fed. R. Civ. P. 31. Again, the deponent is called before a court reporter and sworn, but then the reporter reads a list of questions previously submitted by the attorney and records the answers. A great deal of expense is saved since the attorney does not attend the deposition, but the loss of flexibility in inability to ask follow-up questions makes this discovery device unpopular.

Interrogatories are written questions submitted to the opposing party for answers under oath. Fed. R. Civ. P. 33. Interrogatories may be sent only to parties. While the attorney writes the interrogatories, they are still relatively inexpensive compared to the oral deposition. Some attorneys believe that an advantage of interrogatories is more complete answers are given, since research can be done and the answers can be given after proper consideration; other attorneys believe that this is a disadvantage, since the opposing attorney can sanitize the answers before they are given. Again, there is no flexibility of follow-up questions.

A *request for production of documents* allows the attorney to inspect and copy documents and other tangible things (including computer data) in the "possession, custody or control" of another party. Fed. R. Civ. P. 34. Although a request for production of documents and things may be sent only to a party, documents in the possession of a nonparty may be obtained by use of a subpoena duces tecum under Fed. R. Civ. P. 45.

Requirement of a showing of good cause for production was eliminated by amendment in 1970, so use of this device—as all others save the physical or mental exam—proceeds without resort to the court, in the absence of objection to discovery. Usually, inspection of documents works by agreement of the parties rather than formal

request for production; in a complex case, production of documents may involve thousands of hours in inspection of a party's files.

When the mental or physical condition of a party is in controversy, the court may order a *physical or mental examination* "for good cause." Fed. R. Civ. P. 35. While a party who claims personal injury clearly places physical condition in controversy, examinations of a party who "has not affirmatively put into issue his own mental or physical condition are not to be automatically ordered merely because the person has been involved in an accident * * *." *Schlagenhauf v. Holder*, 379 U.S. 104, 121, 85 S. Ct. 234, 244, 13 L.Ed.2d 152, 165 (1964). Even so, little showing of good cause is ordinarily required, and in fact, such examinations are typically arranged by stipulation of the attorneys.

Requests for admission require the opposing party to admit the truth of

any matters within the scope of Rule 26(b)(1) relating to:

(A) facts, the application of law to fact, or opinions about either; and

(B) the genuineness of any described documents.

Fed.R.Civ.P. 36(a)(1). This device is designed to verify information and narrow issues for trial, and to save expense of unnecessary proof at trial, not to discover new information. Requests for admissions may be thought of as a brush-clearing device, not a method of obtaining truly important admissions. Admission of a disputed fact will simply be denied.

E. Sanctions for Failure to Make Discovery

A party or person from whom discovery is sought may seek a protective order from the court against inappropriate discovery. Fed. R. Civ. P. 26(c). *See* I.B.5, *supra*. Absent a protective order, the person refusing to submit to discovery will be subject to a court order compelling discovery [Federal Rule 37(a)], followed by sanctions should the person fail to obey the order [Federal Rule 37(b)]. In other words, sanctions for failure to make discovery almost always require a two step process.

> The general scheme of the rule is that sanctions can be imposed only for failure to comply with an order of the court. Thus, when the discovery procedure itself requires a court order, as under Rule 35, or permits a court order, as when there has been a discovery conference under Rule 26(f) or a protective order has been denied under Rule 26(c), failure to obey the order can be punished immediately by any of the sanctions listed in Rule 37(b)(2). When the discovery procedure is one set in motion by the parties themselves without court order, the party seeking discovery must first obtain an order under Rule 37(a) requiring the recalcitrant party or witness to make the discovery sought; it is only violation of this order that is punishable under Rule 37(b).[vi]

Available sanctions under Rule 37(b) include treating the failure as contempt of court, striking all or parts of pleadings, preventing the admission of evidence, taking designated facts as established, and awarding expenses of attorney's fees.

II. QUESTIONS ON DISCOVERY

Instructions. This section contains questions for you to answer to test and strengthen your knowledge of the law of discovery. Use your scrolling feature so that the screen shows only the question. Answer the question yes, no, or maybe, and formulate your reasoning, then scroll down to compare your answer to the authors' answer. For all questions, assume you are in federal court.

A. Philosophy of Discovery Under the Federal Rules

Q–1. Plaintiff is swimming across a lake when she is struck by Defendant's motorboat. Defendant sends an interrogatory to Plaintiff requesting the names of all of Plaintiff's past swimming instructors. Plaintiff objects that Defendant is "just on a fishing expedition." Upon Defendant's motion, should the court compel the discovery?

Answer to Q–1.

Yes. As the Supreme Court said in *Hickman v. Taylor*, 329 U.S. 495, 507, 67 S. Ct. 385, 392, 91 L.Ed. 451, 460 (1947):

> No longer can the time-honored cry of "fishing expedition" serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession.

So long as the material sought is within the scope of discovery, it must be produced. On these facts, past swimming instructors could perhaps give admissible evidence on Plaintiff's swimming ability, which may be relevant to the defense of contributory/comparative negligence.

Q–2. Plaintiff purchases a trailer home from Defendant manufacturer, and later discovers various defects in

materials and construction. When Plaintiff sues Defendant for damages, Defendant answers and serves Plaintiff with 347 interrogatories. Is Plaintiff required to answer these interrogatories?

Answer to Q–2.

No. Even though the philosophy of the Federal Rules generally is to allow free and open discovery, and the mere fact that a party must respond to a large volume of discovery requests is not grounds for objection, Federal Rule 33(a)(1) allows a party to serve no more than 25 interrogatories without leave of court. This numerical limit was inserted in 1993 in response to perceived discovery abuse. In an appropriate case, the court can grant leave for additional interrogatories. Another option is the parties can stipulate under Rule 29 to modify the limitations placed on discovery.

Prior to 1993, the answer to this question would have been maybe. Federal Rule 26(c) allows a party to move for a protective order from discovery demands that amount to "oppression" or cause "undue burden or expense." Should a party be able to convince the court any discovery is beyond another party's legitimate discovery needs and is in bad faith and intended to annoy, embarrass, oppress, or burden, the protective order may issue. *See* I.B.5, *supra.*

Q–3. Part 1. During her oral deposition, Defendant reveals the existence of a letter relevant to her defense; the letter, she says, is in the possession of her customer. Defendant did not produce this letter as part of her initial disclosures under Federal Rule 26(a)(1)(A)(ii). Has Defendant violated the required disclosures requirement?

Part 2. Plaintiff later makes no effort to obtain the letter through discovery. At trial, when Defendant introduces the letter, will Plaintiff's objection to the evidence be sustained because the contents are "a complete surprise"?

Answer to Q–3.

Part 1. No. Defendant has not violated her obligation to make initial disclosures because Rule 26(a)(1)(A)(ii) requires her to produce documents she may use to support her defense that are in her "possession, custody, or control." This document is in the possession of a customer, not the Defendant.

Were the facts different, and Defendant had failed to make required disclosure of a document in her possession, custody, or control, Defendant would probably not be permitted to use the document at trial as a sanction for failure to disclose it. Fed. R. Civ. P. 37(c)(1).

Part 2. No. Discovery is self-starting. A party may do no discovery, if he so chooses. On these facts, Defendant revealed the existence of the letter, but Plaintiff made no discovery attempt to obtain it. The only fault involved is Plaintiff's. Surprise has not been totally eliminated from trials.

B. Scope of Discovery

Q–4. At his oral deposition, Defendant says he consulted with his personal attorney before sending a notice of termination of contract to Plaintiff. Defendant refuses to say what the attorney advised. Will Plaintiff be able to obtain an order compelling Defendant to reveal the information?

Answer to Q–4.

No. "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense * * *." Fed. R. Civ. P. 26(b)(1). The two specific limits on the scope of discovery are privilege and relevance. The facts clearly indicate that the advice came in a private consultation between Defendant and Defendant's attorney. The attorney-client privilege applies. The material sought is outside the scope of discovery.

Q–5. Defendant collides with Plaintiff at an intersection. Plaintiff sues for negligence and alleges excessive speed. Plaintiff schedules a deposition upon written questions of Witness, who has already been interviewed informally by both parties. The only information Witness has is that ten minutes before the accident, she saw Defendant speeding. Will an objection by Defendant to the deposition be sustained?

Answer to Q–5.

Maybe. As stated in the Answer to Q–4, irrelevant material is outside the scope of discovery. *See* I.B.2., *supra*. The question is whether the fact that Defendant was speeding ten minutes before the accident would be of *any* probative value to a jury attempting to decide whether Defendant was speeding at the time of the accident. In other words, when the jury hears Defendant was speeding earlier, would it have its assessment of the probability that Defendant was speeding at the time of the accident changed? Courts have divided on the relevance of such testimony. *See generally* Kenneth S. Broun (ed.), *McCormick on Evidence* § 185 (6th ed. 2006).

Q–6. Plaintiff refuses to produce a relevant, unprivileged document on the sole ground that it would be hearsay and inadmissible at trial. Will Defendant's motion to compel discovery be granted?

Answer to Q–6.

Yes. "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). Discovery of a hearsay statement may lead to the author, whose personal testimony would be admissible.

Q–7. Defendant refuses to produce an insurance policy covering the occurrence since the ability to pay would be irrelevant to the issues of liability and damages. Will Plaintiff's motion to compel discovery be granted?

Answer to Q–7.

Yes. Fed. R. Civ. P. 26(a)(1)(A)(iv) requires mandatory initial disclosure of any insurance agreement that may help satisfy a potential judgment in the suit. An amendment to Rule 26 in 1970 clarified that such agreements are discoverable, and insurance policies were made part of the Rule 26(a) required initial disclosures in 1993.

Q–8. Following threats of suit by Plaintiff, Defendant hires an outside accountant to analyze its books; the accountant makes a written report to Defendant. Later, Plaintiff commences suit and requests production of the accountant's report. When asked why she wants the report, Plaintiff's attorney responds "No special reason—just being thorough." Must Defendant produce the report?

Answer to Q–8.

No. Since the report was made in response to threats of suit, the report was clearly "prepared in anticipation of litigation," and is protected work product (trial preparation materials). Fed. R. Civ. P. 26(b)(3). Occasionally one will hear a statement that work product protection applies only to the work of an attorney or someone working for an attorney, *i.e.*, attorney's work product, but the doctrine is not so limited and covers a variety of party's representatives: "attorney, consultant, surety, indemnitor, insurer, or agent." Fed. R. Civ. P. 26(b)(3)(A). The question indicates no showing of substantial need to overcome the work product immunity.

Q–9. As part of its regular business recordkeeping, Defendant keeps a record of all checks it issues. When Plaintiff sues on an account, Defendant pleads the affirmative defense of payment. Plaintiff requests production of Defendant's check record. Defendant objects that the material is work product, and that Plaintiff has shown no need to overcome the immunity. Will Plaintiff's motion to compel discovery be granted?

Answer to Q–9.

Yes. The check record is regularly kept as part of the business. It was not prepared in anticipation of litigation or for trial. It is not work product. Need is irrelevant. In fact, this would be a required initial disclosure of a relevant document. Fed. R. Civ. P. 26(a)(1)(A)(ii).

Q–10. Plaintiff's attorney takes the statement of Witness A, who says that Witness B was also present at the accident scene. Defendant sends an interrogatory asking for the names and addresses of "all persons known to Plaintiff who may have witnessed the accident." May Plaintiff refuse to identify Witness B on the ground that discovery of B constitutes work product?

Answer to Q–10.

No. Work product does not protect facts learned. "There is no shield against discovery * * * of the facts that the opponent has acquired, or the persons from whom he obtained the facts * * * even though the documents themselves have a qualified immunity from discovery." Charles A. Wright & Mary Kay Kane, *The Law of Federal Courts* § 82, at 597 (6th ed. 2002). Witness B should have been revealed as a required initial disclosure. Fed. R. Civ. P. 26(a)(1)(A)(i).

Even if Witness B were not found until after Plaintiff had made her required disclosures, Plaintiff would still be under a duty to supplement the disclosures. Fed. R. Civ. P. 26(e).

Q–11. Witness, an acquaintance of Defendant, gives an oral statement to the attorney for Plaintiff. Upon learning that Plaintiff's attorney refuses to provide a copy of the statement to Defendant's attorney because it is work product, Defendant induces Witness to demand a copy of the statement. Must Plaintiff's attorney comply?

Answer to Q–11.

Yes. Even though the work product immunity would protect the oral statement against discovery by Defendant, Witness may demand her own statement. "Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter." Fed. R. Civ. P. 26(b)(3)(C). *See* I.B.3, *supra*. Should Witness then hand the statement over to Defendant, that is his business.

Q–12. Defendant sends Plaintiff an interrogatory requesting the names and addresses of all witnesses Plaintiff intends to call at trial. May Plaintiff object on the grounds of work product?

Answer to Q–12.

Yes. A party is required to identify all witnesses to an occurrence, usually phrased as all persons who may have knowledge, but a list of trial witnesses is compiled only after the attorney has sifted through all potential witnesses and decided who will be asked to testify. This mental sifting makes the list work product. "If the court orders discovery of [work product], it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation." Fed. R. Civ. P. 26(b)(3)(B).

This question assumes the interrogatory is sent during the discovery phase of the litigation. Later, Plaintiff is required to make mandatory disclosure of a witness list at least 30 days prior to trial. Fed. R. Civ. P. 26(a)(3)(A)(i).

Q–13. Prior to commencing suit, Plaintiff's attorney asks Expert A and Expert B to evaluate the design of a machine. As part of his required disclosures under Rule 26(a)(2)(A), Plaintiff identifies Expert B. Defendant sends an interrogatory to Plaintiff requesting the identities of any other experts Plaintiff consulted. Is Plaintiff required to identify Expert A in answer to the interrogatory?

Answer to Q–13.

No. Experts who may testify at trial must be disclosed under Fed. R. Civ. P. 26(a)(2)(A). Plaintiff did so identify Expert B. Experts a party employs in anticipation of litigation who are not expected to be called as a witness at trial need not be identified absent exceptional circumstances. Fed. R. Civ. P. 26(b)(4)(D(ii). Defendant has shown no need at all here.

Q–14. Plaintiff sues Doctor for malpractice, and seeks to depose another Patient of Doctor who has undergone the same procedure. Patient does not want to testify because of personal privacy. When Plaintiff subpoenas Patient for a deposition, can Patient obtain any relief from the court?

Answer to Q–14.

Maybe. Patient can seek a protective order from the court "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c)(1). Courts are solicitous of privacy concerns of nonparties. The court could decide to protect the party or person seeking a protective order in one or more of the ways mentioned in the rule–no one present except persons designated by the court, deposition sealed, and the like.

