Civil Procedure
Law 6212 - Section 13A
Fall 2023

Supplementary Materials
Part 1

Jonathan R. Siegel
GW Law School

Asking Permission to Enter

Zen Buddhism believes that a journey to the truth must begin with one's own decision and that it is achieved through one's own efforts. Therefore, a new monk should be pushed back instead of invited. As with an ox that comes to the riverside voluntarily to drink, after having been kept away from the river, it is better that he drink the water of his own accord than for him to be pulled forcibly.

The elder monk [refuses] to receive the *unsui* [monk undergoing Zen training] into the monastery. Sometimes the new monk is thrown out of the gate, which is then closed behind him. No matter how difficult this test may be, the new monk must endure it. He must keep a bowing posture for two days at the front step of the entrance hall. * * *

Staying Overnight as a Guest

After remaining an entire day in bowing posture, the new monk is allowed to stay in the monastery overnight in a small guest room. For the new monk this first night in the monastery is a most impressive one. He is allowed no lamp after dark. Soon an old monk comes in quietly with a candlestand, serves him a cup of tea, and asks him to sign the guest book.

Until nine o'clock that night, the monk has to meditate facing the wall before he can go to bed. He is given only a wide mattress which he folds in two, lying on the bottom half and pulling the top half over him.

The next day after breakfast he must once more go outside the monastery gate and remain in bowing posture the whole day at the entrance.

Examination in the Guest Room

After a two-day probationary period, the new monk is led to the small guest room, where he must meditate in a cross-legged position for five days. This is obviously a much harder discipline than the niwa-zume examination. Because this small room is in an isolated place, there is never any activity around it. * * *

Entering the Meditation Hall

After seven days of successful examination, the monk is allowed to become a brother in the monastery.

-- Eshin Nishimura, *Unsui: A Diary of Zen Monastic Life*

Once, when a disciple came to a master to be disciplined in the art of fencing, the master, who was in retirement in his mountain hut, agreed to undertake the task. The pupil was made to help him gather wood for kindling, draw water from the nearby spring, split wood, make the fire, cook rice, sweep the rooms and the garden, and generally look after his household affairs. After some time the young man became dissatisfied, for he had not come to work as servant to the old gentleman, but to learn the art of swordsmanship. So one day he approached the master and [asked that the pace of his instruction be increased]. The master agreed. The result was that the young man could not do any piece of work with any feeling of safety. For when he began to cook rice early in the morning, the master would appear and strike him from behind with a stick. When he was in the midst of his sweeping, he would be feeling the same blow from somewhere, from an unknown direction. He had no peace of mind, he had to be always on the *qui vive*. . . . One day the master was found cooking his own vegetables over an open fire. The pupil took it into his head to avail himself of this opportunity. Taking up his big stick, he let it fall on the head of the master, who was then stooping over the cooking pan to stir its contents. But the pupil's stick was caught by the master with the cover of the pan. This opened the pupil's mind to the secrets of the art, which had hitherto been kept from him.

-- Eugen Herrigel, *Zen in the Art of Archery*

Mark Twain, *Life on the Mississippi*:

Chapter VI
A Cub-Pilot's Experience

WHAT with lying on the rocks four days at Louisville, and some other delays, the poor old *Paul Jones* fooled away about two weeks in making the voyage from Cincinnati to New Orleans. This gave me a chance to get acquainted with one of the pilots, and he taught me how to steer the boat, and thus made the fascination of river life more potent than ever for me.

It also gave me a chance to get acquainted with a youth who had taken deck passage—more's the pity; for he easily borrowed six dollars of me on a promise to return to the boat and pay it back to me the day after we should arrive. But he probably died or forgot, for he never came. It was doubtless the former, since he had said his parents were wealthy, and he only traveled deck passage because it was cooler.[*]

I soon discovered two things. One was that a vessel would not be likely to sail for the mouth of the Amazon under ten or twelve years; and the other was that the nine or ten dollars still left in my pocket would not suffice for so imposing an exploration as I had planned, even if I could afford to wait for a ship. Therefore it followed that I must contrive a new career. The *Paul Jones* was now bound for St. Louis. I planned a siege against my pilot, and at the end of three hard days he surrendered. He agreed to teach me the Mississippi River from New Orleans to St. Louis for five hundred dollars, payable out of the first wages I should receive after graduating. I entered upon the small enterprise of 'learning' twelve or thirteen hundred miles of the great Mississippi River with the easy confidence of my time of life. If I had really known what I was about to require of my faculties, I should not have had the courage to begin. I supposed that all a pilot had to do was to keep his boat in the river, and I did not consider that that could be much of a trick, since it was so wide.

The boat backed out from New Orleans at four in the afternoon, and it was 'our watch' until eight. Mr. Bixby, my chief, 'straightened her up,' plowed her along past the sterns of the other boats that lay at the Levee, and then said, 'Here, take her; shave those steamships as close as you'd peel an apple.' I took the wheel, and my heart-beat fluttered up into the hundreds; for it seemed to me that we were about to scrape the side off every ship in the line, we were so close. I held my breath and began to claw the boat away from the danger; and I had my own opinion of the pilot who had known no better than to get us into such peril, but I was too wise to express it. In half a minute I had a wide margin of safety intervening between the *Paul Jones* and the ships; and within ten seconds more I was set aside in disgrace, and Mr. Bixby was going into danger again and flaying me alive with abuse of my cowardice. I was stung, but I was obliged to admire the easy confidence with which my chief loafed from side to side of his wheel, and trimmed the ships so closely that disaster seemed ceaselessly imminent. When he had cooled a little he told me that the easy water was close ashore and the current outside, and therefore we must hug the bank, up-stream, to get the benefit of the former, and stay well out, down-stream, to take advantage of the latter. In my own mind I

[*] 'Deck' passage—*i.e.*, steerage passage

resolved to be a down-stream pilot and leave the up-streaming to people dead to prudence.

Now and then Mr. Bixby called my attention to certain things. Said he, 'This is Six-Mile Point.' I assented. It was pleasant enough information, but I could not see the bearing of it. I was not conscious that it was a matter of any interest to me. Another time he said, 'This is Nine-Mile Point.' Later he said, 'This is Twelve-Mile Point.' They were all about level with the water's edge; they all looked about alike to me; they were monotonously unpicturesque. I hoped Mr. Bixby would change the subject. But no; he would crowd up around a point, hugging the shore with affection, and then say: 'The slack water ends here, abreast this bunch of China-trees; now we cross over.' So he crossed over. He gave me the wheel once or twice, but I had no luck. I either came near chipping off the edge of a sugar plantation, or I yawed too far from shore, and so dropped back into disgrace again and got abused.

The watch was ended at last, and we took supper and went to bed. At midnight the glare of a lantern shone in my eyes, and the night watchman said:

'Come! turn out!'

And then he left. I could not understand this extraordinary procedure; so I presently gave up trying to, and dozed off to sleep. Pretty soon the watchman was back again, and this time he was gruff. I was annoyed. I said:

'What do you want to come bothering around here in the middle of the night for? Now, as like as not, I'll not get to sleep again to-night.'

The watchman said:

'Well, if this an't good, I'm blest.'

The 'off-watch' was just turning in, and I heard some brutal laughter from them, and such remarks as 'Hello, watchman! an't the new cub turned out yet? He's delicate, likely. Give him some sugar in a rag and send for the chambermaid to sing "Rock-a-by, Baby" to him.'

About this time Mr. Bixby appeared on the scene. Something like a minute later I was climbing the pilot-house steps with some of my clothes on and the rest in my arms. Mr. Bixby was close behind, commenting. Here was something fresh—this thing of getting up in the middle of the night to go to work. It was a detail in piloting that had never occurred to me at all. I knew that boats ran all night, but somehow I had never happened to reflect that somebody had to get up out of a warm bed to run them. I began to fear that piloting was not quite so romantic as I had imagined it was; there was something very real and work-like about this new phase of it.

It was a rather dingy night, although a fair number of stars were out. The big mate was at the wheel, and he had the old tub pointed at a star and was holding her straight up the middle of the river. The shores on either hand were not much more than half a mile apart, but they seemed wonderfully far away and ever so vague and indistinct. The mate said:

'We've got to land at Jones's plantation, sir.'

The vengeful spirit in me exulted. I said to myself, 'I wish you joy of your job, Mr. Bixby; you'll have a good time finding Mr. Jones's plantation such a night as this; and I hope you never *will* find it as long as you live.'

Mr. Bixby said to the mate:

'Upper end of the plantation, or the lower?'

'Upper.'

'I can't do it. The stumps there are out of water at this stage. It's no great distance to the

lower, and you'll have to get along with that.'

'All right, sir. If Jones don't like it he'll have to lump it, I reckon.'

And then the mate left. My exultation began to cool and my wonder to come up. Here was a man who not only proposed to find this plantation on such a night, but to find either end of it you preferred. I dreadfully wanted to ask a question, but I was carrying about as many short answers as my cargo-room would admit of, so I held my peace. All I desired to ask Mr. Bixby was the simple question whether he was ass enough to really imagine he was going to find that plantation on a night when all plantations were exactly alike and all the same color. But I held in. I used to have fine inspirations of prudence in those days.

Mr. Bixby made for the shore and soon was scraping it, just the same as if it had been daylight. And not only that, but singing:

'Father in heaven, the day is declining,' etc.

It seemed to me that I had put my life in the keeping of a peculiarly reckless outcast. Presently he turned on me and said:

'What's the name of the first point above New Orleans?'

I was gratified to be able to answer promptly, and I did. I said I didn't know.

'Don't *know?*'

This manner jolted me. I was down at the foot again, in a moment. But I had to say just what I had said before.

'Well, you're a smart one!' said Mr. Bixby. 'What's the name of the *next* point?'

Once more I didn't know.

'Well, this beats any thing. Tell me the name of *any* point or place I told you.'

I studied a while and decided that I couldn't.

'Look here! What do you start out from, above Twelve-Mile Point, to cross over?'

'I—I—don't know.'

'You—you—don't know?' mimicking my drawling manner of speech. 'What *do* you know?'

'I—I—nothing, for certain.'

'By the great Caesar's ghost, I believe you! You're the stupidest dunderhead I ever saw or ever heard of, so help me Moses! The idea of *you* being a pilot—*you!* Why, you don't know enough to pilot a cow down a lane.'

Oh, but his wrath was up! He was a nervous man, and he shuffled from one side of his wheel to the other as if the floor was hot. He would boil a while to himself, and then overflow and scald me again.

'Look here! What do you suppose I told you the names of those points for?'

I tremblingly considered a moment, and then the devil of temptation provoked me to say:

'Well—to—to—be entertaining, I thought.'

This was a red rag to the bull. He raged and stormed so (he was crossing the river at the time) that I judge it made him blind, because he ran over the steering-oar of a trading-scow. Of course the traders sent up a volley of red-hot profanity. Never was a man so grateful as Mr. Bixby was; because he was brimfull, and here were subjects who could *talk back*. He threw open a window, thrust his head out, and such an irruption followed as I never had heard before. The fainter

and farther away the scowmen's curses drifted, the higher Mr. Bixby lifted his voice and the weightier his adjectives grew. When he closed the window he was empty. You could have drawn a seine through his system and not caught curses enough to disturb your mother with. Presently he said to me in the gentlest way:

'My boy, you must get a little memorandum book, and every time I tell you a thing, put it down right away. There's only one way to be a pilot, and that is to get this entire river by heart. You have to know it just like A B C.'

Papers from *Acme Delivery v. United States*

The following pages contains copies of the summons and the complaint from a real case called *Acme Delivery v. United States*. These documents illustrate what a real summons and complaint look like.

Appended to the complaint was a long, multi-page exhibit. Only one page of the exhibit is reproduced here. The other pages were similar.

CIV 1 (Rev. 12/81)
(Formerly D.C. Form No. 45a Rev. (... ...))

SUMMONS IN A CIVIL ACTION

United States District Court

FOR THE

DISTRICT OF COLORADO

Linda Blair 7/22/92 3:57pm

CIVIL ACTION FILE NO.

92-B-1441

Acme Delivery Service, Inc.

Plaintiff

v.

United States of America

Defendant

SUMMONS

To the above named Defendant : United States of America

You are hereby summoned and required to serve upon William C. Danks

plaintiff's attorney , whose address 3033 E. 1st Ave., #303, Denver, CO 80206

AND FILE WITH THE CLERK OF THE COURT
an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

JAMES R. MANSPEAKER
Clerk of Court.

[signature]
Deputy Clerk.

Date: 7-22-92

[Seal of Court]

NOTE:—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

I hereby certify and return that on the 22nd day of July, 1992.

I received this summons and served it together with the complaint herein as follows:

(For service made by mail:

I hereby certify that I mailed this summons on ____________, 19____.

at ______________________________ ; and that such service was
place of mailing

☐ accepted ☐ refused ☐ returned but not refused.

Upon refusal of service, I certify that I made further service as follows:

Fees for Service

Travel _____ $ __________

Service _____ $ __________

______________________________ or ______________________________
Authorized or Specially Appointed Process Server — *United States Marshal*

by ______________________________
Deputy United States Marshal

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

July 22, 1992 — Carol A. Diaz
Date — *Authorized or Specially Appointed Process Server*

Note: Certification required only if service is made by a person other than a United States Marshal or his deputy.

No. ____

United States District Court
FOR THE

v.

SUMMONS IN CIVIL ACTION

Returnable not later than ____ days after service.

Attorney for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

92 JUL 2 P3:48

ACME DELIVERY SERVICE, INC.	) CIVIL ACTION
Plaintiff,	) No. ______
vs.	) COMPLAINT
UNITED STATES OF AMERICA	)
Defendant.	) 92- -1441

BY __________ DEP CLK.

The plaintiff, Acme Delivery Service, Inc. for its Complaint alleges.

JURISDICTION

1. This action arises under the Federal Tort Claims Act, Sections 2671 through 2680 of Title 28 of the United States Code. This Court has jurisdiction pursuant to 28 USC 1346(b).

GENERAL ALLEGATIONS

2. The plaintiff, Acme Delivery Service, Inc. is a Colorado corporation with its principal place of business in Aurora, Colorado. The other plaintiffs/class members are listed with their addresses on the attached Exhibits 1, 2, and 3.

3. Sometime prior to September 1, 1990, defendant, United States of America, by and through the United States Department of Defense, hired three companies to arrange for the transportation of personal belongings of military personnel. The names of the companies are: American Ensign Van Services, Inc., Sun Forwarding, Inc. and Richardson Forwarding, Inc.

4. On or about September 1, 1990, the defendant knew or should have known that these three companies were insolvent and unable to pay their bills.

5. In violation of the defendant's rules and regulations, the defendant failed to place the three companies on "non-use" status or to debar the three companies.

6. Upon information and belief the defendant did not place the three companies on "non-use" status until November 19, 1990.

7. The defendant knew that the three companies would not do the actual transportation themselves but would be retaining other companies to perform the actual transportation services.

8. Between September 1, 1990 and November 19, 1990, the three companies retained Acme Delivery Service, Inc. to perform part of the transportation of the goods. Acme Delivery Service, Inc. in turn retained certain other companies to perform various segments of the transportation of the goods. Acme Delivery Service, Inc. has paid these other companies in excess of $150,000 for which it has not been reimbursed.

9. Acme Delivery Service, Inc. is owed a total of $203,178.88 plus interest for transportation and arranging the transportation of the subject goods. This amount includes the amount described in paragraph eight (8) which Acme Delivery Service, Inc. has paid out but which has not been reimbursed.

10. The defendant refuses to pay Acme Delivery Service, Inc. the amount owed on the grounds that its obligation has been paid to the three companies and it is not responsible for the failure of the three companies to pay Acme Delivery Service, Inc.

11. On or about March 19, 1991, Acme Delivery Service, Inc. submitted its claim based on the allegations herein in the amount of $203,179.88 to the United States Department of Defense. On or about November 22, 1991, the claim was denied. On December 19, 1991, Acme Delivery Service, Inc. requested reconsideration and on January 28th, the reconsideration was denied.

CLASS ACTION ALLEGATIONS

12. The plaintiff brings this case as a class action on behalf of all companies which provided transportation services at the request of the three companies listed above during the time period from September 1, 1990 to the date (on or about November 19, 1990), when the defendant placed the three companies on non-use status.

13. Upon information and belief, the number of such companies is 912 and the amount owed is $18,726,131.38 plus interest. A list of all such companies and the amount owed is attached as Exhibit 1. Exhibit 1 is incorporated by reference.

14. Included within the class described in exhibit 1 and/or as additional plaintiffs in the event that the class is not certified are the companies listed on the Exhibits which are attached and incorporated by reference as Exhibits 2 and 3. These companies have submitted a claim with the Department of Defense for the amounts shown. The claims have been denied.

15. The class certification is sought pursuant to FRCP 23(c)(1). All of the prerequisites of a class action are met in that (1) the class is so numerous that joinder of all members is impracticable; (2) the questions of law and fact are common to all members of the class; (3) the amount owed to each of the carriers can be established through their invoices; (4) the claims of Acme Delivery Service, Inc. are the same as other members of the class (5) Acme Delivery Service, Inc. will fairly and adequately protect the interests of the class. In addition, the questions of law and fact which are common to the members of the class predominate over any questions affecting individual members. The only unique fact is the amount owed to each carrier which amount should be subject to stipulation. A class action is far more expeditious and it is superior to numerous different suits filed by the many different carriers.

FIRST CLAIM

16. Paragraphs one (1) through fifteen (15) are incorporated by reference.

17. On or about September 1, 1990, the defendant was negligent in violating its rules and regulations which required it to place the three companies on "non-use" status. The negligence of the defendant caused damages to the plaintiff in the amount of $203,179.88 plus interest from the date of the transportation services and damage to the other members of the class/other plaintiffs in the amount shown on Exhibits 1, 2 and 3.

SECOND CLAIM

18. Paragraphs one (1) through seventeen (17) are incorporated by reference.

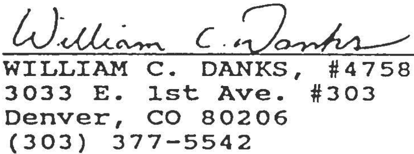
19. The three companies were real or apparent agents of the defendant.

20. Acme Delivery Service, Inc. performed the work based upon the reasonable expectation that the defendant would pay directly (or indirectly through its agents) the amount owed.

21. The defendant has wrongfully refused to pay Acme Delivery Service, Inc. causing damages in the amount of $203,179.88 plus interest and damages to the other members of the class/other plaintiffs in the amount shown on Exhibits 1, 2 and 3.

Wherefore, the plaintiff, Acme Delivery Service, Inc. prays for certification of this case as a class action. It further prays for judgment against the United States of America in the amount of $203,179.88 and in the amounts shown on Exhibits 1, 2 and 3 for each of the companies shown on those exhibits for a total of $18,726,131.38 plus interest (prejudgment and post-judgment), costs, and other appropriate relief.

Respectfully submitted,



WILLIAM C. DANKS, #4758
3033 E. 1st Ave. #303
Denver, CO 80206
(303) 377-5542

Plaintiffs Addresses:

Acme Delivery Service, Inc.
P.O. Box #17729
Denver CO 80217-0729

Addresses of other companies
as shown on Exhibits 1, 2 and 3.

AMERICAN ENSIGN VAN SERVICES, INC.