C. Discovery Devices

Q–15. Plaintiff sues Defendant for negligence. Plaintiff sends a set of interrogatories to Witness, asking for a complete description of the accident. Should Witness decline to answer, will Plaintiff be able to obtain an order from the court compelling discovery?

Answer to Q–15.

No. Interrogatories may be served only on parties. Fed. R. Civ. P. 33(a)(1). Witness is not a party. The only discovery devices that may be used against nonparties are oral depositions and depositions upon written questions.

Q–16. A letter relevant to the action of Plaintiff v. Defendant is in the possession of Third Party. Defendant serves a subpoena duces tecum on Third Party, instructing him to make the letter available to Defendant's attorney for inspection and copying. Must Third Party comply with the subpoena [Hint: see Fed. R. Civ. P. 45(a)]?

Answer to Q-16.

Yes. Fed. R. Civ. P. 45(a)(1)(A) reads as follows:

Every subpoena must:

* * *

(iii) command each person to whom it is directed to do the following at a specified time and place: attend and testify; produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or permit the inspection of premises * * *.

This rule allows use of a subpoena against Third Party to obtain the letter without the wasted effort of requiring Third Party to testify. Prior to 1991,Fed. R. Civ. P. 45(a) allowed use of a subpoena only to "command each person to whom it is directed to attend and give testimony," *i.e.*, at a deposition, hearing, or trial. Use of a subpoena to obtain documents from a nonparty in the absence of testimony was improper. Some states still consider use of a subpoena for documents only to be an abuse of process.

Were Third Party a party to the action, then this request to produce documents would be appropriate under Fed. R. Civ. P. 34. A subpoena would not be necessary.

Q–17. Plaintiff sues Defendant for personal injury damages arising from a car accident, alleging that Defendant ran a red light. Defendant, without any particular showing of good cause other than the need to verify plaintiff's injuries, moves the court for an order compelling Plaintiff to submit to a physical examination. Will the court order the discovery?

Answer to Q–17. Yes. While a physical examination may be ordered under Fed. R. Civ. P. 35(a)(2)(A) only "for good cause," Plaintiff has clearly placed his physical condition into issue by claiming personal injury damages, and that claim alone will furnish sufficient cause for the court to order the examination.

Q–18. In the same action described in Q–17, Plaintiff, without any particular showing of cause, moves the court for an order compelling Defendant to submit to an eye examination. Will the court order the discovery?

Answer to Q–18.

No. A physical examination may be ordered for a party, but only "for good cause." Fed. R. Civ. P. 35(a)(2)(A).

Plaintiff has made no showing at all of cause for an eye exam on these facts. The court will not order a physical examination of the parties in every accident case. *See Schlagenhauf v. Holder*, 379 U.S. 104, 121, 85 S. Ct. 234, 244, 13 L.Ed.2d 152, 165 (1964).

D. Sanctions for Failure to Make Discovery

Q–19. Defendant notices Plaintiff's deposition. Plaintiff appears and testifies, but refuses to answer questions on one subject. Defendant immediately goes to court and moves for sanctions, specifically requesting the court to rule that any evidence on that subject will be foreclosed at trial. Will the court grant a sanction for failure to make discovery?

Answer to Q–19.

No. Sanctions for failure to make discovery is a two-step process. The party seeking discovery must first move the court for an order compelling discovery. Second, should the party resisting discovery not comply with that court order, then sanctions may be imposed. *See* I.E., *supra.* Since the first step of an order compelling discovery has not been taken, the second step of sanctions is not available.

III. COMPUTER EXERCISE

You are now ready for additional work on discovery. We have not written a computer-assisted exercise to accompany this written exercise on discovery, but the CALI library contains a discovery game in which students compete against each other. It is self contained, and the facts necessary to play the discovery game are proved to you as part of the exercise. The computer-assisted exercise CALI CIV 20 was written by Own Fiss, Sterling Professor of Law, Yale Law School.

CALI CIV 20: Woburn: A Game of Discovery

This game is designed to introduce students to the fundamentals of the discovery process. It is based on the acclaimed book "A Civil Action," by Jonathan Harr, and draws its problems from the litigation arising out of the contamination of the Aberjona aquifer in Woburn, Massachusetts. Woburn provides students with a unique opportunity to acquaint themselves with the Federal Rules of Civil Procedure regarding discovery in the context of a concrete, real-life case. Assuming the roles of plaintiffs' and defendants' attorneys, the players alternate making decisions about when and how to disclose or request discovery of certain pieces of information, as well as when to cooperate with and when to oppose their opponent's discovery efforts. The simulation is highly interactive, with the computer taking the role of Judge Skinner, who occasionally intervenes to rule on discovery motions. The thirteen problem sets included with Woburn cover a wide variety of topics, including:

- mandatory initial and supplemental disclosure requirements;
- proper use of various methods of discovery (subpoenas, interrogatories, depositions, requests for document production, medical examinations, requests for admission);
- expert witness reports;
- work product and privilege defenses;
- cost-shifting for discovery activities;
- attorney's fees awards; and
- sanctions for conduct in violation of the rules.

Woburn teaches students the details of the rules. It also illuminates the strategic dimensions of discovery. While pursuing their discovery efforts within the context of the rules, the players are forced to think strategically about the costs of various discovery activities, time constraints, and their reputation with the judge, jury, and the legal community at large. Frivolous motions are punished by a loss of reputation; time-consuming document requests may exhaust a player's financial resources. The need to juggle these non-legal factors brings the rules to life, showing students how particular rules affect attorneys' decision-making processes in concrete situations. The game is to be played out of class, on the students' own schedule. At the end the students will have internalized the structure and dynamics of the discovery rules, and be ready to discuss the more conceptual or policy-oriented issues in class. On-screen reports let the players know at all times how their discovery efforts are progressing, and pictures of the actual persons involved in the trial as well as of the contamination site, court documents, and so forth, further heighten the impact of the game.

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[i]"Delay and excessive expense now characterize a large percentage of all civil litigation. The problems arise in significant part, as every judge and litigator knows, from abuse of the discovery procedures available under the

Rules." Dissent from Order Amending Civil Rules, 446 U.S. 997, 999 (1980) (Powell, J., joined by Stewart, J., and Rehnquist, J.). (Return to text)

[ii]"But to the extent that [discovery] permits a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the process will reveal relevant evidence, it is a social cost rather than a benefit." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741, 95 S. Ct. 1917, 1928, 44 L.Ed.2d 539, 552 (1975). (Return to text)

[iii]Several sources are collected in 8 Charles A. Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice and Procedure: Civil § 2001 (2010). (Return to text)

[iv]*See generally* Charles A. Wright & Mary Kay Kane, The Law of Federal Courts § 83 (6th ed. 2002). (Return to text)

[v]The 1993 amendment to Fed. R. Civ. P. 26(a) introduced required disclosures to federal practice. The amendment was controversial, and in recognition of that controversy, the amended rule allowed individual districts to opt out of the initial disclosure requirements by local rule. Several districts did so. Following several years of experience, in 2000 the Supreme Court amended the rule again to eliminate the opt out possibility. The initial disclosures indeed became "required disclosures" in all federal districts. (Return to text)

[vi]Charles A. Wright & Mary Kay Kane, The Law of Federal Courts § 90, at 642 (6th ed. 2002). The authors note four exceptions to this two-step process exist. An immediate sanction is allowed for a willful failure to appear at a deposition or answer interrogatories or respond to a request for inspection; for an unjustified refusal to make admissions; for failure to join in framing a discovery plan upon request by another party; or for failure to make a required disclosure. (Return to text)

5.

Exercise Nine - Judgment as a Matter of Law

I. JUDGMENT AS A MATTER OF LAW

A. Controlling the Jury

The judgment as a matter of law is one of many devices available to the judge to control the freedom of the jury. Many other devices available during and after trial, including rulings on evidence and the motion for new trial, also control jury freedom. This exercise deals only with judgment as a matter of law and its closely-related kin, the binding instruction. It is probably the most important. Before discussing this device, we sketch briefly some policy arguments for and against restricting jury freedom.

Two principal arguments favor restricting jury freedom. First, without a method to take cases away from the jury, the court would be unable to dispose of frivolous cases prior to trial. For example, a person sues her neighbor, claiming the neighbor was rude to her. If the jury were totally free to decide issues of law and fact, the plaintiff would be entitled to a jury trial on the issue of whether being rude to one's neighbor is actionable. Or take a case in which the facts alleged in the complaint state a claim upon which relief can be granted, but no significant evidence supports the claim. For example, a person believes he is being poisoned by a neighbor, and so alleges in the complaint. The only evidence the plaintiff can produce is testimony that his neighbor said churlish things about him. Obviously, there ought to be some way of preventing such cases from going to the jury. The normal jury would not even want to hear them.

A second reason for restricting jury freedom is to prevent jury lawlessness. Were a jury allowed to decide cases on an ad hoc basis, the law would be both uncertain and inconsistent. Parties in like positions would not be treated alike, and the uncertainty would encourage litigation. A jury might decide to award damages because it was prejudiced against the defendant, even though no rule of law supported its decision. A sympathetic jury might decide to award damages to an injured person even though no evidence connects defendant to the injury. The judgment as a matter of law, and the lesser power to grant a new trial when the verdict is against the weight of the evidence, provide a degree of control by the trial court, which itself is subject to control by a multi-judge appellate court.

Arrayed against these arguments are those favoring jury freedom:

1. The jury possesses a collective wealth of common sense that allows it effectively to evaluate the testimony

of ordinary witnesses.
2. The jury's collective memory may be superior to the memory of a single judge. The jurors, working together, may be able to do a better job of piecing together the testimony.
3. Juries are less susceptible to corruption or other forms of improper influence than are judges. The jury is an ad hoc body summoned for only a few cases, and can perform its duties without feeling the tug of conflicting personal loyalties.
4. The jury, because it is an ad hoc body, may have more courage than the judge. Even when not elected, the judge may be subject to political influence, or at least the force of public opinion. In a controversial case, the judge may try to reach a compromise instead of giving complete victory to a controversial litigant. The jury may be more willing to take controversial stances.5. Many factual disputes in lawsuits are not really susceptible to rational determination. By delegating decision of these factual disputes to a multi-person body that is perceived as non-political and neutral, the judicial system may produce decisions that are more satisfying to the litigants than would be the case if a single judge made these difficult decisions.

These arguments in favor of jury freedom are stronger when applied to some aspects of the jury's job than others. When the jury makes a decision about the credibility of a witness, i.e., when it decides whether the witness is testifying truthfully or falsely, the jury's collective competence may be superior to that of the trial judge. Common sense and collective memory may give the jury greater power to search out inconsistencies in testimony or to understand ordinary witnesses. Also, the bad judge—the one who is subject to improper influence or who does not have the courage to reach a proper decision—is less subject to appellate review on credibility decisions than on the other decisions that a trial judge must make. This limit on appellate control stems from the fact that credibility decisions are often based upon the appearance and demeanor of the witness at trial—whether the witness hesitated when giving testimony, whether the witness appeared evasive, and so forth. An appellate court cannot recapture the demeanor of a witness on the basis of the "cold record." Therefore, credibility decisions are normally left to the fact-finder at trial. When this is done, a choice must be made about giving the power to make these credibility decisions either to the trial judge or to the jury. Many would favor giving the power to the jury.

In contrast, when the decision at trial involves an issue of law, or an issue of whether certain inferences can be drawn from certain facts, the "cold record" is quite adequate for purposes of appellate review. Therefore, the arbitrary, corrupt, or incompetent trial judge can be controlled by the appellate court; less reason exists for sending these issues to the jury. Moreover, the trial judge is often better qualified to decide these issues than is the jury.

B. Judgment as a Matter of Law

1. Directed Verdict and JNOV

For hundreds of years, courts and lawyers used the devices of *directed verdict* and *JNOV* (judgment n.o.v. or judgment *non obstante veredicto*). The only substantial difference between these two devices was the timing of the motion. The motion for directed verdict was made after the opponent had rested, or at the close of all the evidence. In either event, the motion was made before the case was given to the jury. The motion for judgment n.o.v. was in effect a motion for directed verdict delayed until after the jury had returned its verdict. Hence, the party was asking the court to order entry of judgment in its favor notwithstanding the jury's verdict in favor of the opponent.

The terminology, though not the timing or purpose of the motions, changed for the federal courts in 1991. By amendment to Fed. R. Civ. P. 50, the directed verdict and JNOV motions are now the same motion: a motion for *judgment as a matter of law*. The idea is that the JNOV is actually a reserved motion for directed verdict. The

common name was adopted to recognize that fact and also to recognize that the directed verdict and the JNOV are really the same motion made at different stages of the proceeding. In federal practice, a motion for directed verdict had to be made at the close of all the evidence in order to preserve one's right to make the motion for judgment n.o.v. This requirement is preserved after the amendment: a motion for judgment as a matter of law (old directed verdict) must be made after the opposing party has been fully heard (typically at the close of all the evidence) in order for a party to renew the motion after the verdict is returned (old JNOV). Fed. R. Civ. P. 50(b). This requirement is rooted in the history of the right to jury trial. *See* Charles A. Wright & Mary Kay Kane, *The Law of Federal Courts* § 95, at 685-86 (6th ed. 2002).

We refer to the judgment as a matter of law, but of course the older cases, including the three reproduced later in this exercise, refer to directed verdict and JNOV. Many states also continue to use the terminology of directed verdict and JNOV. One can expect lawyers to continue to use the terms, even in federal courts, for some time to come. In federal courts today, any motion for directed verdict or for JNOV will be treated as a motion for judgment as a matter of law.

The timing of the motion for judgment as a matter of law gives the trial court the option of ruling either before or after the jury's verdict. A wise judge who is unsure about whether the motion should be granted prior to submission of the case to the jury may decide to wait until after the jury has returned its verdict. The jury may moot the issue by returning a verdict in favor of the proponent of the motion. Even when the jury returns a verdict against the proponent, the proponent will almost certainly move again for judgment as a matter of law later. Then the trial judge can grant the motion.

The decision to wait may save time and money. If the appellate court decides that the trial judge was wrong in granting the motion after the verdict, it can reinstate the jury verdict instead of remanding for a new trial. That saves the litigants and the court system the cost of another trial. When the trial judge grants the motion prior to submission to the jury, and the appellate court decides the trial judge was wrong, the only likely option is to grant an entire new trial.

On the other hand, judges must decide motions properly. In a case when the jury should not be allowed to return a verdict in favor of one of the parties, granting the motion prior to submission to the jury saves the jury from going through the useless charade of returning a verdict that will soon be nullified.

The standard for granting a judgment as a matter of law [Fed. R. Civ. P. 50(a)] before the case goes to the jury or a "renewed" judgment as a matter of law [Fed. R. Civ. P. 50(b)] after the jury verdict is returned is necessarily the same, at least in theory. In practice, however, some judges require a more impressive showing for a judgment as a matter of law before verdict (old directed verdict) than after verdict (old JNOV). This is so because of the differing treatments on appeal discussed above and also because the judge may be reluctant to take a case from a jury that has sat through the entire trial.