JANUARY 18, 1991 CASE NO: LA 90-30536-CA PAGE:

SCHEDULE A-3: CREDITORS HAVING UNSECURED CLAIMS WITHOUT PRIORITY

CREDITOR	DATE DESCRIPTION	STATUS	AMOU
A & G TRANSPORTATION 718 QUEENS RD PASADENA, TX 77502			448.
A & W TRANSPORTATION P O BOX 325 LUMBERTON, NJ 08084			.
A ARNOLD & SON TRANSFER & STRG 181 TRADE ST LEESTOWN, KY 40510			1,223.
A C WHITE MOVING SYSTEMS INC 6000 WHEATON DR ATLANTA, GA 30336			35,031.
A C WHITE TRANSFER & STORAGE P O BOX 3213 MACON, GA 31201			13,421.
A C WHITE TRANSFER & STORAGE P O BOX 3213 MACON, GA 31205			23,903.
A MOORE MOVING AND STORAGE 110 BOWLING AVE JEFFERSONVILLE, IN 47130			2,353.
A P A TRANSPORT CORP P O BOX 831 NORTH BERGEN, NJ 07047			547.
A WALECKA & SON 2375 CRANBERRY RT 28 WEST WAREHAM, MA 02576			8,525.
A&D MOVING & STORAGE P O BOX 835 RATCLIFF, KY 40160			40,760.
A-1 AURORA RELOCATION SVCS INC 11701 E 33RD AVE AURORA, CO 80010			20,601.
A-1 GUNN PORT SERVICE P O BOX 37361 JACKSONVILLE, FL 32205			.0
A-1 MOV & STGE 722 N KRAFT AVE PANAMA CITY, FL 32401			57.0
A-1 MOVING & STORAGE CO P O BOX 3133 VALDOSTA, GA 31601			2,732.6

EXHIBIT
1

Introduction to Pleading

Litigation begins with documents. The plaintiff files a *complaint* and the defendant files an *answer*. *See* Fed. R. Civ. P. 3, 12(a). The complaint gets a case started. What should the plaintiff be required to say in a complaint? In the federal system, Rule 8 answers this question. Read Rule 8(a) in the Supplement.

Among other things, Rule 8 requires the complaint to include "a short and plain statement of the claim showing that the pleader is entitled to relief." What do you think this means? Which, if any, of the following statements seem to you to satisfy this requirement of Rule 8?

- "The defendant owes the plaintiff $1 million."
- "The plaintiff lent the defendant $1 million, which the defendant has not paid back."
- "The plaintiff lent the defendant $1 million, which the defendant promised to pay back, but which the defendant has not paid back."
- "The plaintiff lent the defendant $1 million, which the defendant promised to pay back, but which the defendant has not paid back, even though payment is past due."

The complaint in the case of *Acme Delivery v. United States*, which appears on the immediately preceding pages in these Supplementary Materials, illustrates what a real complaint looks like. What was the plaintiff's claim in the *Acme Delivery* case?

What if a complaint does not satisfy Rule 8? Rule 12(b)(6) permits a defendant to move to dismiss a complaint on the ground that the complaint "fails to state a claim upon which relief can be granted." The following case brings out a point of fundamental importance about such a motion.

VASSILEV v. CITY OF NEW YORK
2014 WL 3928783 (S.D.N.Y 2014)

Honorable PAUL A. CROTTY, District Judge.

Plaintiff Anton Vassilev ("Vassilev"), a public school teacher at Intermediate School 291 ("IS 291") who was terminated from that position in 2010, sues . . . the New York City Department of Education ("DOE") . . . and former DOE Chancellor Dennis Walcott (collectively, "Defendants"). Vassilev claims that he was tenured and, accordingly, his termination without a pre-termination hearing amounted to a deprivation of a property right. . . . Accordingly, Vassilev alleges violation of his due process rights[*] . . . .

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[*] [See note 1 following the case for an explanation of the plaintiff's claim. –Ed.]

Defendants move to dismiss . . . .

Plaintiff was hired as a probationary teacher in September 2006. ([Complaint] ¶ 7.) Plaintiff received "Satisfactory" ratings from the school's principal, Sean Walsh, in each of Plaintiff's first three years teaching at IS 291 (2006–2009). (*Id.* ¶ 9.) Plaintiff admits that he was never formally granted tenure, but claims tenure by estoppel as of the end of the 2008–2009 school year, based on having three consecutive years of "Satisfactory" ratings. (*Id.* ¶ 10.) Defendants point to an Extension of Probation Agreement that appears to be signed by Plaintiff. If valid, the agreement would vitiate Plaintiff's claim of having tenure status; but Plaintiff alleges that he never signed such an agreement and suggests that it was forged. (*Id.* ¶¶ 10, 16–18.) . . .

Under Federal Rule of Civil Procedure 12(b)(6), a court may dismiss a complaint if a plaintiff fails to "provide the grounds upon which his claim rests through factual allegations sufficient 'to raise a right to relief above the speculative level.' . . . Plaintiffs must allege " 'enough facts to state a claim to relief that is plausible on its face.' . . . "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." . . . The court must accept as true all well-pleaded factual allegations and draw all inferences in a plaintiff's favor. . . . Allegations that are merely conclusory, however, are "not entitled to be assumed true." . . .

"In order to succeed on a claim of deprivation of procedural due process, a plaintiff must establish that state action deprived him of a protected property or liberty interest." . . . Tenured teachers have a protected property interest in continued employment, . . . but non-tenured teachers do not: "a probationary employee may be terminated without notice or a hearing." . . .

There is a substantial factual dispute between the parties concerning Plaintiff's status. Plaintiff claims to be tenured by estoppel, but Defendants maintain that Plaintiffs probationary status was extended, and he was terminated while on probationary status. Plaintiff responds that the extension of probation agreement is a forgery. "The purpose of a 12(b)(6) motion to dismiss is not to test the factual accuracy of the complaint's allegations, but rather to test whether the complaint's factual allegations, taken as true, state a legal claim upon which relief may be granted." . . . Plaintiff has sufficiently alleged that he acquired tenure by estoppel. *See Brenes v. City of New York*, 733 F.Supp.2d 357, 360 (E.D.N.Y.2010) ("Tenure by estoppel is obtained 'when a school board accepts the continued services of a teacher or administrator, but fails to take the action required by law to either grant or deny tenure prior to the expiration of the teacher's probationary term .... The normal probationary period that a teacher must complete is three years ...."). If Plaintiff was in fact a tenured employee, he was entitled to a pre-termination hearing and other process prior to termination. . . . Plaintiff has therefore sufficiently alleged a procedural due process claim.

For the foregoing reasons, the Court . . . denies . . . Defendants' motion to dismiss. . . . Whether Plaintiff was still on probationary status or had attained tenure by estoppel is a factual question which cannot be determined as a matter of pleading . . . .

Notes and Questions

1. The Fourteenth Amendment to the Constitution of the United States provides that a state may not "deprive any person of life, liberty, or property, without due process of law." In *Perry v. Sindermann*, 408 U.S. 593 (1972), the Supreme Court held that a tenured teacher at a state-run

school has a “property interest” in his job and that the Fourteenth Amendment therefore requires the state to give such a person “due process” when firing him. But in *Board of Regents v. Roth*, 408 U.S. 564 (1972), the Supreme Court held that an *untenured* state employee had no “property interest” in his job, and that a state could therefore fire such an employee without following any required process—the state could, for example, simply inform the employee that he was fired without stating any reason. The same rules apply to city employees such as the plaintiff in the above case.

2. In the above case, the plaintiff claimed to be a tenured city employee and that the city violated his Fourteenth Amendment rights by firing him without due process. The defendant, however, claimed that the plaintiff was not tenured, but was still a “probationary” employee who had not yet received tenure. How did the court resolve this dispute?

3. The court said that it must “accept as true all well-pleaded factual allegations” in the plaintiff’s complaint. Did this include the allegation that the plaintiff had tenure? Did the court “accept” this allegation as true? Did the court determine that the allegation *was* true?

4. What happens next in the *Vassilev* case? Has the dispute over whether the plaintiff had tenure been resolved? If not, how will it get resolved?

5. If on a motion to dismiss under Rule 12(b)(6) a court must accept all the allegations in the complaint as true, what good is such a motion? If the court is required to accept all the allegations in the complaint, under what circumstances could a complaint *ever* be dismissed on a Rule 12(b)(6) motion?

Introduction to Joinder

In the archetypal, idealized lawsuit, one plaintiff sues one defendant on one claim. In real life, lawsuits are often messy, sprawling affairs involving numerous parties and claims. The rules of joinder determine whether multiple claims and parties can be joined together in a single lawsuit.

In the federal system, the most important joinder rules are Federal Rules 13(a), (b), (g), 14(a)(1)-(5), 18, 20, and 23(a). Read these rules in the Supplement. Then test your understanding of the rules by answering the following hypothetical questions, which will be discussed in class:

Joinder Hypotheticals

1. The Pallisades Corporation (Pallisades) needs an office building built. It hires the Dawson Construction Company (Dawson), a general contractor, to build it. During the course of construction, an explosion seriously damages the building. Pallisaes fires Dawson, hires a new contractor, and has to pay $100,000 to get things back to where they were before the explosion. Pallisades brings a lawsuit against Dawson in federal district court for $100,000 in damages.

You are the lawyer for Dawson. Your client tells you that (1) the explosion was caused by Tolland Electrical Co., the electrical subcontractor working on the Pallisades building, (2) Pallisades owes Dawson $80,000 for work done on the building prior to the explosion, which Pallisades has refused to pay, and (3) Pallisades also owes Dawson $35,000 for an entirely different job that was completed previously, the billing for which is still disputed.

What would you do? Which rules in the Federal Rules of Civil Procedure would you use?

2. Alice is injured in a three-car accident. She sues Bert and Carol, the drivers of the other cars, in federal court. She seeks $100,000 in damages from each of them.

a. You are the lawyer for Bert. Bert was injured in the accident in the amount of $50,000 and believes that Alice and Carol were at fault. What would you do? Which rules would you use?

b. Bert mentions that Carol happens to owe him $100,000 which he lent her a year ago, which she has failed to repay. Would any rule allow that claim to be joined to the pending lawsuit between Alice, Bert, and Carol?

c. Finally, Bert mentions that he believes his dentist, David, committed malpractice against him in the course of an expensive dental procedure the year before, and that he wants to sue David for $100,000 in damages. Would any rule allow that claim to be joined to the pending lawsuit?

3. Having explored the rules to the extent necessary to answer these questions, can you say in general what kinds of parties and claims the rules allow to be joined to a lawsuit? What kinds of parties and claims cannot be joined? What animating purpose explains the extent and the limits of the joinder provisions of the Federal Rules?

BARAB v. MENFORD

United States District Court, E.D. Pennsylvania, 1983

98 F.R.D. 455

VanARTSDALEN, District Judge.