Stated generally, and therefore to some extent incompletely, the question whether a judgment as a matter of law should be granted turns upon whether the jury could reasonably return a verdict in favor of the party opposing the motion. If no reasonable jury could find for that party on the basis of the evidence that has been presented to it, i.e., reasonable minds could not differ, then the motion should be granted. As you will see later, this standard, though generally true, is in need of some qualification.

2. Binding Instructions

The judgment as a matter of law standard is of central importance in understanding another device for controlling the jury—the binding instruction. A binding instruction tells the jury that it must find a certain fact to be true; the judge decides the issue. The binding instruction differs from the ordinary instruction, which informs the jury about the law and tells the jury to apply the facts as *it* finds them.

Example:

In a slander case [*see* Exercise Three, part III.B], defendant in the answer denies publication of a statement calling plaintiff an LSD user and raises the affirmative defense of truth. In the opening statement to the jury, defendant's lawyer states that the defense expects to prove both that the LSD statement was made privately (i.e., only to the plaintiff, so the element of publication is missing) and that the LSD statement was true.

Defendant's lawyer introduces no evidence that would support a reasonable finding the LSD statement was true. There is a genuine dispute, however, about whether the LSD statement was made publicly or privately.

In instructing the jurors, the court will tell them they can not find that the LSD statement was true, and that the only issue for their decision is whether the LSD statement was made privately. The court would issue a "binding instruction" on the issue of truth or falsity.

The binding instruction amounts to a partial judgment as a matter of law. It is issued when one of the parties would not be entitled to a favorable jury determination on a particular issue, but could still win the case because the jury might reasonably find favorably on other issues. The standard for granting a binding instruction is the same as the standard for granting a judgment as a matter of law.

Often, whether a party is entitled to a judgment or binding instruction on a certain issue will depend upon which party bears the "burden of proof" on that issue. In saying that a party bears the burden of proof, we mean that the party bears both the burden of persuasion and the initial burden of production.

3. Burdens of Production and Persuasion

While we commonly hear of the burden of proof, a more exacting analysis identifies two burdens of proof: the burden of production of evidence and the burden of persuading the jury.

A party is said to bear the *burden of production*, also called the burden of going forward with the evidence, on a particular issue if failure to offer evidence sufficient to support a jury determination on the issue will result in an adverse judgment as a matter of law against it. In other words, the party with the burden of production must go forward and submit sufficient evidence so that the court can conclude that a reasonable juror *could* find more likely than not in favor of that party's position on all issues essential to its case.

Obviously, the allocation of the burden of production is of great importance in deciding which party will be able to prevail on a motion for judgment as a matter of law. Where to allocate the production burden is a difficult question, and involves consideration of many possible factors. At the same time, we must recognize that in the broad mine run of cases, the plaintiff, as the party attempting to change the status quo, bears the burden of production (and the burden of persuasion).

Example:

In a slander case, plaintiff alleges, and defendant admits, that defendant called plaintiff a thief. The only issue raised by the pleadings is whether the statement was true, i.e., whether plaintiff is a thief. Neither party produces any evidence on this issue. If plaintiff bears the burden of producing evidence that he is not a thief, he will suffer an adverse judgment as a matter of law. If defendant bears the burden of producing evidence that plaintiff is a thief, she will suffer an adverse judgment as a matter of law.

The foregoing example is a case in which neither party produces *any* evidence on a dispositive issue of fact. That is the easiest case. A judgment as a matter of law will often be justified, however, even when the party with the burden of production produces some evidence relevant to the issue.

Example:

Plaintiff alleges that defendant called him a thief, and defendant denies making the statement. On the issue, plaintiff introduces only evidence that the defendant disliked him. This testimony has some tendency to suggest that the defendant would say bad things about the plaintiff. Yet it is a slender reed upon which to base a determination that she called plaintiff a thief. A jury verdict in plaintiff's favor would be nearly as arbitrary as one based on no evidence at all. The judge would be justified in granting a judgment as a matter of law because the plaintiff has not produced sufficient evidence to satisfy his burden of production.

The *burden of production* should be distinguished from the *burden of persuasion.* A party bearing the burden of production on an issue must produce sufficient evidence to create an issue for the jury. The rules about burden of production are applied by the *court* in the decision whether to send the issue to the jury. Once an issue is sent to the jury, the judge instructs the jury about the burden of persuasion, and rules about burden of persuasion are applied by the *jury* in determining which party should receive a favorable jury verdict.

Example:

The plaintiff bears the burden of persuasion on fact X. Under the relevant law, the party who bears the burden of persuasion must establish the existence of the fact in dispute by a preponderance of the evidence; in other words, the existence of the fact is more probable than its nonexistence, or more likely than not. The court will instruct the jury about this rule. If the jury determines that the existence and nonexistence of fact X are equally probable, it should return a verdict against the plaintiff.

Although the concepts of production burden and persuasion burden are distinct, the weight of the production burden depends upon the weight of the persuasion burden. For example, if a party has the burden of persuading the jury that there is "virtual certainty" that fact X is true, then to satisfy the burden of production the party would need to convince the judge that he has produced evidence sufficient to allow a reasonable jury to determine that fact X is true to a virtual certainty. Note that this is not the same thing as saying that the party must convince the *judge* that fact X is true to a virtual certainty. A judge might believe that the existence of fact X has not been established to a virtual certainty, while simultaneously believing that a reasonable jury could find its existence more likely than not.

For this exercise, you may assume that the burden of persuasion is the usual one in civil actions of preponderance, i.e., showing that the existence of a fact is more probable than its nonexistence. Therefore, if the opponent of a judgment as a matter of law motion bears the burdens of production and persuasion, the court, in deciding

whether that party came forward with sufficient evidence to satisfy the burden of production, must decide whether a reasonable jury could find the existence of the fact more probable–more likely–than not.

A party who bears the burden of persuasion and the initial burden of production is commonly said to bear the burden of proof. Usually the same party bears both burdens. In most jurisdictions, however, the burden of production can shift from one party to the other, and possibly back again, during the course of the trial. This shifting occurs when the party bearing the initial burden of production has produced evidence of such great weight that the *other* party will suffer an adverse judgment on the issue if it fails to produce evidence to the contrary.

Example:

Plaintiff sues defendant for slander, alleging that defendant called her an LSD user. The only issue for decision at trial is whether the statement was made. Plaintiff bears the burden of proof on this issue.

When plaintiff introduces evidence sufficient to permit a reasonable jury to find that the LSD statement was made, she has satisfied her burden of production and is entitled to go to the jury. Suppose plaintiff goes further, and produces evidence of such probative force that, in the absence of contrary evidence, no reasonable jury could find that the statement was *not* made. For example, plaintiff produces testimony of several unimpeached, disinterested witnesses who claim to have heard defendant make the statement. In most jurisdictions, the plaintiff would then be entitled to a judgment as a matter of law unless defendant produces some contrary evidence. In such circumstances, the burden of production has shifted to the defendant. The defendant must go forward to produce evidence sufficient to allow a reasonable juror to decide more likely than not that the statement was *not* made in order to take the case to the jury.

In the foregoing example, the plaintiff has the burden of proof, that is, the initial burden of production and the burden of persuasion. When she produces enough evidence to satisfy the burden of production, the case moves into the area of jury control. When the plaintiff produces overwhelming evidence, the burden of production shifts to the defendant, once again allowing the judge to take control. When the defendant produces evidence that contradicts plaintiff's evidence, the case will once again become a matter for the jury to decide.

While most jurisdictions permit the burden of *production* to shift, the usual rule is that the burden of *persuasion* never shifts. It remains always upon the party on whom it was originally cast. If the plaintiff bears the burden of persuasion upon an issue, then whenever the issue is sent to the jury, the jury will be instructed to find against the plaintiff if he has not satisfied the persuasion burden. This instruction will be given whether or not the production burden shifted to the defendant at some point in the lawsuit.

Moreover, imposing the persuasion burden on the plaintiff affects the definition of both parties' burdens of production. In order to survive a motion for judgment as a matter of law, i.e., satisfy the burden of production, the plaintiff must produce evidence sufficient to permit a reasonable jury to find itself persuaded in her favor. In contrast, the defendant will survive a motion merely by showing that a reasonable jury could find itself *either* persuaded in his favor *or* in equipoise—that is, not persuaded by either side.

Examples:

(1) Plaintiff's decedent and defendant's decedent, driving from opposite directions, crash in the middle of the highway. Both plaintiff and defendant allege the other driver was solely at fault in crossing the center line.

No evidence is submitted, since there are no witnesses and accident reconstruction is unavailable. The court will grant a judgment as a matter of law against plaintiff, the party with the burden of production, because no reasonable juror could find more likely than not in favor of plaintiff. At most, the jurors would be in equipoise as either proposition is equally likely on the evidence submitted.

(2) Plaintiff farmer's cow is killed on defendant railroad's tracks. The only evidence shows that the cow was struck near both a downed fence that is the responsibility of the railroad to maintain and an open gate that is the responsibility of the farmer to keep closed. The court will grant a judgment as a matter of law against the plaintiff because no reasonable person could find more likely than not that the cow gained access to the tracks over the downed fence instead of through the open gate in this 50-50 case. The party with the burden of production must provide sufficient evidence so that a reasonable juror could assess the probabilities at least 51-49 in his favor.

4. Evidence Considered for Judgment as a Matter of Law

We have said that the issue for the court on a motion for judgment as a matter of law is whether the jury could reasonably return a verdict for the party opposing the motion. This statement is a useful simplification of the standard. In most jurisdictions, however, it is not precisely correct unless qualified, because the governing law imposes limits upon the evidence that the court may consider in determining whether a finding for the opponent would be reasonable.

No one questions the trial judge's authority to grant judgment when no evidence has been produced on a material issue, or when so little evidence has been produced by the party bearing the burden of proof that even considering only the evidence in its favor and believing all of it, no reasonable jury could find in its favor. Moreover, there seems to be general agreement that a judge should grant judgment when the only evidence in favor of the party with the burden of proof is incredible on its face—that is, it is incredible even in the absence of impeachment of the testifying witnesses or contradiction by other witnesses. For example, the jury cannot be allowed to base a verdict upon testimony by a witness that he inhabits two bodies or that she saw the event by the light of the sun rising in the west. This is not to say that the court can disregard evidence it disbelieves. Standard law is that a judgment as a matter of law motion must be decided by the court without weighing credibility and granting all reasonable inferences to the party opposing the motion. A witness who testifies to facts not inherently incredible must be given full weight. Even a convicted perjurer's testimony may not be discounted.

The typical situation is that the opponent of the motion has produced testimony that is not inherently incredible. In deciding whether to grant judgment, what evidence should the trial judge be allowed to consider? The judicial answers to this question can, if some variations are overlooked, be placed into three categories.

a. The Favorable–Evidence–Only Test

In determining whether a jury could reasonably find for the opponent of a judgment as a matter of law motion, the court should consider only the evidence favorable to the opponent, completely ignoring any unfavorable evidence.

This test gives the jury power to believe or disbelieve any witness (subject, of course, to the qualification that the jury may not believe a witness whose testimony is incredible on its face). For example, the jury may believe the testimony of a convicted perjurer even if it is contradicted by the testimony of 20 bishops. The testimony of the 20 bishops must be ignored by a judge ruling on the judgment as a matter of law motion because it is unfavorable to the opponent of the motion. Moreover, the jury may disbelieve the testimony of any witness, even if the witness

has not been impeached or contradicted. Therefore, under this test, a court could not grant judgment in favor of a party bearing the burden of proof, since the jury might disbelieve all of that party's witnesses and find itself unpersuaded.

This test gives the jury a great deal of power, yet does not completely destroy the function of the judgment as a matter of law. The court can still grant judgment on grounds that, even believing all the favorable testimony and ignoring all other testimony, a jury could not reasonably determine that the party with the burden of proof had established a case by a preponderance of the evidence.

Example:

Decedent is found dead under conditions of apparent suicide. Decedent's widow brings a civil action against the defendant, claiming that the defendant killed her husband. She produces the testimony of W that a month before decedent's death, W saw decedent defeat defendant in a fistfight. Defendant produces 20 witnesses who were present at the time of the alleged fight. The 20 witnesses all testify that no fight occurred.

In determining whether to grant a judgment as a matter of law under the favorable-evidence-only test, the court must accept W's testimony that the fight took place. There is nothing inherently incredible about a fistfight, and the testimony of the 20 opposing witnesses must be ignored. The judge should still grant judgment for the defendant, however, because the jury could not reasonably infer that defendant committed murder merely on the basis of testimony that defendant had an earlier fistfight with decedent.

Another way of describing the favorable-evidence-only test is to say that the jury has the power to believe or disbelieve the direct evidence testimony of any witness, but it must be reasonable in drawing inferences from circumstantial evidence.

b. The Qualified Favorable–Evidence Test

In deciding whether the jury could reasonably return a verdict in favor of the opponent of a judgment as a matter of law motion, the court should consider only (a) evidence favorable to the opponent, and (b) evidence unfavorable to the opponent that is not contradicted by direct evidence and that cannot reasonably be disbelieved. All other evidence must be disregarded.

This test still allows the jury to *believe* any testimony that is not inherently incredible; however, this test deprives the jury of the power to *disbelieve* whomever it pleases. The testimony of the convicted perjurer can still be accepted, even though contradicted by 20 bishops. The jury cannot disbelieve testimony that is not directly contradicted if it would be unreasonable to do so. Thus, this test permits granting judgment in favor of the party bearing the burden of proof.

Example:

P alleges in his complaint that D called him a murderer. D answers, denying that she made the statement and admitting all other allegations in the complaint. P has the burden of proof on whether the statement was made. P produces as witnesses 20 bishops who testify that they heard D make the statement. Their testimony is uncontradicted, unimpeached, and disinterested. D does not cross-examine the bishops and she rests without producing any evidence. P is entitled to judgment as a matter of law under the qualified favorable-evidence test.

Note that the qualified favorable-evidence test still gives the jury power to resolve contradictions in direct evidence. Thus, if D had taken the stand and denied making the statement, she would have been entitled to go to the jury despite the contrary testimony of 20 bishops.

Testimony can be contradicted either by direct evidence or by circumstantial evidence. If D takes the stand and denies making the statement, she has contradicted the bishops with direct evidence. Both the bishops and the defendant have testified about a fact that they claim to have perceived with their senses. In the following example, direct evidence is contradicted by circumstantial evidence.

Example:

Plaintiff and defendant have a collision in a traffic intersection. Twenty bishops testify that they were watching the traffic light in the intersection and it was red in plaintiff's direction. Their testimony is disinterested and unimpeached.