Third-party defendant Channel Home Centers, Inc. (Channel) has filed a motion to file and serve a third-party complaint upon Joy Plastics, Inc. In a letter to the court, defendant's counsel stated that he has no objection to Channel's motion. Plaintiff's counsel also stated in a letter to the court that he does not oppose Channel's motion as long as this would not impede trial of this action. Notwithstanding that Channel's motion is unopposed, the motion will be denied for the reasons set forth herein.

Federal Rule of Civil Procedure 14(a) provides in part that "a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action *who is or may be liable to [the original defendant] for all or part of the plaintiff's claim against him.*" Fed.R.Civ.P. 14(a) (emphasis added). It is no longer possible under Rule 14, as it was prior to the 1948 amendment to the rule, to implead a third party claimed to be solely liable to the plaintiff. * * * A proposed third-party plaintiff must allege facts sufficient to establish the derivative or secondary liability of the proposed third-party defendant. * * * Thus, under Rule 14(a), a third-party complaint is appropriate only in cases where the proposed third-party defendant would be secondarily liable to the original defendant in the event the latter is held to be liable to the plaintiff.

In this action, Channel, the proposed third-party plaintiff, is alleged to have sold to the defendant [Menford, doing business under the name "Pamela Menford's Hacienda Inn,"] the doormat which allegedly caused the injuries to plaintiff Mildred Barab. Channel denied selling the doormat to the defendant and, after discovery, continues to assert that denial. Channel contends that after having the doormat inspected by one of its buyers, it was able to identify the proposed third-party defendant, Joy Plastics, Inc., as the manufacturer and/or seller. Channel further contends that it could not reasonably have discovered the identity and involvement of the proposed third-party defendant at an earlier date because Channel had no records of the sale or purchase of the product and Joy Plastics, Inc., was *not* a supplier of the product to Channel.

It is clear from Channel's allegations that Channel has established no basis for the derivative or secondary liability of Joy Plastics, Inc. Channel's contentions, if accepted as true, would be a total defense to the defendant's third-party complaint against Channel. The fact that Joy Plastics, Inc., may be liable to the original defendant, in the event that the plaintiffs assert a claim against Joy Plastics, Inc., and prevail, does not form a basis for Channel to implead Joy Plastics, Inc., as a third-party defendant. Channel has alleged no facts which would suggest any possibility that Joy Plastics, Inc., could be liable to Channel. It is Channel's position that it never sold the doormat in question; that Joy Plastics, Inc., never supplied the product to Channel; and that Channel and Joy Plastics, Inc., had no relationship with each other in reference to the sale of the doormat to the Hacienda Inn.

The discovery deadline in this action was initially set for February 15, 1982. By agreement of the parties, and upon approval by the court, discovery was extended to April 15, 1982. On March 3, 1982, a third-party summons was issued to Channel as a third-party defendant. Discovery has continued in this action, notwithstanding the April 15, 1982 discovery deadline. To permit Channel

to implead Joy Plastics, Inc., at this stage of the litigation would inevitably impede trial of this action. Of necessity, Joy Plastics, Inc., would need additional time for discovery to determine its relative position in the litigation. In the event that Channel does establish that it did not manufacture or supply the doormat at issue, the original defendant may have a claim against Joy Plastics, Inc. However, this is not a matter to be determined in these proceedings.

Notes and Questions

1. The opinion does not clearly state some of the facts of the case, but you should be able to infer them from the opinion. Who were the original parties to this litigation? What happened that caused the litigation to arise? How did Channel Home Centers get involved? Which Federal Rule was used to bring Channel into the case?

2. Why did the rule permit Channel Home Centers to be brought into the case? Why does the rule *not* permit Channel Home Centers to bring Joy Plastics into the case? Could anyone bring Joy Plastics into the case? How could that be done?

3. Would it be *efficient* to allow a defendant like Channel to implead a defendant like Joy Plastics? If it would, why do the rules not allow it?

THE PINE TAR CASE

KANSAS CITY ROYALS v. NEW YORK YANKEES

Decision of Lee MacPhail, President, American League
July 28, 1983

With two out in the ninth inning of the game of July 24th, Kansas City at New York, George Brett hit a home run with a man on to put the Royals ahead by a score of 5-4. Manager Martin objected, claiming that the pine tar on Brett's bat extended beyond the permissible 18 inches from the handle. Plate umpire Tim McClelland conferred with crew chief Joe Brinkman and with umpires Nick Bremigan and Drew Coble. The portion of the bat covered with pine tar was measured and found to be well over 18 inches. Brett was therefore called out ending the game and giving New York a 4-3 victory.

The umpires cite Official Playing Rule 6.06(a) which states "that a batter is out for illegal action when he hits an illegally batted ball." They state that Rule 1.10(b) provides that a ball hit with a bat "treated with any material (including pine tar) ... which extends past the 18 inch limitation ... shall cause the bat to be removed from the game;" and is therefore an illegally batted ball. They ruled that since the bat used by Brett was illegal under Rule 1.10(b) and since Rule 6.06(a) provides that a batter hitting an illegally batted ball is out, Brett must therefore be called out and the home run nullified.

Decision

It is the position of this office that the umpires' interpretation, while technically defensible, is not in accord with the intent or spirit of the rules and that the rules do not provide that a hitter be called out for excessive use of pine tar. The rules provide instead that the bat be removed from the game. The protest of the Kansas City club is therefore upheld and the home run by Brett is permitted to stand. The score of the game becomes 5-4 Kansas City with Kansas City at bat and two out in the top of the ninth inning. The game becomes a Suspended Game at that point and must be completed before the close of the season if practicable or at the close of the season if it should affect the first place position in either division.

The reasoning of this office in reaching the above decision is as follows:

(1) Official Playing Rule 6.06(a) states that a batter is out for illegal action when "he hits an illegally batted ball." An "illegally batted ball" is defined in the rules as including one hit with a bat which does not conform to Official Playing Rule 1.10.

(2) Rule 1.10 outlines several requirements affecting the legality of a bat. One of these is that "the bat handle, for not more than 18 inches from the end may be covered or treated with any material (including pine tar) to improve the grip...," but that no such material shall improve the reaction or distance factor of the bat. Rule 1.10 specifically provides that if the pine tar extends past the 18 inch limitation, the bat shall be removed from the game. If it was intended that this infraction should fall under the penalty of the batter's being declared out, it does not seem logical that the rule should specifically specify that the bat should be removed from the game. . . .

(3) It is more logical to infer that the second part of the definition of an illegal batted ball, that pertaining to a bat which does not conform to Rule 1.10, is meant to refer to bats covered under Rule 6.06(d), which have been altered or tampered with in such a way to improve the distance factor or cause an unusual reaction on the baseball. . . .

(4) It is the conviction of the League President that the intent of the above rules is to declare a batter out and to inflict discipline upon him for use of an illegal bat, which has been "altered or tampered with to improve the distance factor or cause an unusual reaction on the baseball." (It has not been seriously contended that the pine tar on Brett's bat did either). It is not the intent of the rules to declare batters out or discipline them for improper use of pine tar. (The provision restricting the distance pine tar can extend up the barrel of the bat was primarily intended to keep from spoiling the ball and requiring new balls to be constantly brought into the game.) Conversations with several members of the Rules Committee reinforce this belief. The provision to prevent this is specifically spelled out in Rule 1.10 (i.e., remove the bat from the game).

(5) As stated, it has not been the usual practice in the Major Leagues to call batters out for using a bat with excessive pine tar. . . . [President MacPhail discussed two prior incidents concerning excessive pine tar on bats.]

Conclusions

A. Protest is allowed based on the League's decision with respect to the proper interpretation of the rules involved. It is the League's position that that meaning and intent is to discipline and declare out batters using bats that have been tampered with to increase distance potential, but not to treat pine tar excesses in the same manner. Instead, the use of bats with pine tar extending beyond 18 inches should simply be prohibited. The opposing team has the right to call the infraction to the umpire's attention and ask that the bat be changed or cleaned up.

B. Although Manager Martin and his staff should be commended for their alertness, it is the strong conviction of the League that games should be won and lost on the playing field -- not though technicalities of the rules -- and that every reasonable effort consistent with the spirit of the rules should be made to so provide.

C. Although the umpires are being overruled, it is not in my opinion the fault of the umpires involved, but rather is the fault of the Official Playing Rules, which in some areas are unclear and unprecise. (The rules, which must cover many complicated situations, have been in effect for many years and have been amended repeatedly. At times, however, other rules affecting related situations have not been brought into conformity.) The responsibility for this, and the responsibility perhaps for the lack of clear, uniform instructions to the umpires on the interpretation of the rules must rest with those of us in administrative positions in baseball, including myself.

Notes and Questions

1. The Official Rules of the National Football League provide for an appellate procedure within the game of football, known as "Instant Replay." Under the rules, Instant Replay is conducted by the NFL's Senior Vice President of Officiating ("SVPO"), an official at NFL's office in New York. The SVPO is in contact with all games electronically, regardless of where each game is

played. If a team's Head Coach challenges a call made on the field by the field officials, the SVPO reviews available tapes of the play and may change the call. However, the rules provide:

> An on-field ruling will be changed only when the Senior Vice President of Officiating or his or her designee determines that clear and obvious visual evidence warrants a change.

2019 Official Playing Rules of the National Football League, Rule 15, § 2, art. 1.

Under this rule, if the SVPO believes that the initial call on the field was wrong, but that it was a close call and not clear-cut, what is the SVPO supposed to do?

Why should this be the rule? In the case of a close call, why shouldn't the matter be governed by the best judgment of the SVPO?

2. Did President MacPhail determine that there was a "clear and obvious" error in the ruling of the field umpires in the Pine Tar Case? If not, what explains the difference between the football replay rule, in which reversal of the field official's call is possible only in cases of "clear and obvious" error, and this decision in a baseball appeal?

3. The football replay rule also provides:

> The Replay System will cover the following play situations:
>
> (a) Plays involving possession . . .
> (b) Plays involving touching of either the ball or the ground . . .
> (c) Plays governed by the goal line . . .
> (d) Plays governed by the boundary lines . . .
> [and several other, specified situations].
>
> The following aspects of plays are not reviewable:
>
> (a) Whether an erroneous whistle sounded;
> (b) Whether a ball was illegally batted or kicked;
> (c) Whether a passer intentionally grounded a pass; . . .
> [and several other, specified situations].