Plaintiff testifies that he was waiting for the light to change when he saw two cars in front of him start through the intersection. Plaintiff inferred that the light had changed from red to green and followed them, but does not claim that he actually saw the light change.

If believed, plaintiff's testimony supports a reasonable inference that the light had changed. Plaintiff has not, however, produced direct testimony that contradicts the bishops' testimony; plaintiff has contradicted the bishops with circumstantial evidence.

In the foregoing example, a belief in plaintiff's testimony is not logically inconsistent with belief in the bishops' testimony. Therefore, granting judgment would not deprive the jury of the power to believe the testimony of any witness; it would only deprive the jury of the power to disbelieve the bishops' testimony. Under the qualified favorable-evidence test, the trial judge would have power to grant judgment for defendant.

c. The All-the-Evidence Test

In deciding whether the jury could reasonably return a verdict in favor of the opponent of a judgment as a matter of law motion, the court should consider all the evidence, favorable or unfavorable, for both parties.

This test gives the trial judge power to resolve conflicts in direct testimony and to determine whether the jury could reasonably believe or disbelieve witnesses.

Example:

The only issue raised by the pleadings is whether defendant called plaintiff a murderer. Defendant has admitted all the other allegations of plaintiff's complaint. Twenty bishops testify that they heard defendant make the statement. Defendant denies making the statement. Under the all the evidence test, the trial judge could properly grant judgment as a matter of law against the defendant because the evidence is overwhelming and the jury could not reasonably believe her testimony over that of the 20 bishops.

The all-the-evidence test does not place the trial judge in the position of a juror. The judge is supposed to defer to the jury and grant judgment only when a jury verdict for the opposing party would be unreasonable.

Example:

The only issue raised by the pleadings is whether defendant called plaintiff a murderer. Defendant admitted all the other allegations of plaintiff's complaint.

Plaintiff testifies that defendant called him a murderer in the presence of third person T. Defendant denies making the statement, and T corroborates defendant's denial. The judge believes the defendant and T, yet recognizes that reasonable persons could differ about who was telling the truth. Under the all-the-evidence test, the judge should not grant judgment, since that would be weighing credibility.

The all-the-evidence test has been called the "set-aside" test, because courts adopting it have sometimes said that the judge should grant judgment if, looking at all the evidence, she would feel duty bound to set aside a verdict for the party opposing the motion for judgment as a matter of law. Linking the test to setting aside a contrary verdict, i.e., granting a new trial on the ground that the verdict is against the weight of the evidence, apparently allows the trial judge to resolve issues of credibility, at least to the extent of ruling that a reasonable jury could not believe a witness's testimony. Trial judges have this power when ruling on a motion for new trial, and so linking the judgment as a matter of law test gives them this power when ruling on a motion for judgment as a matter of law.

II. COMPUTER EXERCISE: CALI CIV 04

A. Introductory Note

This computer-aided exercise was written primarily to explore the three competing standards for judgment as a matter of law. The debate over the proper test to use to consider the evidence on such a motion continued in the federal courts–and state courts–for more than 50 years following the decision in *Wilkerson v. McCarthy*, 336 U.S. 53, 69 S. Ct. 413, 93 L.Ed. 497 (1949) [*see* II.B., *infra*]. The Supreme Court ended the debate for the federal courts in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150, 120 S. Ct. 2097, 2110, 147 L.Ed.2d 105, 121-22 (2000):

> Those decisions holding that review under Rule 50 should be limited to evidence favorable to the nonmovant appear to have their genesis in [*Wilkerson*]. * * * But subsequent decisions have clarified that [*Wilkerson*] was referring to the evidence to which the trial court should *give credence*, not to the evidence that the court should *review*. In the analogous context of summary judgment under Rule 56, we have stated that the court must review the record "taken as a whole." [Citation omitted.] And the standard for granting summary judgment "mirrors" the standard for judgment as a matter of law, such that "the inquiry under each is the same." [Citations omitted.] It therefore follows that, in entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record.

While the question of whether to use the favorable-evidence-only test, the qualified-favorable-evidence test, or the all-the-evidence test has been answered, the interpretations of the *Chamberlain*, *Wilkerson*, and *Simblest* opinions [*see* II.B, *infra*] required in this lesson remain useful as an exercise in reading of opinions, recognition of holding and dictum, and synthesis of cases.

B. Cases and Questions

Please read the following three federal cases on judgments as a matter of law (remember that these cases will refer

to directed verdict and JNOV instead) and answer the following questions before going to the computer terminal. Be prepared to give reasons for your answers.

1. What arguments can be made that in the *Chamberlain* case, the Supreme Court endorsed the all-the-evidence test? Examine the *Chamberlain* opinion carefully for language supporting or refuting the proposition that the Court endorsed the all-the-evidence ("set-aside") test, and be prepared to cite sections of the opinion containing such language.

2. What arguments can be made that the *Chamberlain* case is consistent with the favorable-evidence-only test or with the qualified favorable-evidence test?

3. Is the *Wilkerson* case consistent with the theory that the Supreme Court follows the all-the-evidence test?

4. Is the *Wilkerson* case consistent with the theory that the Supreme Court follows the favorable-evidence-only test?

5. Is the *Wilkerson* case consistent with the theory that the Supreme Court follows the qualified favorable-evidence test?

6. Is the *Simblest* case consistent with the theory that the Second Circuit had adopted the all-the-evidence test? The favorable-evidence-only test? The qualified favorable-evidence test?

PENNSYLVANIA RAILROAD CO. v. CHAMBERLAIN
Supreme Court of the United States, 1933.
288 U.S. 333, 53 S. Ct. 391, 77 L.Ed. 819.

[§ 1]

Mr. Justice Sutherland delivered the opinion of the Court.

This is an action brought by respondent against petitioner to recover for the death of a brakeman, alleged to have been caused by petitioner's negligence. The complaint alleges that the deceased, at the time of the accident resulting in his death, was assisting in the yard work of breaking up and making up trains and in the classifying and assorting of cars operating in interstate commerce; that in pursuance of such work, while riding a cut of cars, other cars ridden by fellow employees were negligently caused to be brought into violent contact with those upon which deceased was riding, with the result that he was thrown therefrom to the railroad track and run over by a car or cars, inflicting injuries from which he died.

[§ 2]

At the conclusion of the evidence, the trial court directed the jury to find a verdict in favor of petitioner. Judgment upon a verdict so found was reversed by the court of appeals. Judge Swan dissenting. 59 F.(2d) 986.

[§ 3]

That part of the yard in which the accident occurred contained a lead track and a large number of switching tracks branching therefrom. The lead track crossed a "hump," and the work of car distribution consisted of pushing a

train of cars by means of a locomotive to the top of the "hump," and then allowing the cars, in separate strings to descend by gravity, under the control of hand brakes, to their respective destinations in the various branch tracks. Deceased had charge of a string of two gondola cars, which he was piloting to track 14. Immediately ahead of him was a string of seven cars, and behind him a string of nine cars, both also destined for track 14. Soon after the cars ridden by deceased had passed to track 14, his body was found on that track some distance beyond the switch. He had evidently fallen onto the track and been run over by a car or cars.

[§ 4]

The case for respondent rests wholly upon the claim that the fall of deceased was caused by a violent collision of the string of nine cars with the string ridden by deceased. Three employees, riding the nine-car string, testified positively that no such collision occurred. They were corroborated by every other employee in a position to see, all testifying that there was no contact between the nine-car string and that of the deceased. The testimony of these witnesses, if believed, establishes beyond doubt that there was no collision between these two strings of cars, and that the nine-car string contributed in no way to the accident. The only witness who testified for the respondent was one Bainbridge; and it is upon his testimony alone that respondent's right to recover is sought to be upheld. His testimony is concisely stated, in its most favorable light for respondent, in the prevailing opinion below by Judge Learned Hand, as follows [p. 986]:

[§ 5]

"The plaintiff's only witness to the event, one Bainbridge, then employed by the road, stood close to the yardmaster's office, near the 'hump.' He professed to have paid little attention to what went on, but he did see the deceased riding at the rear of his cars, whose speed when they passed him he took to be about eight or ten miles. Shortly thereafter a second string passed which was shunted into another track and this was followed by the nine, which, according to the plaintiff's theory, collided with the deceased's. After the nine cars had passed at a somewhat greater speed than the deceased's, Bainbridge paid no more attention to either string for a while, but looked again when the deceased, who was still standing in his place, had passed the switch and onto the assorting track where he was bound. At that time his speed had been checked to about three miles, but the speed of the following nine cars had increased. They were just passing the switch, about four or five cars behind the deceased. Bainbridge looked away again and soon heard what he described as a 'loud crash,' not however an unusual event in a switching yard. Apparently this did not cause him at once to turn, but he did so shortly thereafter, and saw the two strings together, still moving, and the deceased no longer in sight. Later still his attention was attracted by shouts and he went to the spot and saw the deceased between the rails. Until he left to go to the accident, he had stood fifty feet to the north of the track where the accident happened, and about nine hundred feet from where the body was found."

[§ 6]

The court, although regarding Bainbridge's testimony as not only "somewhat suspicious in itself, but its contradiction … so manifold as to leave little doubt," held, nevertheless, that the question was one of fact depending upon the credibility of the witnesses, and that it was for the jury to determine, as between the one witness and the many, where the truth lay. The dissenting opinion of Judge Swan proceeds upon the theory that Bainbridge did not testify that in fact a collision had taken place, but inferred it because he heard a crash, and because thereafter the two strings of cars appeared to him to be moving together. It is correctly pointed out in

that opinion, however, that the crash might have come from elsewhere in the busy yard and that Bainbridge was in no position to see whether the two strings of cars were actually together; that Bainbridge repeatedly said he was paying no particular attention; and that his position was such, being 900 feet from the place where the body was found and less than 50 feet from the side of the track in question, that he necessarily saw the strings of cars at such an acute angle that it would be physically impossible even for an attentive observer to tell whether the forward end of the nine-car cut was actually in contact with the rear end of the two-car cut. The dissenting opinion further points out that all the witnesses who were in a position to see testified that there was no collision; that respondent's evidence was wholly circumstantial, and the inferences which might otherwise be drawn from it were shown to be utterly erroneous unless all of petitioner's witnesses were willful perjurers. "This is not a case," the opinion proceeds, "where direct testimony to an essential fact is contradicted by direct testimony of other witnesses, though even there is it conceded a judgment as a matter of law might be proper in some circumstances. Here, when all the testimony was in, the circumstantial evidence in support of negligence was thought by the trial judge to be so insubstantial and insufficient that it did not justify submission to the jury."

[§ 7]

We thus summarize and quote from the prevailing and dissenting opinions, because they present the divergent views to be considered in reaching a correct determination of the question involved. It, of course, is true, generally, that where there is a direct conflict of testimony upon a matter of fact, the question must be left to the jury to determine without regard to the number of witnesses upon either side. But here there really is no conflict in the testimony as to the facts. The witnesses for petitioner flatly testified that there was no collision between the nine-car and the two-car strings. Bainbridge did not say there was such a collision. What he said was that he heard a "loud crash," which did not cause him at once to turn, but that shortly thereafter he did turn and saw the two strings of cars moving together with the deceased no longer in sight; that there was nothing unusual about the crash of cars—it happened every day; that there was nothing about this crash to attract his attention except that it was extra loud; that he paid no attention to it; that it was not sufficient to attract his attention. The record shows that there was a continuous movement of cars over and down the "hump," which were distributed among a large number of branch tracks within the yard, and that any two strings of these cars moving upon the same track might have come together and caused the crash which Bainbridge heard. There is no direct evidence that *in fact* the crash was occasioned by a collision of the two strings in question; and it is perfectly clear that no such fact was brought to Bainbridge's attention as a perception of the physical sense of sight or of hearing. At most there was an inference to that effect drawn from observed facts which gave equal support to the opposite inference that the crash was occasioned by the coming together of other strings of cars entirely away from the scene of the accident, or of the two-car string ridden by deceased and the seven-car string immediately ahead of it.

[§ 8]

We, therefore, have a case belonging to that class of cases where proven facts give equal support to each of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover.

[§ 9]

The rule is succinctly stated in *Smith v. First National Bank in Westfield*, 99 Mass. 605, 611–612, 97 Am.Dec. 59, quoted in the *Des Moines National Bank* case, *supra*:

> "There being several inferences deducible from the facts which appear, and equally consistent with all those facts, the plaintiff has not maintained the proposition upon which alone he would be entitled to recover. There is strictly no evidence to warrant a jury in finding that the loss was occasioned by negligence and not by theft. When the evidence tends equally to sustain either of two inconsistent propositions, neither of them can be said to have been established by legitimate proof. A verdict in favor of the party bound to maintain one of those propositions against the other is necessarily wrong."

[§ 10]

That Bainbridge concluded from what he himself observed that the crash was due to a collision between the two strings of cars in question is sufficiently indicated by his statements. But this, of course, proves nothing, since it is not allowable for a witness to resolve the doubt as to which of two equally justifiable inferences shall be adopted by drawing a conclusion, which, if accepted, will result in a purely gratuitous award in favor of the party who has failed to sustain the burden of proof cast upon him by the law.

[§ 11]

And the desired inference is precluded for the further reason that respondent's right of recovery depends upon the existence of a particular fact which must be inferred from proven facts, and this is not permissible in the face of the positive and otherwise uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved, from which testimony it affirmatively appears that the fact sought to be inferred did not exist. This conclusion results from a consideration of many decisions…. A rebuttable inference of fact, as said by the court in the *Wabash Railroad* case, "must necessarily yield to credible evidence of the actual occurrence." And, as stated by the court in *George v. Mo. Pac. R.R. Co., supra,* "It is well settled that where plaintiff's case is based upon an inference or inferences, that the case must fail upon proof of undisputed facts inconsistent with such inferences." Compare *Fresh v. Gilson,* 16 Pet. 327, 330, 331, 10 L.Ed. 982. In *Southern Ry. Co. v. Walters, supra,* the negligence charged was failure to stop a train and flag a crossing before proceeding over it. The court concluded that the only support for the charge was an inference sought to be drawn from certain facts proved. In rejecting the inference, this court said [p. 194]:

[§ 12]

"It is argued that it may be inferred from the speed of the train when some of the witnesses observed it crossing other streets as well as Bond Avenue, and from a guess of the engineer as to the time required to get up such speed after a full stop, that none could have been made at Bond Avenue. But the argument amounts to mere speculation in view of the limited scope of the witnesses' observation, the down grade of the railway tracks at the point, and the time element involved. (Compare *Chicago, M. & St. P.R. Co. v. Coogan*, 271 U.S. 472, 46 S. Ct. 564, 70 L.Ed. 1041.) Five witnesses for defendant [employees] testified that a full stop was made and the crossing flagged, and that no one was hit by the rear of the tender, which was the front of the train.

[§ 13]

"An examination of the record requires the conclusion that the evidence on the issue whether the train was stopped

before crossing Bond Avenue was so insubstantial and insufficient that it did not justify a submission of that issue to the jury."

[§ 14]

Not only is Bainbridge's testimony considered as a whole suspicious, insubstantial and insufficient, but his statement that when he turned shortly after hearing the crash the two strings were moving together is simply incredible if he meant thereby to be understood as saying that he saw the two in contact; and if he meant by the words "moving together" simply that they were moving at the same time in the same direction but not in contact, the statement becomes immaterial. As we have already seen he was paying slight and only occasional attention to what was going on. The cars were eight or nine hundred feet from where he stood and moving almost directly away from him, his angle of vision being only 3°33¢ from a straight line. At that sharp angle and from that distance, near dusk of a misty evening (as the proof shows), the practical impossibility of the witness being able to see whether the front of the nine-car string was in contact with the back of the two-car string is apparent. And, certainly, in the light of these conditions, no verdict based upon a statement so unbelievable reasonably could be sustained as against the positive testimony to the contrary of unimpeached witnesses, all in a position to see, as this witness was not, the precise relation of the cars to one another. The fact that these witnesses were employees of the petitioner, under the circumstances here disclosed, does not impair this conclusion. *Chesapeake & Ohio Ry. v. Martin*, 283 U.S. 209, 216–220, 51 S. Ct. 453, 75 L.Ed. 983.

[§ 15]

We think, therefore, that the trial court was right in withdrawing the case from the jury. It repeatedly has been held by this court that before evidence may be left to the jury, "there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed." *Pleasants v. Fant*, 22 Wall. 116, 120, 121, 22 L.Ed. 780. And where the evidence is "so overwhelmingly on one side as to leave no room to doubt what the fact is, the court should give a peremptory instruction to the jury." *Gunning v. Cooley*, 281 U.S. 90, 94, 50 S. Ct. 231, 233, 74 L.Ed. 720; *Patton v. Texas & Pacific Railway Co.*, 179 U.S. 658, 660, 21 S. Ct. 275, 45 L.Ed. 361. The rule is settled for the federal courts, and for many of the state courts, that whenever in the trial of a civil case the evidence is clearly such that if a verdict were rendered for one of the parties the other would be entitled to a new trial, it is the duty of the judge to direct the jury to find according to the views of the court. Such a practice, this court has said, not only saves time and expense, but "gives scientific certainty to the law in its application to the facts and promotes the ends of justice." *Bowditch v. Boston*, 101 U.S. 16, 18, 25 L.Ed. 980; *Barrett v. Virginian Ry. Co.*, 250 U.S. 473, 476, 39 S. Ct. 540, 63 L.Ed. 1092, and cases cited; *Herbert v. Butler*, 97 U.S. 319, 320, 24 L.Ed. 958. The scintilla rule has been definitely and repeatedly rejected so far as the federal courts are concerned. *Schuylkill & D. Improvement & R. Company v. Munson*, 14 Wall. 442, 448, 20 L.Ed. 867; *Commissioners of Marion County v. Clark*, 94 U.S. 278, 284, 24 L.Ed. 59; *Small Co. v. Lamborn & Co.*, 267 U.S. 248, 254, 45 S. Ct. 300, 69 L.Ed. 597; *Gunning v. Cooley, supra; Ewing v. Goode, supra*, at pp. 443–444.

[§ 16]

Leaving out of consideration, then, the inference relied upon, the case for respondent is left without any substantial support in the evidence, and a verdict in her favor would have rested upon mere speculation and conjecture. This,

of course, is inadmissible. *C.M. & St. P. Ry. v. Coogan*, 271 U.S. 472, 478, 46 S. Ct. 564, 70 L.Ed. 1041; *Gulf, etc., R.R. v. Wells*, 275 U.S. 455, 459, 48 S. Ct. 151, 72 L.Ed. 370; *New York Central R. Co. v. Ambrose, supra; Stevens v. The White City, supra.*

[§ 17]

The judgment of the Circuit Court of Appeals is reversed and that of the District Court is affirmed.

Mr. Justice Stone and Mr. Justice Cardozo concur in the result.

WILKERSON v. MCCARTHY
Supreme Court of the United States, 1949
336 U.S. 53, 69 S. Ct. 413, 93 L.Ed. 497

[§ 1]

Mr. Justice Black delivered the opinion of the Court.

The petitioner, a railroad switchman, was injured while performing duties as an employee of respondents in their railroad coach yard at Denver, Colorado. He brought this action for damages under the Federal Employers' Liability Act.

[§ 2]

The complaint alleged that in the performance of his duties in the railroad yard it became necessary for him to walk over a wheel-pit on a narrow boardway, and that due to negligence of respondents, petitioner fell into the pit and suffered grievous personal injuries. The complaint further alleged that respondents had failed to furnish him a safe place to work in several detailed particulars, namely, that the pit boardway (1) was not firmly set, (2) was not securely attached, and (3) although only about 20 inches wide, the boardway had been permitted to become greasy, oily, and slippery, thereby causing petitioner to lose his balance, slip, and fall into the pit.

[§ 3]

The respondents in their answer to this complaint admitted the existence of the pit and petitioner's injuries as a result of falling into it. They denied, however, that the injury resulted from the railroad's negligence, charging that plaintiff's own negligence was the sole proximate cause of his injuries. On motion of the railroad the trial judge directed the jury to return a verdict in its favor. The Supreme Court of Utah affirmed, one judge dissenting.

[§ 4]

The opinion of the Utah Supreme Court strongly indicated, as the dissenting judge pointed out, that its finding of an absence of negligence on the part of the railroad rested on that court's independent resolution of conflicting testimony. This Court has previously held in many cases that where jury trials are required, courts must submit the issues of negligence to a jury if evidence might justify a finding either way on those issues. See, e.g., *Lavender v. Kurn*, 327 U.S. 645, 652, 653, 66 S. Ct. 740, 743, 744, 90 L.Ed. 916; *Bailey v. Central Vermont Ry.*, 319 U.S.

350, 354, 63 S. Ct. 1062, 1064, 1065, 87 L.Ed. 1444; *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 68, 63 S. Ct. 444, 451, 452, 87 L.Ed. 610, 143 A.L.R. 967; and see *Brady v. Southern R. Co.*, 320 U.S. 476, 479, 64 S. Ct. 232, 234, 88 L.Ed. 239. It was because of the importance of preserving for litigants in FELA cases their right to a jury trial that we granted certiorari in this case.

[§ 5]

The evidence showed the following facts without dispute:

[Petitioner fell into the railroad's pit while attempting to cross it on a "permanent board" that straddled it. For three years, all railroad employees had used the "permanent board" as a walkway. However, three months before petitioner's fall, the railroad had placed "safety chains" around the pit. Petitioner's position was that the railroad's employees customarily used the board as a walkway despite the safety chains, and that the railroad's failure to prevent this use constituted negligence. The railroad's position was that only the "pit workers" (who did not include plaintiff) used the permanent board after the safety chains were in place.]

Neither before nor after the chains were put up had the railroad ever forbidden pit workers or any other workers to walk across the pit on the "permanent board." Neither written rules nor spoken instructions had forbidden any employees to use the board. And witnesses for both sides testified that pit workers were supposed to, and did, continue to use the board as a walkway after the chains and posts were installed. The Utah Supreme Court nevertheless held that erection of the chain and post enclosure was itself the equivalent of company orders that no employees other than pit workers should walk across the permanent board when the chains were up. And the Utah Supreme Court also concluded that there was insufficient evidence to authorize a jury finding that employees generally, as well as pit workers, had continued their long-standing and open practice of crossing the pit on the permanent board between the time the chains were put up and the time petitioner was injured.

[§ 6]

It is the established rule that in passing upon whether there is sufficient evidence to submit an issue to the jury we need look only to the evidence and reasonable inferences which tend to support the case of a litigant against whom a peremptory instruction has been given. Viewing the evidence here in that way it was sufficient to show the following:

[§ 7]

Switchmen and other employees, just as pit workers, continued to use the permanent board to walk across the pit after the chains were put up as they had used it before. Petitioner and another witness employed on work around the pit, testified positively that such practice continued. It is true that witnesses for the respondents testified that after the chains were put up, only the car men in removing and applying wheels used the board "to walk from one side of the pit to the other…." Thus the conflict as to continued use of the board as a walkway after erection of the chains was whether the pit workers alone continued to use it as a walkway, or whether employees generally so used it. While this left only a very narrow conflict in the evidence, it was for the jury, not the court, to resolve the conflict.

[§ 8]

It was only as a result of its inappropriate resolution of this conflicting evidence that the State Supreme Court affirmed the action of the trial court in directing the verdict. Following its determination of fact, the Utah Supreme Court acted on the assumption that the respondents "had no knowledge, actual or constructive, that switchmen were using the plank to carry out their tasks," and the railroad had "no reason to suspect" that employees generally would so use the walkway. From this, the Court went on to say that respondents "were only required to keep the board safe for the purposes of the pit crewmen … and not for all the employees in the yard." But the court emphasized that under different facts, maintenance of "a 22–inch board for a walkway, which is almost certain to become greasy or oily, constitutes negligence." And under the evidence in this case as to the board, grease and oil, the court added: "It must be conceded that if defendants knew or were charged with knowledge that switchmen and other workmen generally in the yard were habitually using the plank as a walkway in the manner claimed by plaintiff, then the safety enclosure might be entirely inadequate, and a jury question would have been presented on the condition of the board and the adequacy of the enclosure."

[§ 9]

We agree with this last quoted statement of the Utah court, and since there was evidence to support a jury finding that employees generally had habitually used the board as a walkway, it was error for the trial judge to grant judgment in favor of respondents.

[Concurring and dissenting opinions omitted]

SIMBLEST v. MAYNARD
United States Court of Appeals, Second Circuit, 1970
427 F.2d 1

Timbers, District Judge:

[§ 1]

We have before us another instance of Vermont justice—this time at the hands of a federal trial judge who, correctly applying the law, set aside a $17,125 plaintiff's verdict and entered judgment n.o.v. for defendant, Rule 50(b), Fed. R. Civ. P., in a diversity negligence action arising out of an intersection collision between a passenger vehicle driven by plaintiff and a fire engine driven by defendant in Burlington, Vermont, during the electric power blackout which left most of New England in darkness on the night of November 9, 1965. We affirm.

I.

[§ 2]

Plaintiff, a citizen and resident of New Hampshire, was 66 years of age at the time of the accident. He was a distributor of reference books and had been in Burlington on business for three days prior to the accident. He was an experienced driver, having driven an average of some 54,000 miles per year since 1922. He was thoroughly familiar with the intersection in question. His eyesight was excellent and his hearing was very good.

[§ 3]

Defendant, a citizen of Vermont, had resided in Burlington for 44 years. He had been a full time fireman with the Burlington Fire Department for 17 years. He was assigned to and regularly drove the 500 gallon pumper which he was driving at the time of the accident. He was thoroughly familiar with the intersection in question.

[§ 4]

The accident occurred at the intersection of Main Street (U.S. Route 2), which runs generally east and west, and South Willard Street (U.S. Routes 2 and 7), which runs generally north and south. The neighborhood is partly business, partly residential. At approximately the center of the intersection there was an overhead electrical traffic control signal designed to exhibit the usual red and green lights.

[§ 5]

At the time of the accident, approximately 5:27 P.M., it was dark, traffic was light and the weather was clear. Plaintiff was driving his 1964 Chrysler station wagon in a westerly direction on Main Street, approaching the intersection. Defendant was driving the fire engine, in response to a fire alarm, in a southerly direction on South Willard Street, also approaching the intersection.

[§ 6]

Plaintiff testified that the traffic light was green in his favor as he approached and entered the intersection; but that when he had driven part way through the intersection the power failure extinguished all lights within his range of view, including the traffic light. All other witnesses, for both plaintiff and defendant, testified that the power failure occurred at least 10 to 15 minutes prior to the accident; and there was no evidence, except plaintiff's testimony, that the traffic light was operating at the time of the accident.

[§ 7]

Plaintiff also testified that his speed was 12 to 15 miles per hour as he approached the intersection. He did not look to his right *before* he entered the intersection; after looking to his left, to the front and to the rear (presumably through a rear view mirror), he looked to his right for the first time *when he was one-half to three-quarters of the way through the intersection* and then for the first time saw the fire engine within 12 feet of him. He testified that he did not hear the fire engine's siren or see the flashing lights or any other lights on the fire engine.

[§ 8]

Plaintiff further testified that his view to the north (his right) as he entered the intersection was obstructed by various objects, including traffic signs, trees on Main Street and a Chamber of Commerce information booth on Main Street east of the intersection. All of the evidence, including the photographs of the intersection, demonstrates that, despite some obstruction of plaintiff's view to the north, he could have seen the approaching fire engine if he had looked between the obstructions and if he had looked to the north after he passed the information booth. One of plaintiff's own witnesses, Kathleen Burgess, testified that "maybe five to ten seconds previous to when he was struck he might have seen the fire truck," referring to the interval of time after plaintiff passed the information booth until the collision.

[§ 9]

Defendant testified that, accompanied by Captain Fortin in the front seat, he drove the fire engine from the Mansfield Avenue Fire Station, seven and one-half blocks away from the scene of the accident, in the direction of the fire on Maple Street. While driving in a southerly direction on South Willard Street and approaching the intersection with Main Street, the following warning devices were in operation on the fire engine: the penetrator making a wailing sound; the usual fire siren; a flashing red light attached to the dome of the fire engine; two red lights on either side of the cab; and the usual headlights. Defendant saw plaintiff's car east of the information booth and next saw it as it entered the intersection. Defendant testified that he was traveling 20 to 25 miles per hour as he approached the intersection; he slowed down, applied his brakes and turned the fire engine to his right, in a westerly direction, in an attempt to avoid the collision. He estimated that he was traveling 15 to 20 miles per hour at the time of impact. A police investigation found a 15 foot skid mark made by the fire engine but no skid marks made by plaintiff's car.

[§ 10]

The fire engine struck plaintiff's car on the right side, in the area of the fender and front door. Plaintiff's head struck the post on the left side of his car, causing him to lose consciousness for about a minute. He claims that this injury aggravated a chronic pre-existing degenerative arthritic condition of the spine.

[§ 11]

Other witnesses who virtually bracketed the intersection from different vantage points were called. Frank Valz, called by plaintiff, was looking out a window in a building on the northeast corner of the intersection; he saw the fire engine when it was a block north of the intersection; he heard its siren and saw its flashing red lights. Kathleen Burgess, another of plaintiff's witnesses (referred to above), was driving in a northerly direction on South Willard Street, just south of the intersection; seeing the fire engine when it was a block north of the intersection, she pulled over to the curb and stopped; she saw its flashing lights, but did not hear its siren. Holland Smith and Irene Longe, both called by defendant, were in the building at the southwest corner of the intersection; as the fire engine approached the intersection, they each heard its warning signals and saw its flashing lights in operation.