2019 Official Playing Rules of the National Football League, Rule 15, §§ 3, 4. Why is the replay rule limited to certain kinds of calls, leaving some calls not reviewable? Assuming the replay rule is a good idea, why shouldn't it apply to all situations?

4. President MacPhail ordered that the Pine Tar game be concluded on August 18, 1983. The continuation of the game was almost scuttled by a lawsuit brought by ticket holders who had attended the first part of the game on July 24 and who alleged they had a right to see the conclusion of the game without paying the $2.50 admission charge announced by the Yankees. A New York State trial court enjoined the game from proceeding, but an appellate judge vacated the injunction and ruled, "play ball." In the end, the Yankees allowed prior ticket holders in for free.

As the game resumed, the Yankee pitcher threw first to first base and then to second base, and the Yankees claimed that Brett should still be ruled out on the ground that he had not touched those bases after hitting his homer on July 24. However, both the first and second base umpires signaled "safe." Yankee Manager Billy Martin pointed out that the new first base umpire hadn't even been at the game on July 24 and questioned how that umpire could know whether Brett had touched first base. The second base umpire then produced an affidavit signed by all the umpires from the July 24 game attesting that Brett had touched all the bases on July 24.

The continuation of the game finally proceeded. It lasted just 9 minutes, 41 seconds, since all four remaining batters (one from Kansas City and three from New York) made immediate outs. The Yankees therefore lost, 5-4.

Background reading for the *Des Moines Navigation* case

Homestead Co. v. Valley Railroad, 84 U.S. (17 Wall.) 153 (1872): The Iowa Homestead Company claimed to own certain land in Iowa. Title to the land was disputed. The company sued, in state court in Iowa, several other parties that had claims to the land or part of the land, including the Des Moines Navigation and Railroad Company. Some of those parties caused the case to be removed from state court to federal court. The federal court heard the extremely complicated case and decided it against the Homestead Company. The Homestead Company appealed to the Supreme Court of the United States. The Supreme Court affirmed the judgment that the Homestead Company did not own the land in question.

As part of the same case, the Homestead Company also asserted that, during the pendency of the litigation, it had paid taxes on the land. The Homestead Company claimed that if it ultimately were determined not to own the land, it should at least be able to recover from the defendants the taxes that it had paid, and which the defendants, if they owned the land, ought to have paid. As to this claim, the Supreme Court said:

> It seems that the appellants, during this litigation, paid the taxes on a portion of these lands, and claim to be reimbursed for this expenditure in case the title is adjudged to be in the defendants, on the ground that they paid the taxes in good faith and in ignorance of the law. But ignorance of the law is no ground for recovery, and the element of good faith will not sustain an action where the payment has been voluntary, without any request from the true owners of the land, and with a full knowledge of all the facts. It is an elementary proposition, which does not require support from adjudged cases, that one person cannot make another his debtor by paying the debt of the latter without his request or assent.
>
> It is true, in accordance with our decision, the taxes on these lands were the debt of the defendants, which they should have paid, but their refusal or neglect to do this did not authorize a contestant of their title to make them its debtor by stepping in and paying the taxes for them, without being requested so to do. Nor can a request be implied in the relation which the parties sustained to each other. There is nothing to take the case out of the well-established rule as to voluntary payments. If the appellants, owing to their too great confidence in their title, have risked too much, it is their misfortune, but they are not on that account entitled to have the taxes voluntarily paid by them refunded by the successful party in this suit.

Mark Twain, *Life on the Mississippi*:

Chapter VIII
Perplexing Lessons

At the end of what seemed a tedious while, I had managed to pack my head full of islands, towns, bars, 'points,' and bends; and a curiously inanimate mass of lumber it was, too. However, inasmuch as I could shut my eyes and reel off a good long string of these names without leaving out more than ten miles of river in every fifty, I began to feel that I could take a boat down to New Orleans if I could make her skip those little gaps. But of course my complacency could hardly get start enough to lift my nose a trifle into the air, before Mr. Bixby would think of something to fetch it down again. One day he turned on me suddenly with this settler:

'What is the shape of Walnut Bend?'

He might as well have asked me my grandmother's opinion of protoplasm. I reflected respectfully, and then said I didn't know it had any particular shape. My gunpowdery chief went off with a bang, of course, and then went on loading and firing until he was out of adjectives.

I had learned long ago that he only carried just so many rounds of ammunition, and was sure to subside into a very placable and even remorseful old smooth-bore as soon as they were all gone. That word 'old' is merely affectionate; he was not more than thirty-four. I waited. By and by he said:

'My boy, you've got to know the *shape* of the river perfectly. It is all there is left to steer by on a very dark night. Everything else is blotted out and gone. But mind you, it hasn't the same shape in the night that it has in the daytime.'

'How on earth am I ever going to learn it, then?'

'How do you follow a hall at home in the dark? Because you know the shape of it. You can't see it.'

'Do you mean to say that I've got to know all the million trifling variations of shape in the banks of this interminable river as well as I know the shape of the front hall at home?'

'On my honor, you've got to know them *better* than any man ever did know the shapes of the halls in his own house.'

'I wish I was dead!'

'Now I don't want to discourage you, but—'

'Well, pile it on me; I might as well have it now as another time.'

'You see, this has got to be learned; there isn't any getting around it. A clear starlight night throws such heavy shadows that if you didn't know the shape of a shore perfectly you would claw away from every bunch of timber, because you would take the black shadow of it for a solid cape; and you see you would be getting scared to death every fifteen minutes by the watch. You would be fifty yards from shore all the time when you ought to be within fifty feet of it. You can't see a snag in one of those shadows, but you know exactly where it is, and the shape of the river tells you when you are coming to it. Then there's your pitch-dark night; the river is a very different shape on a pitch-dark night from what it is on a starlight night. All shores seem to be straight lines, then, and mighty dim ones, too; and you'd *run* them for straight lines, only you know better. You boldly drive your boat right into what seems to be a solid, straight wall (you knowing very well that in reality there is a curve there), and that wall falls back and makes way for you. Then there's your gray mist.

You take a night when there's one of these grisly, drizzly, gray mists, and then there isn't any particular shape to a shore. A gray mist would tangle the head of the oldest man that ever lived. Well, then, different kinds of *moonlight* change the shape of the river in different ways. You see—'

'Oh, don't say any more, please! Have I got to learn the shape of the river according to all these five hundred thousand different ways? If I tried to carry all that cargo in my head it would make me stoop-shouldered.'

'*No!* you only learn *the* shape of the river, and you learn it with such absolute certainty that you can always steer by the shape that's *in your head*, and never mind the one that's before your eyes.'

'Very well, I'll try it; but after I have learned it can I depend on it? Will it keep the same form and not go fooling around?'

Before Mr. Bixby could answer, Mr. W. came in to take the watch, and he said:

'Bixby, you'll have to look out for President's Island and all that country clear away up above the Old Hen and Chickens. The banks are caving and the shape of the shores changing like everything. Why, you wouldn't know the point above 40. You can go up inside the old sycamore snag, now.'

So that question was answered. Here were leagues of shore changing shape. My spirits were down in the mud again. Two things seemed pretty apparent to me. One was, that in order to be a pilot a man had got to learn more than any one man ought to be allowed to know; and the other was, that he must learn it all over again in a different way every twenty-four hours.

* * *

In the course of time I began to get the best of this knotty lesson, and my self-complacency moved to the front once more. Mr. Bixby was all fixed, and ready to start it to the rear again. He opened on me after this fashion:

'How much water did we have in the middle crossing at Hole-in-the-Wall, trip before last?'

I considered this an outrage. I said:

'Every trip, down and up, the leadsmen are singing through that tangled place for three-quarters of an hour on a stretch. How do you reckon I can remember such a mess as that?'

'My boy, you've got to remember it. You've got to remember the exact spot and the exact marks the boat lay in when we had the shoalest water, in every one of the five hundred shoal places between St. Louis and New Orleans; and you mustn't get the shoal soundings and marks of one trip mixed up with the shoal soundings and marks of another, either, for they're not often twice alike. You must keep them separate.'

When I came to myself again, I said:

'When I get so that I can do that, I'll be able to raise the dead, and then I won't have to pilot a steamboat to make a living. I want to retire from this business. I want a slush-bucket and a brush; I'm only fit for a roustabout. I haven't got brains enough to be a pilot; and if I had I wouldn't have strength enough to carry them around, unless I went on crutches.'

'Now drop that! When I say I'll learn[*] a man the river, I mean it. And you can depend on it, I'll learn him or kill him.'

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[*] 'Teach' is not in the river vocabulary.

FORD MOTOR CO. v. MONTANA EIGHTH JUDICIAL DISTRICT COURT, 141 S. Ct. 1017 (2021), was a consolidation of two cases, each of which concerned an accident in a Ford automobile. Markkaya Gullett was killed in Montana after the tread separated from the rear tire of her Ford Explorer. Her estate sued Ford in Montana state court, claiming design defect, failure to warn, and negligence. Adam Bandemer was injured in Minnesota when he was in a crash in a Ford Crown Victoria and his airbag failed to deploy. He sued Ford in Minnesota state court, claiming products liability, negligence, and breach of warranty.

Ford is a global company that is incorporated in Delaware with its principal place of business in Michigan. It does business and advertises its vehicles throughout the United States. It encourages a resale market for its products—almost all its dealerships buy and sell used Fords as well as new ones. It provides parts to dealers, repair shops, and auto supply stores to help consumers keep their Ford vehicles running.

In each of the two cases, Ford moved to dismiss for lack of personal jurisdiction. Ford argued that personal jurisdiction over it could exist only if its conduct in a state "gave rise" to a plaintiff's claims, which, Ford argued, would be true only in the states where it designed, manufactured, or sold the particular vehicle involved in the case. None of these things had occurred in the forum state in either case. The Explorer involved in the Montana case had been designed in Michigan, manufactured in Kentucky, and was first sold to a consumer in Washington state. The Crown Victoria involved in the Minnesota case had been designed in Michigan, manufactured in Canada, and was first sold to a consumer in North Dakota. The vehicles ended up in Montana and Minnesota following resales and consumer movements of the vehicles.

The highest state court in Montana and Minnesota each denied Ford's motion to dismiss. The Supreme Court granted Ford's petition for certiorari in each case.

All the Justices (except Justice Barrett, who did not participate) agreed that personal jurisdiction over Ford was proper. Justice Kagan's opinion for the Court (joined by the Chief Justice and by Justices Breyer, Sotomayor, and Kavanaugh) noted that prior cases had held that for a state to exercise specific personal jurisdiction over a defendant in a case, the case must "arise out of *or relate to* the defendant's contacts with the forum." Accordingly, she said, the plaintiff's claim does not necessarily have to be *causally* related to the defendant's contacts with the forum state. She noted that in the *World-Wide Volkswagen* case, involving a car sold in New York that later caused injury in Oklahoma, the Court had held that there was no jurisdiction in Oklahoma over the New York car dealer, but had suggested that Oklahoma would have jurisdiction over Audi (the car's manufacturer) and Volkswagen (the car's nationwide importer) if they had purposefully done business in Oklahoma in a way that would put them on notice that they might be sued in the state for an accident involving one of their cars, even though the particular car involved in the case had not been sold in Oklahoma. She then said:

> To see why Ford is subject to jurisdiction in these cases, . . . consider first the business that the company regularly conducts in Montana and Minnesota. . . . Small wonder that Ford has here conceded "purposeful availment" of the two States' markets. . . . By every means imaginable—among them, billboards, TV and radio

> spots, print ads, and direct mail—Ford urges Montanans and Minnesotans to buy its vehicles, including (at all relevant times) Explorers and Crown Victorias. Ford cars—again including those two models—are available for sale, whether new or used, throughout the States, at 36 dealerships in Montana and 84 in Minnesota. And apart from sales, Ford works hard to foster ongoing connections to its cars' owners. The company's dealers in Montana and Minnesota (as elsewhere) regularly maintain and repair Ford cars, including those whose warranties have long since expired. And the company distributes replacement parts both to its own dealers and to independent auto shops in the two States. Those activities, too, make Ford money. And by making it easier to own a Ford, they encourage Montanans and Minnesotans to become lifelong Ford drivers.
>
> Now turn to how all this Montana- and Minnesota-based conduct relates to the claims in these cases, brought by state residents in Montana's and Minnesota's courts. Each plaintiff 's suit, of course, arises from a car accident in one of those States. In each complaint, the resident-plaintiff alleges that a defective Ford vehicle—an Explorer in one, a Crown Victoria in the other—caused the crash and resulting harm. And as just described, Ford had advertised, sold, and serviced those two car models in both States for many years. (Contrast a case, which we do not address, in which Ford marketed the models in only a different State or region.) In other words, Ford had systematically served a market in Montana and Minnesota for the very vehicles that the plaintiffs allege malfunctioned and injured them in those States. So there is a strong "relationship among the defendant, the forum, and the litigation"—the "essential foundation" of specific jurisdiction. . . .[4]

Justice Kagan also noted that even though the Court rejected Ford's argument a plaintiff's claim must be *causally* connnected to the defendant's contacts with the forum state, it was "far from clear" that such a causal relationship was lacking in the two cases. Possibly, she said, the owners of the cars involved in the two cases might never have bought them, and so the cases might never have arisen, but for Ford's activities in Montana and Minnesota, including advertising in those two states and other activities designed to make driving a Ford vehicle convenient in those states, such as having Ford dealers ready to provide service and providing auto shops with Ford parts. However, she said, jurisdiction in cases like the two cases before the Court should not "ride on the exact reasons for an individual plaintiff's purchase or on his ability to present persuasive evidence about them."

Justice Kagan also said that allowing Montana and Minnesota to exercise jurisdiction was

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[4] None of this is to say that any person using any means to sell any good in a State is subject to jurisdiction there if the product malfunctions after arrival. We have long treated isolated or sporadic transactions differently from continuous ones. . . . And we do not here consider internet transactions, which may raise doctrinal questions of their own. . . . So consider, for example, a hypothetical offered at oral argument. "[A] retired guy in a small town" in Maine "carves decoys" and uses "a site on the Internet" to sell them. Tr. of Oral Arg. 39. "Can he be sued in any state if some harm arises from the decoy?" *Ibid*. The differences between that case and the ones before us virtually list themselves. (Just consider all our descriptions of Ford's activities outside its home bases.) So we agree with the plaintiffs' counsel that resolving these cases does not also resolve the hypothetical. See *id.,* at 39-40.

fair in light of Ford's enjoyment of the benefits of those states' laws (such as contract and property law). Also, she observed, automakers regularly marketing vehicles in Montana and Minnesota could not be unfairly surprised at being sued in those states when one of their vehicles causes injury there, regardless of where the vehicle was first sold. She also noted that Montana and Minnesota had significant interests at stake, such as providing a convenient forum for their residents to redress injuries inflicted by out-of-state actors. These interests were, she said, actually more significant than the interests of the states of first sale (Washington and North Dakota).

Justice Kagan distinguished *Bristol-Myers*. Although the defendant in that case was, like Ford, a national manufacturer that sold its products throughout the United States (including in the forum state), the forum state lacked any connection to the plaintiffs' claims. The plaintiffs were not residents of the forum state, had not purchased the defendant's product there, and had not sustained their injuries there. In the two cases against Ford, the plaintiffs resided in the forum states and alleged that they had suffered injury in the forum states from products that Ford extensively promoted, sold, and serviced in the forum states. Therefore, she said, the connection between the plaintiffs' claims nd Ford's activities in the forum states was close enough to support specific jurisdiction.

Justice Alito, concurring in the judgment, agreed with the Court's rejection of Ford's argument that there must be a "strict causal relationship" between the plaintiffs' claims and the defendant's activities in the forum state, but did not want to say that "no causal link of any kind is needed." He thought it reasonable "to infer that the vehicles in question here would never have been on the roads in Minnesota and Montana if they were some totally unknown brand that had never been advertised in those States, was not sold in those States, would not be familiar to mechanics in those States, and could not have been easily repaired with parts available in those States." Therefore, he said, the relationship between the plaintiff's claims and Ford's activities in the forum states was "causal in a broad sense" and sufficient for personal jurisdiction. He said: "When 'arise out of'" is understood in this way, it is apparent that 'arise out of ' and 'relate to' overlap and are not really two discrete grounds for jurisdiction."

Finally, Justice Gorsuch, joined by Justice Thomas, also concurred in the judgment. He agreed that personal jurisdiction was proper, but expressed concern that the Court's "related to" test was too amorphous. The Court's opinion, he said, did not explain where the line was between Ford and the hypothetical seller of duck decoys discussed in footnote 4 of the Court's opinion. Much litigation would be needed, he said, to explore the "virtually infinite number" of possible affiliations, lying between these two, that a defendant might have with a forum state. Moreover, Justice Gorsuch said, the right question was "what the Constitution as originally understood requires, not what nine judges consider 'fair' or 'just.'" He suggested that "all of this Court's efforts since *International Shoe* . . .might . . . in the end . . . be about trying to assess fairly a corporate's defendant's presence or consent."

Factual Background for *Mullane v. Central Hanover Bank &Trust Co.*

The facts of the *Mullane* case are complicated. Here is a simplified summary.

The case concerns trusts. A "trust" is an artificial entity created so that one person, the "trustee," can control property beneficially owned by another person, the "beneficiary." There are many reasons why someone might want to create a trust, but one common example is to provide for a person's spouse and children after that person's death. Person X might write a will providing that upon X's death, X's property should be placed in trust and invested, that the trustee should give the income generated by the trust to X's spouse during the spouse's lifetime, and that upon the spouse's death the remaining property in the trust should be divided among X's children.

If, in the preceding example, the trustee of the trust were a professional money manager, the trustee would charge a fee. Money management, like many things, benefits from economies of scale; it is relatively cheaper to manage a large trust than a small one. Therefore, at the time of the *Mullane* case, New York law provided for "common trust funds" (similar to modern-day mutual funds), in which many small trusts were merged into one large trust managed by a single trustee. Each participating trust shared an appropriate portion of the common trust's income and expenses.

The New York law provided that every three years the trustee of a common trust fund could seek a "judicial settlement" of its accounts. To do this, the trustee would ask New York's Surrogate's Court for such a settlement. Such settlement, if approved, would determine that the trustee had correctly paid all amounts owed to all beneficiaries and had not made any errors, stolen any money, or in any other way breached any of its duties to the beneficiaries of the fund. After such a settlement, no beneficiary could sue the trustee for any claims regarding the trust for the period covered by the settlement.

The Central Hanover Bank sought such a settlement of a common trust fund for which it was the trustee. Mullane was appointed to represent all those having an interest in the income from the fund. Mullane objected that the beneficiaries whom he represented had not received proper notice of the settlement proceeding. Pursuant to the New York law, the only notice to the beneficiaries that the settlement proceeding was taking place was that (a) at the time they initially joined the common trust fund, beneficiaries received notice that judicial settlement of the fund's accounts would be periodically sought as provided for by the New York law, and (b) at the time of each particular settlement proceeding, notice of the proceeding was published in a local newspaper for four consecutive weeks. Mullane claimed that this notice did not satisfy the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

With that as background, please start reading *Mullane* from the sentence beginning "We are met at the outset with a challenge . . ." toward the bottom of p. 239 of the Casebook.

HOFFMAN v. BLASKI, 363 U.S. 335 (1960): Plaintiffs brought a patent infringement action against defendant in the Northern District of Texas. Defendants were an individual and a corporation controlled by that individual. Plaintiffs alleged that the individual was a resident of, and the corporation maintained its only place of business in, the Northern District of Texas, and that it was there that the defendants infringed the plaintiffs' patents.