[§ 12]

Defendant's motions for a judgment as a matter of law at the close of plaintiff's case and at the close of all the evidence having been denied and the jury having returned a plaintiff's verdict, defendant moved to set aside the verdict and the judgment entered thereon and for entry of judgment n.o.v. in accordance with his motion for a judgment as a matter of law. Chief Judge Leddy filed a written opinion granting defendant's motion.

[§ 13]

On appeal plaintiff urges that the district court erred in granting defendant's motion for judgment n.o.v. or, in the alternative, in declining to charge the jury on the doctrine of last clear chance. We affirm both rulings of the district court.

II.

[§ 14]

In determining whether the motion for judgment n.o.v. should have been granted, a threshold question is presented as to the correct standard to be applied. This standard has been expressed in various ways. Simply stated, it is whether the evidence is such that, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable men could have reached. See, *e.g., Brady v. Southern Railway Company*, 320 U.S. 476, 479–80 (1943); *O'Connor v. Pennsylvania Railroad Company*, 308 F.2d 911, 914–15 (2 Cir.1962). *See also* 5 Moore's Federal Practice ¶ 50.02[1], at 2320–23 (2d Ed.1968); Wright, Law of Federal Courts § 95, at 425 (2d Ed.1970). On a motion for judgment n.o.v. the evidence must be viewed in the light most favorable to the party against whom the motion is made and he must be given the benefit of all reasonable inferences which may be drawn in his favor from that evidence. *O'Connor v. Pennsylvania Railroad Company*, *supra*, at 914–15; 5 Moore, *supra*, at 2325; Wright, *supra*, at 425.

[§ 15]

We acknowledge that it has not been settled in a diversity action whether, in considering the evidence in the light most favorable to the party against whom the motion is made, the court may consider all the evidence or only the evidence favorable to such party and the uncontradicted, unimpeached evidence unfavorable to him. Under Vermont law, all the evidence may be considered. *Kremer v. Fortin*, 119 Vt. 1, 117 A.2d 245 (1955) (intersection collision between fire engine and passenger car). Plaintiff here urges that under the federal standard only evidence favorable to him should have been considered, citing *Wilkerson v. McCarthy*, 336 U.S. 53, 57 (1949). As plaintiff reads that case, the court below should not have considered anything else, not even the uncontradicted, unimpeached evidence unfavorable to him. However, we are committed to a contrary view in a diversity case. *O'Connor v. Pennsylvania Railroad Company*, *supra.*

[§ 16]

The Supreme Court at least twice has declined to decide whether the state or federal standard as to the sufficiency of the evidence is controlling on such motions in diversity cases. *Mercer v. Theriot*, 377 U.S. 152, 156 (1964) (per curiam); *Dick v. New York Life Insurance Company*, 359 U.S. 437, 444–45 (1959). Our Court likewise has declined to decide this issue in recent cases. *Mull v. Ford Motor Company*, 368 F.2d 713, 716 n. 4 (2 Cir.1966); *Hooks v. New York Central Railroad Company*, 327 F.2d 259, 261 n. 2 (2 Cir.1964); *Evans v. S.J. Groves & Sons Company*, 315 F.2d 335, 342 n. 2 (2 Cir.1963). *See* 5 Moore, *supra*, at 2347–50.

[§§ 17 & 18]

Our careful review of the record in the instant case leaves us with the firm conviction that, under either the Vermont standard or the more restrictive federal standard, plaintiff was contributorily negligent as a matter of law; and that Chief Judge Leddy correctly set aside the verdict and entered judgment for defendant n.o.v. *O'Connor v. Pennsylvania Railroad Company*, *supra*, at 914, *Presser Royalty Company v. Chase Manhattan Bank*, 272 F.2d 838, 840 (2 Cir.1959).

[§ 19]

Under the Vermont standard which permits all the evidence to be considered, Kremer v. Fortin, *supra*, plaintiff was so clearly guilty of contributory negligence that no further dilation is required.

[§ 20]

Under the more restrictive federal standard—i.e., considering only the evidence favorable to plaintiff and the uncontradicted, unimpeached evidence unfavorable to him—while a closer question is presented than under the Vermont standard, we nevertheless hold that plaintiff was guilty of contributory negligence as a matter of law.

[§ 21]

In our view, applying the federal standard, the critical issue in the case is whether the fire engine was sounding a siren or displaying a red light as it approached the intersection immediately before the collision. Upon this critical issue, Chief Judge Leddy accurately and succinctly summarized the evidence as follows:

> "All witnesses to the accident, except the plaintiff, testified that the fire truck was sounding a siren or displaying a flashing red light. All of the witnesses except Miss Burgess and the plaintiff testified that the fire truck was sounding its siren and displaying a flashing red light."

[§ 22]

The reason such evidence is critical is that under Vermont law, 23 V.S.A. § 1033, upon the approach of a fire department vehicle which is sounding a siren or displaying a red light, or both, all other vehicles are required to pull over to the right lane of traffic and come to a complete stop until the emergency vehicle has passed. Since the emergency provision of this statute supersedes the general right of way statute regarding intersections controlled by traffic lights, 23 V.S.A. § 1054, the lone testimony of plaintiff that the traffic light was green in his favor as he approached and entered the intersection is of no moment. And since the emergency provision of 23 V.S.A. § 1033 becomes operative if *either* the siren is sounding *or* a red light is displayed on an approaching fire engine, we focus upon plaintiff's own testimony that he did not see the fire engine's flashing light, all other witnesses having testified that the red light was flashing.

[§ 23]

As stated above, plaintiff testified that he first saw the fire engine when he was one-half to three-quarters of the way through the intersection and when the fire engine was within 12 feet of his car. At the speed at which the fire engine was traveling, plaintiff had approximately one-third of a second in which to observe the fire engine prior to the collision. Accepting plaintiff's testimony that his eyesight was excellent, and assuming that the fire engine's flashing red light was revolving as rapidly as 60 revolutions per minute, plaintiff's one-third of a second observation does not support an inference that the light was not operating, much less does it constitute competent direct evidence to that effect. Opportunity to observe is a necessary ingredient of the competency of eyewitness evidence. Plaintiff's opportunity to observe, accepting his own testimony, simply was too short for his testimony on the operation of the light to be of any probative value whatsoever.

[§ 24]

Plaintiff's testimony that he did not see the fire engine's flashing red light, in the teeth of the proven physical facts,

we hold is tantamount to no proof at all on that issue. O'Connor v. Pennsylvania Railroad Company, *supra*, at 915. As one commentator has put it, " … the question of the total absence of proof quickly merges into the question whether the proof adduced is so insignificant as to be treated as the equivalent of the absence of proof." 5 Moore, *supra*, at 2320. If plaintiff had testified that he had not looked to his right at all, he of course would have been guilty of contributory negligence as a matter of law. We hold that his testimony in fact was the equivalent of his saying that he did not look at all.

[§ 25]

Chief Judge Leddy concluded that plaintiff was guilty of contributory negligence as a matter of law: accordingly, he set aside the verdict and entered judgment n.o.v. for defendant. We agree.

[Discussion of last clear chance doctrine omitted]

Affirmed.

Having studied these three opinions and answered the questions immediately preceeding the opinions, you are ready to go to the computer to work through CALI CIV 04: Judgments as a Matter of Law. The estimated completion time for CALI CIV 04 is two hours, although this exercise can be divided into segments to be completed in separate sittings.

6.

Exercise Eleven - Preclusion

I. INTRODUCTION

A. Overview

Preclusion can be one of the most analytically difficult areas of civil procedure. The basic doctrines of preclusion are relatively straightforward, but in the application of concrete situations to those doctrines lies the difficulty. One can easily say the balance of the entire claim is precluded, but what is the full extent of the claim? One can easily say that only an issue necessary to the result is precluded, but when is an issue necessary? This exercise explores these concepts.

The term preclusion is an umbrella for the related series of doctrines that deal with deciding when a court will bar litigation of a claim or issue because that claim or issue has already been decided in a previous action. This entire area of the law comes to us from common law decisions. It is not treated in the Federal Rules of Civil Procedure.

Working with the common law decisions in preclusion is made more difficult because terminology in the area is not uniform. Courts and commentators can and do disagree, for example, on the meaning of "res judicata." The majority use the term to apply only to preclusion of entire claims, but the Restatement (Second) of Judgments uses it more broadly to apply also to preclusion of issues. Beyond these disagreements, some courts simply misuse the terms. Accordingly, our first order of business is to explain the meaning of the many terms in this area as they are used in this exercise.

To avoid this dispute over the scope of res judicata, we will use terms of clear meaning: *claim preclusion* and *issue preclusion*. Claim preclusion bars claims; it is claim wide. Issue preclusion bars issues; it is issue wide.

Both require two lawsuits—neither applies to a direct attack on a judgment in the same proceeding. A judgment in the first lawsuit is asserted to preclude all or part of the second lawsuit. Preclusion does not operate within a single lawsuit. A motion to vacate a judgment cannot be defeated by application of preclusion.

Claim preclusion, or what most courts and commentators would call res judicata, provides that a final, valid judgment on the merits will prevent parties (and those in privity with them) from relitigating the entire claim, *i.e.*, all issues that were or should have been litigated, in a second action. Typically, a plaintiff will have split the claim,

asserting only part of it in the first suit. The plaintiff may bring a second suit on an additional theory of recovery or for additional damages. Even though never litigated, these additional theories or damages are precluded. Should the plaintiff have won the first suit, the additional matters are sometimes said to have *merged* into the first judgment. Should the plaintiff have lost the first suit, the additional matters might be said to be *barred* by the first judgment. Some might therefore refer to claim preclusion as merger and bar. Claim preclusion covers the entire claim.

Issue preclusion, or what many would call collateral estoppel, provides that a final, valid judgment on the merits will prevent parties (and those in privity with them) from relitigating an issue that was actually litigated and necessary to the prior judgment should the same issue arise in a different claim. For example, A sues B for negligence. A receives a judgment after trial. B then sues A for negligence in the same incident. B will be precluded from relitigating the issue of her negligence (and will therefore lose on summary judgment in a contributory negligence state). Issue preclusion covers only individual issues.

Both of these doctrines will be developed in more detail in the following sections of this introductory essay, but first we mention two doctrines that are related, yet distinct. *Law of the case* works within a single case. It provides that once an issue is decided by an appellate court, the decision will be binding on the lower court on remand; it will also be binding through self-restraint by the appellate court should the case return on a second appeal. *Stare decisis*, or precedent, applies the result in a case to a second, factually-similar case. The doctrine is based in principles of stability and consistency, and attempts to ensure that like-situated litigants are treated alike. While preclusion doctrines require the same parties and are binding even in different jurisdictions, a precedent will be applied to different parties but will be treated as only persuasive rather than binding in different jurisdictions.

B. Policy

Preclusion is supported by policies protecting both private and public interests.

Policies protecting private litigants from being "twice vexed" by the same claim are strong. First and foremost, the prevailing party has a definite interest in the stability of the judgment. This means the party can rely on a decision, such as ownership of property, in planning for the future. Beyond this consideration, litigation is always a burden, financially and emotionally; second litigation of the same matter is an additional burden. Preventing relitigation also serves the end of halting a potential means of harassment of a person.

Public policies served by preclusion are equally or more weighty. Preclusion is a necessity so that the judgment of a court is not a mere empty gesture. The state has a definite interest in the end of litigation, not only to protect its judgments but also to conserve finite judicial resources. This promotes efficiency in a court system, and makes room for the court to hear other parties' disputes. When litigants understand that the court will apply preclusion, the litigation will have an end. Persons other than the parties will also be able to rely on judgments.

At the same time, promotion of these policies comes at a price. The second claim or issue is precluded no matter what its merit. The court may even be convinced that the first judgment was wrong. It is still preclusive. "Res judicata reflects the policy that sometimes it is more important that a judgment be stable than that it be correct." John H. Friedenthal, Mary Kay Kane & Arthur R. Miller, *Civil Procedure* § 14.3, at 655 (4th ed. 2005).

C. Affirmative Defense

Claim preclusion and issue preclusion are affirmative defenses, enumerated in Federal Rule 8(c)(1). Consequently, they must be pleaded or they will be lost. The court will not likely raise the defense on its own initiative. A party might also waive its right to assert a preclusion defense by actions explicit or implicit in the first litigation.

II. THE PRECLUSION DOCTRINES

A. Claim Preclusion

Claim preclusion provides that a final, valid judgment on the merits prevents relitigation of the entire claim, including all matters that were or should have been litigated, by the same parties, plus others in privity with them. The constituent elements of claim preclusion are the following:

1) a final, valid judgment on the merits;

2) the same parties, plus others in privity with them; and

3) the entire claim, including all matters that were or should have been litigated.

We briefly examine each of these three elements in turn.

1. Final, Valid Judgment on the Merits

All courts agree that claim preclusion requires a final, valid judgment. To be valid, a judgment must have been reached by a court with proper subject matter and personal jurisdiction. The judgment is valid when the court had jurisdiction, even though the result of the case may be thought erroneous. To be final, the court must have completed "all steps in the adjudication * * * short of execution." *Restatement (Second) of Judgments* § 13 (1982). Consequently, a judgment is final, for preclusion purposes, even though it remains unexecuted. More importantly, most courts hold a judgment of a trial court final even though the losing party takes an appeal.

Disagreement among courts and commentators is encountered when the element of a final, valid judgment is expanded to include "on the merits." *See generally* John H. Friedenthal, Mary Kay Kane & Arthur R. Miller, *Civil Procedure* § 14.7 (4th ed. 2005). Most would agree that the judgment must have been on the merits to support claim preclusion, although agreement with that proposition is not universal. The problem arises in the context of a pretrial dismissal of a claim. While a dismissal for lack of jurisdiction certainly is not on the merits, a dismissal for failure to state a claim is treated as on the merits by most courts. While almost all courts agree that a default judgment or a consent judgment can support claim preclusion, they disagree whether voluntary dismissal or involuntary dismissal for rule violation can support claim preclusion. For example, is claim preclusion supported by involuntary dismissal under Federal Rule 41(b) for failure to prosecute? Such a result would appear to have nothing to do with the merits, yet the rule itself provides otherwise:

> If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule–except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19–operates as an adjudication on the merits.

Fed. R. Civ. P. 41(b). Such problems have prompted some commentators to eliminate the requirement that the judgment be "on the merits." Every court and commentator does agree that a judgment reached after trial, summary judgment, or judgment as a matter of law is on the merits.