The defendants moved to transfer the case to the Northern District of Illinois, where two other cases concerning the same patents were already pending and where numerous relevant witnesses resided. The plaintiffs objected that the defendants did not reside in that district, maintained no place of business there, and did not infringe the patents there. The plaintiffs asserted that neither personal jurisdiction nor venue would have been proper in the Northern District of Illinois had the plaintiffs attempted to sue there originally. The defendants stated that they waived these defects. The district court found that the convenience of the parties and witnesses and the interest of justice would be served by transferring the case to the Northern District of Illinois and so granted the defendants' motion.

The plaintiffs sought a writ of mandamus requiring the district judge in Illinois to remand the case to the Texas district. The Court of Appeals for the Seventh granted this writ. The Supreme Court granted the defendants' petition for certiorari.

At the time of the case, 28 U.S.C. § 1404(a) read:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

The Supreme Court held that this phrase plainly referred only to a district or division in which the plaintiff would have had a *right* to bring the case. Accordingly, it held that the transfer by the district court to a district that would not have been a proper venue originally, and in which the defendants would not have been subject to personal jurisdiction, was improper, even though the defendants purported to waive these defects. The Court noted that allowing such a transfer would not only violate the text of § 1404(a) but would introduce "discrimination," because it would allow district courts to transfer cases to any district to which a case's *defendants* consented, even if the plaintiffs in the case objected, but would not allow a transfer to any district requested by the *plaintiffs*, if the defendants objected.

Three Justices dissented. They believed that the text of § 1404(a) was not as clear as the Court thought, and that a district court should be able to transfer a case to a district requested by the defendant if it determines that the interests of convenience and justice would be served thereby. As to the Court's concern about discrimination, the dissenters noted that transfer was not automatic, but occurred only if the district court determined that transfer would serve the interests of convenience and justice. They argued that a district court would be unlikely to so find if the plaintiff had a valid objection to a transfer.

BUSINESS GUIDES, INC. v.
CHROMATIC COMMUNICATIONS ENTERPRISES, INC.
498 U.S. 533 (1991)

JUSTICE O'CONNOR delivered the opinion of the Court.

In this case we decide whether Rule 11 of the Federal Rules of Civil Procedure imposes an objective standard of reasonable inquiry on represented parties who sign pleadings, motions, or other papers.

I

Business Guides, Inc., a subsidiary of a leading publisher of trade magazines and journals, publishes directories for 18 specialized areas of retail trade. In an effort to protect its directories against copying, Business Guides deliberately plants in them bits of false information, known as "seeds." Some seeds consist of minor alterations in otherwise accurate listings--transposed numbers in an address or zip code, or a misspelled name--while others take the form of wholly fictitious listings describing nonexistent businesses. Business Guides considers the presence of seeds in a competitor's directory to be evidence of copyright infringement.

On October 31, 1986, Business Guides, through its counsel Finley, Kumble, Wagner, Heine, Unterberg, Manley, Myerson, and Casey (Finley, Kumble), filed an action in the United States District Court for the Northern District of California against Chromatic Communications Enterprises, Inc., claiming copyright infringement, conversion, and unfair competition, and seeking a temporary restraining order (TRO). The TRO application was signed by a Finley, Kumble attorney and by Business Guides' president on behalf of the corporation. Business Guides submitted under seal affidavits in support of the application. These affidavits charged Chromatic with copying, as evidenced by the presence of 10 seeds in Chromatic's directory. One affidavit, that of sales representative Victoria Burdick, identified the 10 listings in Business Guides' directory that had allegedly been copied, but did not pinpoint the seed in each listing.

A hearing on the TRO was scheduled for November 7, 1986. Three days before the hearing, the District Judge's law clerk phoned Finley, Kumble and asked it to specify what was incorrect about each listing. Finley, Kumble relayed this request to Business Guides' Director of Research, Michael Lambe. This was apparently the first time the law firm asked its client for details about the 10 seeds. Based on Lambe's response, Finley, Kumble informed the court that Business Guides was retracting its claims of copying as to three of the seeds. The District Court considered this suspicious and so conducted its own investigation into the allegations of copying. The District Judge's law clerk spent one hour telephoning the businesses named in the "seeded" listings, only to discover that 9 of the 10 listings contained no incorrect information.

Unaware of the District Court's discovery, Finley, Kumble prepared a supplemental affidavit of Michael Lambe, identifying seven listings in Chromatic's directory and explaining precisely what part of each listing supposedly contained seeded information. Lambe signed this affidavit on the morning of the November 7 hearing. Before doing so, however, Lambe crossed out reference to a fourth seed that he had determined did not in fact reflect any incorrect information but which Finley, Kumble had not retracted.

At the hearing, the District Court, based on its discovery that 9 of the original 10 listings contained no incorrect information, denied the application for a TRO. More importantly, the judge stayed further proceedings and referred the matter to a Magistrate to determine whether Rule 11 sanctions should be imposed. The Magistrate conducted two evidentiary hearings, at which he instructed Business Guides and Finley, Kumble to explain why 9 of its 10 charges of copying were meritless. Both claimed it was a coincidence. Doubting the good faith of these representations, the Magistrate recommended that both the law firm and the client be sanctioned. * * *

Later, claiming to have uncovered the true source of the errors, the parties asked for and received a third hearing. Business Guides explained that in compiling its "master seed list," it had departed from its normal methodology. Usually, letters and numbers were transposed deliberately and recorded on the seed list before the directory was published. In this case, the company had compiled the master seed list after publication by looking for unintended typographical errors in the directory. To locate such errors, sales representative Victoria Burdick had compared the final version of the directory against initial questionnaires that had been submitted to Business Guides by businesses that wanted to be listed. When Burdick discovered a disparity between a questionnaire and the final directory, she included it on the seed list. She assumed, without investigating, that the information on the questionnaires was accurate. As it turned out, the questionnaires themselves sometimes contained transposed numbers or misspelled names, which other employees had corrected when proofreading the directory prior to publication. Consequently, many of the seeds appearing on the master list contained no false information. The presence of identical listings in a competitor's directory thus would not indicate copying, but rather accurate research.

The Magistrate accepted this explanation, but determined that sanctions were nonetheless appropriate. * * * First, he found that Business Guides, in filing the initial TRO application, had "failed to conduct a proper inquiry, resulting in the presentation of unreasonable and false information to the court." * * * The Magistrate did not recommend that Finley, Kumble be sanctioned for the initial application, however, as the firm had been led to believe that there was an urgent need to act quickly and thus relied on the information provided by its sophisticated corporate client. * * * Next, the Magistrate recommended that both Business Guides and Finley, Kumble be sanctioned for having failed to inquire into the accuracy of the remaining seeds following Michael Lambe's discovery, based on only a few minutes of investigation, that 3 of the 10 were invalid. * * * Finally, the Magistrate recommended that both the law firm and its client be sanctioned for their conduct at the first two evidentiary hearings. Instead of investigating the cause of the errors in the seed list, Business Guides and Finley, Kumble had relied on a "coincidence" defense. * * * The Magistrate determined that "[n]o reasonable person would have been satisfied with these explanations.... Finley, Kumble and Business Guides did not need this court to point out the blatant errors in the logic of their representations." * * *

The District Court agreed with the Magistrate, stating: "The standard of conduct under Rule 11 is one of objective reasonableness. Applying this standard to the circumstances of this case, it is clear that both Business Guides and Finley Kumble have violated the Rule." * * *

Chromatic brought a motion for sanctions against both Business Guides and Finley, Kumble. It later moved to withdraw the motion with respect to Finley, Kumble, after learning that the law firm had recently dissolved and that all proceedings against the firm were stayed under § 362 of the Bankruptcy Code. * * * The District Court accepted this withdrawal and issued its ruling without

prejudice to Chromatic's right to pursue sanctions against Finley, Kumble at a later date. * * *

Before ruling on the motion for sanctions against Business Guides, the District Court made additional factfindings. It observed that of the 10 seeds that had originally been alleged to be present in Chromatic's directory, only one actually contained false information. * * * This seed was a wholly fictitious listing for a company that did not exist. Chromatic denied that it had copied this listing from Business Guides' directory; it offered an alternative explanation--that Business Guides had "planted" the fake listing in Chromatic's directory. A Business Guides employee had requested a copy of Chromatic's directory, filled out a questionnaire providing information about the nonexistent company, and mailed this questionnaire to Chromatic intending that the company publish the false listing in its directory. * * * Business Guides did not deny the truth of these charges, and the District Court found that petitioner's silence amounted to a "tacit admission." * * * In light of this finding, the court had no choice but to conclude: "Business Guides' entire lawsuit has no basis in fact...." "[T]here was, and is, no evidence of copyright infringement." * * *

The court then ruled on Chromatic's motion for sanctions. Citing "the rather remarkable circumstances of this case, and the serious consequences of Business Guides' improper conduct," it dismissed the action with prejudice. * * * Additionally, it imposed $13,865.66 in sanctions against Business Guides, the amount of Chromatic's legal expenses and out-of-pocket costs. * * *

The Court of Appeals for the Ninth Circuit affirmed the District Court's holdings that Business Guides was subject to an objective standard of reasonable inquiry into the factual basis of papers submitted to the court, and that Business Guides had failed to conduct a reasonable inquiry before (1) signing the initial TRO application, and (2) submitting Michael Lambe's supplemental declaration. * * *

II

A

[Federal Rule of Civil Procedure 11 provides:]

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of

> existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.[5]

[The Court concluded that because a representative of Business Guides had signed the TRO application, Rule 11 permitted sanctions to be entered against Business Guides, even though nothing in the Rule requires a represented party to sign a court document.]

B

Having concluded that Rule 11 applies to represented parties, we must next determine whether the certification standard for a party is the same as that for an attorney. The plain language of the Rule again provides the answer. It speaks of attorneys and parties in a single breath and applies to them a single standard: "The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." As the Court of Appeals correctly observed: "[T]he rule draws no distinction between the state of mind of attorneys and parties." * * * Rather, it states unambiguously that any signer must conduct a "reasonable inquiry" or face sanctions.