2. Same Parties and Others in Privity

A judgment will not be preclusive unless the parties in the second suit are identical to, or are in privity with, the parties in the first suit. Any stranger to the first litigation cannot be bound by it. Two suits with different parties may qualify for issue preclusion, but not for claim preclusion. Little difficulty is presented in determining whether the same parties are involved; somewhat more difficulty is presented in determining privity.

The answer historically has been that people were in privity only when they acquired the same interest that had been litigated in the first suit, i.e., the person was a successor in interest to a party. Typically, the person might obtain the interest by inheritance, or by assignment. Over the years, courts have extended the concept of privity into other areas. A person who actually controlled the first suit is in privity with the party, as when an insurance company provides the defense for a policyholder who is the named party. Privity will be found between legal representatives and the people they represent, such as guardian and ward, trustee and beneficiary, and the like. Commercial relationships may also support a finding of privity, such as employer and employee. Some commentators even go so far as to say that privity has been so expansively interpreted that it now has become only a verbal symbol for any type of relationship that a court will use to bind a nonparty to a judgment.

One must keep in mind that, even though expanded over the years, privity remains narrow. Persons similarly situated or of like interests with parties are not in privity with them. All instances of persons in privity involve a legal relationship.

3. Same Claim Barred, Including All Issues That Were or Should Have Been Litigated

The preclusive effect covers the entire claim, including not only issues that were litigated but also all issues that should have been litigated. A plaintiff who sues on only one of two available theories of recovery will be precluded from later proceeding on the other theory. The preclusion might be called merger or bar, depending on whether plaintiff won or lost the first action. The same can be said for a plaintiff who seeks damages in the first action, and sues again for additional damages in a second action. Even though plaintiff legitimately discovers additional, unanticipated damages, he will be precluded.

Since the same claim is precluded, the question becomes when the same claim is presented, or how expansively the claim in the first suit will be defined.

Note first that we use the word "claim" instead of the phrase "cause of action." While the cause of action was important at common law, and remains of importance in the minority of American jurisdictions that are code states, it has been rendered obsolete in federal courts and the states that have patterned their rules after the Federal Rules of Civil Procedure. Accordingly, we refer only to claim.

Having said that, we also note that some states choose to define claims broadly to encourage joinder and discourage multiple litigation. Other states choose to define claims rather narrowly out of concern for the perceived harshness of preclusion.

What test can be used to define the limits of a claim? Some courts look at whether the same evidence would be used in both suits. Let us suppose that B is employed by A. A fires B and in the course of the exit interview, becomes agitated and strikes B in the face. B sues A for race discrimination in the firing and the case proceeds to judgment. In a second action, B sues A for breach of contract and battery. The breach of contract theory would be supported by the same evidence as the discrimination theory—the contract, evaluations, etc.—so would be part of the same claim. The battery would be supported by completely different evidence—the striking, etc.—so would be a different claim and preclusion would not apply.

Other courts attempt to determine whether the second action would have the effect of destroying the first judgment. Using the same hypothetical of A firing B, one would expect that neither theory would be part of the same claim: no matter what the result on the discrimination action, a later decision for or against breach of contract or for or against battery would not destroy the first judgment.

Probably the test most commonly used by courts wishing to narrow the effect of claim preclusion asks whether the same primary right was violated by the same primary wrong. This is known as the primary right-primary wrong test. In the above hypothetical of A firing B, each of the separate theories would be a primary right and a primary wrong, so neither of the other two theories would be precluded. Courts adopting this test would likely call the theories causes of action. Similarly, an auto accident might produce both personal injury and property damage to a driver. Under the right-wrong test, the right of not having personal injury inflicted matches the wrong of not inflicting personal injury on another. The property damage is a separate matching of right-wrong, and so a different claim. Or, a theory of restitution would be considered different from a theory of damages for breach of the same contract.

Today, many courts have abandoned these efforts in favor of a transactional test. This test refuses to define a claim through narrow legal theories, and instead determines the scope of a claim by the transaction, *i.e.*, the facts, presented. The transactional approach looks to what a lay person would expect to be included in a single litigation and fits perfectly into the scheme of the Federal Rules of Civil Procedure. The transactional approach produces this rule:

> (1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rule of merger or bar * * * the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.

> (2) What factual grouping constitutes a "transaction," and what groupings constitute a "series," are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

Restatement (Second) of Judgments § 24 (1982).

What matters, therefore, is what theories or damages were sufficiently factually related that they could have been brought in the first suit. Should plaintiff have omitted theories of recovery then available, plaintiff has split theories and will be subject to claim preclusion. Should plaintiff have omitted elements of damages that could have been brought in the first suit, she has split damages, and will be subject to claim preclusion.

This transactional test for a claim produces different results in the hypotheticals considered above. Consider

first the firing of B by A. B was fired only once, and was punched during the course of the firing. That is one grouping of facts, only one transaction, and therefore one claim. Plaintiff B cannot split it into two actions, and claim preclusion will apply. The breach of contract and the battery theories will be barred or merged into the first judgment. Similarly, one auto accident produces one claim, including all types of damages flowing from it, so a second action on property damage would be precluded by the first judgment on personal injury. One contract produces one claim, no matter whether the theory is restitution or damages.

The transactional test gives broad scope to res judicata. It gives full effect to the policies supporting the doctrine. *See* I.B, *supra*. Exceptions exist when claim preclusion will not prevent splitting a claim. *See* II.C, *infra*.

B. Issue Preclusion

While claim preclusion covers the entire claim, issue preclusion prevents relitigation of an individual issue. Issue preclusion provides that a final valid judgment prevents the same parties, plus others in privity with them, from relitigation in another claim of issues actually litigated and necessarily decided by that judgment, unless unfairness would result. "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." *Restatement (Second) of Judgments* § 27 (1982). The constituent elements of issue preclusion (collateral estoppel) are the following:

1) a final, valid judgment;

2) the same parties, plus others in privity with them;

3) an identical issue in the new claim;

4) the issue was actually litigated;

5) the issue was necessary to the judgment; and

6) no unfairness would result.

We briefly examine each of these six elements in turn.

1. Final, Valid Judgment on the Merits

As with claim preclusion [*see* II.B.1, *supra*] the first requirement for issue preclusion is a final, valid judgment. The court must have had jurisdiction, and the judgment must be final except for execution or appeal.

The requirement of a judgment to support issue preclusion is both narrower and broader than for claim preclusion, however. It is narrower in that a default judgment or a consent judgment cannot support issue preclusion because neither was litigated. It is broader in that issues estopped need not involve the merits of the case. For example, plaintiff sues defendant in a distant state. Defendant appears and contests personal jurisdiction. Defendant loses the jurisdictional challenge and does not fight the merits, allowing plaintiff to obtain a default judgment. Plaintiff then sues in defendant's home state to enforce the judgment. This is treated as a different claim: the first claim is on the underlying transaction, and the second is on the foreign judgment. Defendant will be precluded from

relitigating the issue of personal jurisdiction because it was actually litigated and decided, even though it did not involve the merits. On the other hand, should defendant have ignored the process from the distant court, it could litigate the issue in the home state because the issue would never have been litigated.

2. Same Parties and Those in Privity

Traditionally, issue preclusion has required the same parties, or privies, in both actions; this requirement was the same as claim preclusion [*see* II.A.2, *supra*]. The reason a nonparty cannot be bound by a judgment in which it did not participate is this would violate due process. The reason is more difficult to discover when a party to the first action is to be bound by a nonparty to the first action. Certainly, the bound party had its day in court, so due process is not offended. What then prevents binding a party by a nonparty to the first action?

Historically, the doctrine of *mutuality* was thought to require the identical parties in both suits. The doctrine was based on fairness, *i.e.*, any party seeking to take advantage of a favorable result in the first case must have been at risk of an unfavorable result in the same case. Accordingly, when the first suit was between A and B, the second must also be between A and B; a second suit between A and C would not serve for issue preclusion.

The doctrine of mutuality began to break down in the states in the early 1940s. Today, although some states cling to mutuality, most states and the federal courts have abandoned mutuality in favor of ruling that issue preclusion may bind a person who was a party to the first action, even though the opposing party in that action was different from the opposing party in the second action. The person to be precluded has had a day in court. Of course, due process still prevents a nonparty to the first action from being bound. In a simple example, when the first action is between A and B, and the second action is between A and C, then A may be precluded in the second action. C, as a nonparty to the first action, may not be bound.

Nonmutual issue preclusion can work in two situations: defensive collateral estoppel and offensive collateral estoppel. The policies behind the two are quite different.

Defensive collateral estoppel would apply in this situation. A sues B for patent infringement. Following full litigation, the court adjudges the patent invalid. A then sues C for infringement of the same patent. C pleads collateral estoppel against A on the issue of the validity of the patent. C is using collateral estoppel defensively, to defeat plaintiff's claim. *See Blonder–Tongue Labs., Inc. v. University of Illinois Found.*, 402 U.S. 313, 91 S. Ct. 1434, 28 L.Ed.2d 788 (1971). Similarly, a plaintiff who sues the employer (master) for a car accident when the employee (servant) was driving will be collaterally estopped on the issue of the employee's negligence by an unfavorable judgment in the first action. Most courts recognize nonmutual defensive collateral estoppel.

The policies behind the doctrine are strong. Preventing relitigation of an issue litigated and decided against a plaintiff promotes stability of judgments, economy of judicial resources, and prevention of inconsistent results, and also protects the second defendant from harassment by the plaintiff.

A more questionable situation is presented in offensive collateral estoppel, a situation in which plaintiff defeats defendant in the first action and a new plaintiff seeks to take advantage of the first judgment against the same defendant in a second action. The Supreme Court approved use of offensive collateral estoppel in the following situation. P sued D for issuing a false proxy statement; D demanded a jury trial. Before the case went to trial, the Securities and Exchange Commission sued D for issuing the same false proxy statement. The SEC action went to a court trial and D lost. P then successfully asserted that judgment as collateral estoppel in the jury action on the

issue of the falsity of the proxy statement (even though defendant thereby lost the right to have a jury decide the issue). *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 99 S. Ct. 645, 58 L.Ed.2d 552 (1979).

Here the prior judgment was being used offensively by plaintiff instead of defensively by defendant. Offensive collateral estoppel is used most often in a mass tort situation. When the first plaintiff proceeds to a successful judgment, the other plaintiffs in the lawsuit pipeline can and do move for partial summary judgment on the issue of liability.

The policies for offensive collateral estoppel are quite different from defensive collateral estoppel. Rather than encouraging plaintiff to join all parties in the first suit, the incentive is for potential plaintiffs to stay out of the first suit. Should the first plaintiff be successful, another plaintiff can then file suit and assert collateral estoppel. Should the first suit be unsuccessful, another plaintiff can then file suit and start from the beginning; the second plaintiff, as a nonparty to the first suit, cannot be collaterally estopped. This different consequence raises fairness concerns. Also, the policy of promoting efficiency to the court system may be undermined instead of encouraged by offensive collateral estoppel, since the incentive is to wait, see, and file additional suits instead of joining the first suit.

Despite these policy differences between nonmutual defensive collateral estoppel and nonmutual offensive collateral estoppel, many courts today allow both.

3. Different Claim; Identical Issue

The claim must be different; otherwise, claim preclusion would apply, since it covers issues that were or should have been litigated. *See* II.A.3, *supra*. A different claim with a common issue would be presented, for example, should a landlord sue on rent due for the month of October and proceed to judgment, then bring a second action for rent for the month of November. Each month is a separate claim.

In many situations, the issue will be identical without question. At other times, the court may decide that the issue is not identical despite its close similarity. For example, a decision on tax treatment in one year may not be the identical issue to tax treatment in another year. Circumstances may also change. The burden of proof may be different in the two actions. Of course, when the burden of proof is more favorable to the party to be estopped, the issue may be found identical: when a defendant is convicted of murdering a relative in a criminal proceeding, that judgment can be used to collaterally estop the same person as plaintiff/beneficiary in a suit against the insurance company for the proceeds of a policy on the life of the deceased. Note in this example there is no mutuality of the parties, yet defensive collateral estoppel would be applied.

4. Issue Must Have Been Actually Litigated

Collateral estoppel will apply only to an issue that actually was litigated in the first action. That means, by definition, dispositions such as default judgments, consent judgments, and voluntary dismissals cannot qualify for collateral estoppel. Similarly, issues that may appear in the final judgment, but which were not the subject of contest in the action, will not support collateral estoppel. Should a defendant admit an issue in the answer, or even fail to contest it at trial, the issue would not have been litigated. On the other hand, a judgment by summary judgment or by judgment as a matter of law may qualify for collateral estoppel should the motion have been contested.

When an issue was not actually litigated, the policy of finality of judgments will be outweighed by the policies of fairness and decision on the merits. A party may not litigate an issue in the first action for various reasons, including 1) small amount in controversy, 2) inconvenient forum, or 3) poor timing for the litigation.

Whether an issue was litigated may be difficult to determine. The decision may require looking at the record of the first action. Should the record be unclear, the court will probably find the issue was not litigated. This situation would arise often when the first action was determined by a general verdict. For example, A sued B for breach of contract and the defense pleaded was a denial and also a release. The general verdict was for B, the defendant. Was only the breach litigated, or was only the affirmative defense litigated, or were both litigated? Extrinsic evidence may provide the answer, but extrinsic evidence cannot contradict the record.

5. Necessary

Collateral estoppel will not be applied unless the decision on the issue in the first action was necessary, *i.e.*, essential, to the result. For example, P sues D for negligence and D pleads contributory negligence. The judgment is for D on a finding of no negligence. A further finding of contributory negligence against P is not necessary to the result and accordingly is not preclusive. This requirement is rooted in fairness, which is that a party should be estopped only on essential issues from the first action because the party may not have made a full effort on nonessential issues. Further, the court may not have considered such nonessential issues as closely as it did the necessary issues, and no appellate review was likely pursued.

The party who prevailed may have lost some of the issues. These issues cannot be used to estop the party in a second action because necessarily they were not essential to the outcome of the case. Recall the previous hypothetical of A suing B for breach of contract with a denial and an affirmative defense of release. Should the jury find by special verdict that the contract was valid but that B had been released, B wins. The issue of the validity of the contract cannot be the basis of preclusion against B in a second action because B prevailed in the first.

Alternative findings in the first action pose a problem. Again, in the previous hypothetical in which A sued B on a contract and B pleaded an affirmative defense of release, should A prevail on a general verdict, the judgment necessarily was against B on both the contract and the release. Both would be collaterally estopped in a second action. On the other hand, should B prevail on the general verdict, one is not clear whether the contract or the release, or both, afforded the basis for the decision. The situation may be clarified should the court have employed a special verdict; assuming the jury specially found for B on both the contract and the release, as alternative findings both may be collaterally estopped in a second action.

Some of the older opinions distinguish between mediate facts and ultimate facts in whether collateral estoppel should apply. An ultimate fact was one on which the action was based, such as an element of the case; a mediate fact was a mere evidentiary one from which an ultimate fact could be inferred. Ultimate facts were appropriate for collateral estoppel; mere mediate facts were not. Assume D is driving a car that strikes P1, and a half-hour later in a second accident strikes P2. P1 sues for negligence and by special verdict the jury finds D had been drunk and was negligent. In the action by P2, no preclusive effect will be given to the finding D was drunk as that was only an evidentiary fact allowing an inference to the ultimate fact that D did not use due care. This terminology is outdated. Today's approach looks to whether a fact was necessary to the result, not to how the fact fits into the hierarchy of the inferential structure of the elements of the case.

6. Fairness

Even when all of the five above tests for collateral estoppel are met, the court may still refuse to apply the doctrine should the result appear to be unfair because of an inadequate "opportunity or incentive to obtain a full and fair adjudication in the initial action." Restatement (Second) of Judgments § 28(5)(c). Some examples of situations in which a court has refused issue preclusion because of unfairness include inadequate representation in the first action, small amount in controversy in the first action, apparent compromise by the jury in the first action, and unforeseeability of additional action(s). Interestingly, one assertion of unfairness might be that collaterally estopping a party in a second action would deprive it of the right to jury trial. This type of unfairness did not prevent the Supreme Court from approving use of offensive collateral estoppel. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 99 S. Ct. 645, 58 L.Ed.2d 552 (1979).

C. Exceptions to Preclusion

Situations exist in which the elements of one of the preclusion doctrines fit, yet the court will refuse to apply the doctrine. While we do not develop these situations in any depth as they are beyond the scope of this brief note, they include when preclusion would defeat a strong governmental policy, when preclusion was waived by a party in the first action, when the law has changed in the interim, and when the jurisdictional limitations of the first court prevented the full claim from being litigated. This is especially true when both the federal courts and state courts are involved. *See generally* Larry L. Teply & Ralph U. Whitten, Civil Procedure 993-96, 1011-16 (4th ed. 2009).

III. QUESTIONS ON PRECLUSION

Instructions. This section contains questions for you to answer to test and strengthen your knowledge of the law of preclusion. Use your scrolling feature so that the screen shows only the question. Answer the question yes, no, or maybe and formulate your reasoning, then scroll down to compare your answer to the authors' answer. P represents plaintiff and D represents defendant.

A. Claim Preclusion

Q–1. Part 1. P sues D for damages in construction of a house, asserting theories of breach of warranty and negligence. D moves to dismiss for lack of personal jurisdiction. The motion is granted, and the case is dismissed. P later sues D using the identical complaint in another state's court. D pleads res judicata. Does claim preclusion apply?

Part 2. Instead, the motion to dismiss for lack of personal jurisdiction is denied. Following jury trial, P obtains a judgment. Six months later, D moves to vacate the judgment on the ground of fraud. P pleads res judicata. Does claim preclusion apply?

Part 3. The motion to dismiss for lack of personal jurisdiction is denied. Following jury trial, P obtains a judgment. D appeals. While the appeal is pending, P files a second action for damages from construction of the house, alleging a theory of strict liability. D pleads res judicata. Does claim preclusion apply?

Answer to Q–1. Part 1.

No. Claim preclusion requires a final, valid judgment. While some courts and commentators differ on whether the judgment must be on the merits, all would agree that a dismissal for lack of jurisdiction cannot support res judicata.

Part 2. No. This is a direct attack on a judgment within the same action. Res judicata can apply only in a second action.

Part 3. Yes. This is a situation in which P has split theories of recovery, and res judicata will apply. The pendency of an appeal does not affect the finality of the trial court's judgment.

This answer is based on a transactional definition of claim. A primary right-primary wrong definition would likely produce the opposite result. *See* II.A.3, *supra*.

Q–2. Part 1. P, purchaser of shares of D Corp. pursuant to a prospectus issued by the corporation, sues on the ground that the prospectus contains a false statement. P obtains a final judgment of damages for $9,500; the judgment is satisfied. P2, a neighbor of P, who purchased shares of D Corp. pursuant to the same prospectus, sues on the ground that the prospectus contains the same false statement. P2 pleads the first judgment as res judicata. Does claim preclusion apply?

Part 2. P3, a nephew of P, obtains the shares from P by inheritance. Dissatisfied with the amount of the judgment in the first case of *P v. D Corp*., and being a nonparty to that case, P3 sues D Corp. on the ground that the prospectus contained a false statement. Does res judicata apply?

Answer to Q–2. Part 1.

No. Claim preclusion requires the same parties, or those in privity with those parties, in both actions. In this hypothetical, the first action is *P v. D Corp*. and the second action is *P2 v. D Corp*. The common party in both suits is D Corp. This may allow use of issue preclusion against D Corp., in a state that has abandoned the requirement of mutuality, but claim preclusion still strictly requires parties or those in privity with them in both suits.

Similarly, the judgment against D Corp. in the first action may support stare decisis, or precedent, in the second action, but this is not res judicata.

Part 2. Yes. The nephew obtained the shares by inheritance from P. Consequently, P3 is in privity with P. Since P was a party to the first action, P's privies are also bound by res judicata. This is a situation in which P has split damages.

Q–3. P sues D in federal court for age discrimination because D terminated her employment. Following a jury trial and verdict, judgment is entered for D. P later files action against D in state court for breach of employment contract and defamation. D pleads the affirmative defense of res judicata. Does claim preclusion apply?

Answer to Q–3.

Yes. Res judicata is claim wide, precluding all matters of fact and law that were or should have been litigated. P was terminated once: she has one claim, which arose in a single transaction. She must assert all her theories of recovery in the same action, instead of splitting her theories as she did in this hypothetical. Both of the state law theories could have been pleaded in separate counts in the federal action (Fed. R. Civ. P. 10(b)), and supplemental

jurisdiction (28 U.S.C. § 1367) would allow the federal court to hear the state law theories as well as the federal law theory. *See* Exercise Six, part I.B. P's other theories are barred by the unfavorable result in the first action.

P might argue that the defamation theory is a separate transaction. If the defamation occurred at the time of termination, clearly there is a single transaction. If the defamation occurred later, as in an unfavorable job reference, P might argue the separation in time makes this a separate transaction, and so a separate claim. We would answer that this is one common nucleus of fact, and a lay person would expect all of it to be tried together. It is a single transaction, or series of transactions. Therefore, it is a single claim. *See Restatement (Second) of Judgments* § 24(2) (1982), in II.A.3, *supra*.

Note that the converse court situation might save P's unpleaded theory. Should the first action have been brought in state court, with P failing to plead a federal law theory, that theory might be outside the operation of res judicata when the federal theory could not have been brought in state court. This would apply when the federal theory involved exclusive federal jurisdiction, not concurrent jurisdiction, as in this hypothetical.

This answer is based on a transactional definition of claim. A primary right-primary wrong definition would likely produce the opposite result. *See* II.A.3, *supra*.

Q–4. P sues D for punching him in the nose. P's proof on damages is not entirely satisfactory, and the jury awards only $2000. Several months later, P stumbles on additional evidence that supports a new, substantial element of damages. P sues D for the additional damages. Does res judicata apply?

Answer to Q–4.

Yes. P has split his damages, as well as his nose. Claim preclusion includes all matters of fact and law that were or should have been litigated. Certainly, all elements of damages arising out of a single tort are included, and are

merged into the favorable result in the first action. This answer is the same under both the transactional approach and the primary right-primary wrong approach since both cases involve injury to the person.

P may be able to obtain some relief by moving to vacate the first judgment on the ground of newly discovered evidence, but that would be a direct attack on the first judgment, and is not relevant to a discussion of res judicata.

B. Issue Preclusion

Q–5. John and Mary Homeowners signed a contract with AAA Builders to construct their dream home. When the Homeowners moved in, they discovered shoddy work in several rooms and sued AAA Builders for breach of warranty. The Homeowners obtained a judgment. Some time later, AAA Builders sold its business to BBB Builders. BBB studied the books and discovered that not all of the payments from Homeowners had been collected. BBB Builders sued Homeowners to collect the payments. Defendant Homeowners defended on the ground of shoddy work. Does collateral estoppel apply on the issue of the quality of the work?

Answer to Q–5.

Yes. There is a final, valid judgment. The parties are the same in both actions (BBB is in privity with AAA as the purchaser of the business). The claim is different, but the issue of the quality of the work is identical, was actually litigated, and was necessary to the result in the first action. Issue preclusion/collateral estoppel will apply.

Homeowners might also be able to defend on the ground that BBB Builders's predecessor in interest AAA Builders failed to plead a compulsory counterclaim (assuming the action was brought in a federal court or a state that has compulsory counterclaims), but that is not a collateral estoppel issue.

Q–6. P Corp. is in the business of selling freezers and frozen meat. It requires buyers to sign a preprinted, standard form contract. D signs a contract, but when the quality of the meat is unsatisfactory, refuses to pay. P Corp. sues on the contract, and D defends that the interest rate on the contract is usurious under state law. The jury verdict is for D and judgment is entered. P Corp. later sues D2, another buyer, on the same standard form contract. D2 pleads that the interest rate is usurious and moves for summary judgment on the grounds of collateral estoppel. Does collateral estoppel apply?

Answer to Q–6.

Yes. The hypothetical presents a different claim (*P Corp. v. D2* instead of *P Corp. v. D*) with an identical issue (the usurious rate) that was actually litigated and necessary to the first judgment. In those states that have abandoned mutuality, collateral estoppel will be applied because the party to be estopped, P Corp., was a party to the first action and had its day in court. This is defensive collateral estoppel.

The answer would be different in states that retain the doctrine of mutuality, since the parties in the two suits are not the same, and there is no privity between the two defendants, even though they have similar interests. Also, had the first judgment gone against D, the result could not be used against D2, since D2 was not a party to the first action.

Q–7. Dumper, Inc. Is in the waste disposal business. Two lakefront property owners on Lake Wishuwerhere sue Dumper, Inc. for disposing of waste in their lake in violation of federal and state waste disposal statutes and regulations. The defense is that no dumping occurred. Following trial to the court, the judge finds that the dumping did occur and orders judgment for plaintiffs. Hearing of this result, the remaining 84 homeowners on the lake join together to file suit against Dumper, Inc. for damages for the unlawful dumping. Does collateral estoppel apply?

Answer to Q–7.

Yes. Dumper, Inc. defended the common issue of unlawful dumping and lost. The issue in these different claims was actually litigated and necessary to the result. No reason exists to believe that a court would reach a different result in another litigation. Accordingly, Dumper, Inc. will be collaterally estopped from denying the unlawful dumping even though no mutuality exists. This is offensive collateral estoppel.

Defendant might argue that unfairness would result because the first action involved only two homeowners and the second involves 84. This argument likely would not prevent collateral estoppel because the defendant could easily have foreseen that other owners would also seek to enforce their claims and would have had every incentive to defend the first action vigorously.

Defendant might also argue that the second group of owners should not be allowed to lie in the weeds to await the outcome of the first action and then take advantage of a favorable result. Although a few courts have hinted of requiring such potential additional plaintiffs to join or intervene in the first action, the courts have not insisted on mandatory joinder or intervention.

Q–8. Part 1. Ten plaintiffs, join permissively to sue D University for gender discrimination in its promotion policies. Following extensive negotiation, the university allows a consent judgment to be entered against it. Additional plaintiffs then bring suit against the university for the same promotion policies, and move for partial summary judgment on the issue of discrimination, asserting issue preclusion. Does issue preclusion/collateral estoppel apply?

Part 2. Same facts as part 1, except D University answers denying any discrimination, and the case goes to trial. D University concedes the issue following presentation of plaintiffs' case in chief. Does collateral estoppel apply?

Part 3. Same facts as in part 1, except D University contests the issue throughout trial, and the jury verdict is for plaintiffs. Does collateral estoppel apply?

Answer to Q–8, parts 1–3.

Collateral estoppel requires that the issue have been actually litigated. The facts in parts 1 and 2 show the issue was not fully litigated, so no collateral estoppel can apply in the second action. In part 3, the issue was fully litigated, so collateral estoppel applies.

Q–9. P sued D Cabco for personal injuries and property damage arising when one of Cabco's taxicabs collided with P's car. Cabco defended on two grounds: 1) the driver was an independent contractor instead of an agent, so no negligence could be imputed to it, and 2) the driver was not negligent. By special verdict, the jury found that the driver was an agent, but was not negligent, so judgment was entered for D Cabco. A second suit had been filed before the first action went to trial; it involves a collision between the cab of the same driver and P2. P2 now argues that collateral estoppel prevents D Cabco from denying the agency of the driver. Does issue preclusion/collateral estoppel apply?

Answer to Q–9.

No. The issue of the agency of the cab driver was not necessary or essential to the result in the first action. D Cabco won, so issues found against it by definition cannot have been necessary to the result. Issue preclusion/collateral estoppel cannot apply.

Q–10. P purchased a ten-year-old used car "as is" from Dealer for $995. A week later, the radio stopped working and P paid $125. to fix it. He sued Dealer in small claims court for the $125., alleging that Dealer should have a 30–day implied warranty on every car it sells. Dealer denied any implied warranty and sent its sales manager to court without a lawyer to defend the action. P won the $125. A year later, P2 purchased a used car "as is" from Dealer for $19,995, and later sued Dealer for $12,000 for various defects in the car on a theory of 30–day implied warranty. Does collateral estoppel apply?

Answer to Q–10.

Maybe. The elements of collateral estoppel are satisfied in this hypothetical: a final, valid judgment; the same party to be estopped (offensive collateral estoppel); a common issue in the two actions on different claims; issue actually litigated; issue necessary to the result. A court will, however, refuse to apply collateral estoppel when unfairness would result.

Defendant Dealer will argue that the first action involved such a small amount that it had insufficient incentive to litigate fully—it could not have foreseen the substantial consequences in later actions. Also, it was not represented by an attorney in the first action; granted, this was its own choice, but was again a function of the small amount involved.

P would argue that the small amount in the first action does not control because Dealer should have realized that the result could have consequences beyond the individual action. Even though there is disagreement, many jurisdictions recognize small claims judgments can support preclusion. Similarly, the absence of legal representation in the first action was a decision by Dealer.

Given the small amount and the absence of legal representation, fairness may prevent application of collateral estoppel in this hypothetical, but the result is not clear.

IV. COMPUTER EXERCISE: CALI CIV 17

You are now ready for further work in the preclusion doctrines in CIV 17: Preclusion. The computer-assisted exercise is self-contained. The estimated completion time for CALI CIV 17 is one-and-one-half hours, although this exercise can be divided into segments to be completed in separate sittings.