Business Guides devotes much of its brief to arguing that subjective bad faith, not failure to conduct a reasonable inquiry, should be the touchstone for sanctions on represented parties. It points with approval to Rule 56(g) of the Federal Rules of Civil Procedure, which appears to subject affidavits in the summary judgment context to a subjective good faith standard. This argument is misdirected, as this Court is not acting on a clean slate; our task is not to decide what the rule should be, but rather to determine what it is. Once we conclude that Rule 11 speaks to the matter at issue, our inquiry is complete. * * * As originally drafted, Rule 11 set out a subjective standard, but the Advisory Committee determined that this standard was not working. * * * Accordingly, the Committee deleted the subjective standard at the same time that it expanded the rule to cover parties. * * * That the Advisory Committee did not also amend Rule 56(g) hardly matters. Rather than fashion a standard specific to summary judgment proceedings, the Committee chose to amend Rule 11, thereby establishing a more stringent standard for all affidavits and other papers. Even if we

[5] [Rule 11 has been significantly amended since the Court issued this decision. -- Ed.]

were convinced that a subjective bad faith standard would more effectively promote the goals of Rule 11, we would not be free to implement this standard outside of the rulemaking process. "Our task is to apply the text, not to improve upon it." * * *

Nor are we convinced that, as a policy matter, represented parties should not be held to a reasonable inquiry standard. Quite often it is the client, not the attorney, who is better positioned to investigate the facts supporting a paper or pleading. This case is a perfect example. Business Guides brought the matter to Finley, Kumble and requested the law firm to obtain an immediate injunction against Chromatic. Given the apparent urgency, the District Court reasoned that the firm could not be blamed for relying on the factual representations of its experienced corporate client. Rather, the blame--and the sanctions--properly fell on Business Guides:

> "This case illustrates well the dangers of a party's failure to act reasonably in commencing litigation. Here Business Guides, a sophisticated corporate entity, hired a large, powerful and nationally known law firm to file suit against a competitor for copyright infringement. This competitor happened to be a one-man company operating out of a garage in California. Two years later, after extensive time and effort on the part of the court, the various counsel for Business Guides, as well as various counsel for Business Guides' counsel, it turns out there was no evidence of infringement. The entire lawsuit was a mistake. In the meantime, the objects of this lawsuit have spent thousands of dollars of attorney's fees and have suffered potentially irreparable damage to their business. This entire scenario could have been avoided if, prior to filing the suit, Business Guides simply had spent an hour, like the court's law clerk did, and checked the accuracy of the purported seeds." 121 F.R.D., at 405.

Where a represented party appends its signature to a document that a reasonable inquiry into the facts would have revealed to be without merit, we see no reason why a district court should be powerless to sanction the party in addition to, or instead of, the attorney. * * * A contrary rule would establish a safe harbor such that sanctions could not be imposed where an attorney, pressed to act quickly, reasonably relies on a client's careless misrepresentations.

Of course, represented parties may often be less able to investigate the legal basis for a paper or pleading. But this is not invariably the case. Many corporate clients, for example, have in-house counsel who are fully competent to make the necessary inquiry. Other party litigants may have a great deal of practical litigation experience. Indeed, Business Guides itself is no stranger to the courts; it is a sophisticated corporate entity that has been prosecuting copyright infringement actions since 1948. * * * The most that can be said is that the legal inquiry that can reasonably be expected from a party may vary from case to case. Put another way, "what is objectively reasonable for a client may differ from what is objectively reasonable for an attorney." * * * The Advisory Committee was well aware of this when it amended Rule 11. Thus, the certification standard, while "more stringent than the original good-faith formula," is not inflexible. "The standard is one of reasonableness *under the circumstances*" (emphasis added). Advisory Committee's Note to

Fed.Rule Civ.Proc. 11, 28 U.S.C.App., p. 576. This formulation "has been embraced in all thirteen circuits." * * * This is a far more sensible rule than that proposed by Business Guides, which would hold parties proceeding pro se to an objective standard, while applying a lesser subjective standard to represented parties. As noted by the Court of Appeals: "We fail to see why represented parties should be given the benefit of a subjective bad faith standard whereas pro se litigants, who do not enjoy the aid of counsel, are held to a higher objective standard." * * *

Giving the text its plain meaning, we hold that it imposes on any party who signs a pleading, motion, or other paper--whether the party's signature is required by the Rule or is provided voluntarily--an affirmative duty to conduct a reasonable inquiry into the facts and the law before filing, and that the applicable standard is one of reasonableness under the circumstances.

III

* * *

In sum, we hold today that Rule 11 imposes an objective standard of reasonable inquiry on represented parties who sign papers or pleadings. We have no occasion to determine whether or under what circumstances a nonsigning party may be sanctioned. The District Court found that Business Guides failed to conduct a reasonable inquiry before signing the initial TRO application and before submitting the signed declaration of its Director of Research, Michael Lambe. Consequently, the District Court imposed $13,865.66 in sanctions against Business Guides and dismissed the action with prejudice. The Court of Appeals affirmed each of these rulings. For the reasons stated herein, the judgment of the Court of Appeals is

Affirmed.

[The dissenting opinion of Justice Kennedy, joined by Justice Marshall, Justice Stevens, and Justice Scalia, is omitted. The opinion disagreed primarily with the Court's determination that a party who signs a court document, even though not required to, may be sanctioned under Rule 11.]

ROWLAND v. FAYED

United States District Court for the District of Columbia, 1987

115 F.R.D. 605

JOYCE HENS GREEN, District Judge.

* * * Plaintiff Rowland, a foreign national, filed the above-captioned case in this federal court against the defendants Fayed, also foreign nationals, and *The Washington Times*, a citizen of this country. Defendants moved to dismiss for lack of diversity and also sought Rule 11 sanctions against plaintiff for having improperly brought suit in federal court. Plaintiff thereafter voluntarily dismissed his suit, and opposed the motion for sanctions on the grounds that the Court lacked jurisdiction to impose them, and that the jurisdictional defect did not warrant sanctions because it resulted from mere inadvertence rather than bad faith. On May 28, 1986, the Court entered an Order granting defendants' motion and directing the parties to submit additional pleadings as to the amount of the sanction to be imposed. Plaintiff took this directive as an invitation to again argue that the Court was without jurisdiction to impose sanctions; that an inadvertent failure to recognize the absence of diversity when foreign nationals are on both sides of a lawsuit is not conduct deserving of sanctions; and that, if sanctions were imposed, they should be imposed on plaintiff's counsel, Mr. Robert Beckman and Mr. David Kirstein, as the error was theirs and not plaintiff's. In an Order dated September 16, 1986, the Court amended its earlier Order, exonerating plaintiff from all liability for the improper filing and imposing a sanction of $500 jointly against Mr. Beckman and Mr. Kirstein instead.

To date, the Court has apparently succeeded only in convincing plaintiff's counsel that it possesses jurisdiction to impose sanctions. Mr. Beckman and Mr. Kirstein have filed a second motion to alter, amend or vacate, in which they argue, for the third time, that their inadvertent mistake is not worthy of sanctions. * * *

Movants Beckman and Kirstein continue to insist that sanctions are inappropriate absent at least some showing of bad faith, and that the punishment of inadvertent errors serves no real purpose. As the Court stated in its May 28 Order, however, the 1983 amendments to Rule 11 no longer require a showing of bad faith; rather, the amended Rule 11 incorporates a due diligence standard by requiring parties and attorneys to make "reasonable inquiry" before signing pleadings or motions, and is "intended to reduce the reluctance of courts to impose sanctions ... by emphasizing the responsibilities of the attorney and reinforcing those obligations by the imposition of sanctions." * * * The purpose served by imposition of sanctions in a case such as this, therefore, is to emphasize the obligation of attorneys to exercise due care in the preparation and filing of pleadings.

Movants next take issue with the Court's conclusion that "the lack of diversity was apparent on the face of the pleading," May 28 Order at 5, arguing that "the particular diversity rule[ ] regarding foreign parties [is] neither well-known nor apparent," but is instead "a little known judge-made rule" representing "an obscure and counterintuitive twist in [the] law." * * * This circuit, however, has taken a quite different view of the rule, noting recently * * * that "under long-held precedent, diversity must be 'complete'" and thus "[a] diversity suit ... may not be maintained in federal court by an alien against a citizen of a state and a citizen of some other foreign

country." (Quoting *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 2 L.Ed. 435 (1806).) * * *

Movants had knowledge of the foreign citizenship of plaintiff and two of the defendants, and most certainly should have known of the complete diversity rule. If they had any doubts whatsoever as to the applicability of that rule in a suit involving foreign nationals, those doubts could have been put to rest by consulting the most basic of reference works. *Moore's Federal Practice*, for example, states quite succinctly that "[w]hen there are alien parties on both sides of the controversy jurisdiction will be found lacking even though they are citizens of different foreign countries." * * * Contrary to movants' contention, the diversity rule regarding foreign nationals is neither little-known nor obscure, and more importantly, even the most cursory research could not have failed to disclose it. To the extent movants' proffer of evidence suggests that they relied on their extensive federal court practice and their lack of familiarity with the rule concerning foreign nationals, such reliance simply fails to comport with Rule 11's reasonable inquiry requirement. No federal court practitioner could be excused for not knowing the diversity requirements in suits involving citizens of this country; in a suit between foreign nationals, an attorney's knowledge of the long-standing requirement of complete diversity generally should at the very least have raised a question as to whether the rule applies where foreign nationals are on both sides of the case, and that question could have been resolved with an absolute minimum of effort. The complete failure to even consider the question, however, or having considered it, to undertake some slight investigation, could not be deemed reasonable and would not satisfy the obligations imposed by Rule 11. * * *

Accordingly, for all the foregoing reasons, it is this 21st day of May, 1987,

ORDERED that the motion of Beckman and Kirstein to alter, amend or vacate the Court's Order of September 16, 1986, be and it hereby is denied.

Notes and Questions

If you were a district judge, how would you distinguish between a legal argument that simply lost on its merits and a legal argument that was "frivolous" and so sanctionable under Rule 11?

Prior to 2015, the Federal Rules of Civil Procedure contained an Appendix of Forms, which illustrated how various documents contemplated by the rules might look. Of particular note was Form 11, which read:

Form 11

COMPLAINT FOR NEGLIGENCE

(Caption—See Form 1.)

1. (Statement of Jurisdiction—See Form 7.)

2. On *date*, at *place*, the defendant negligently drove a motor vehicle against the plaintiff.

3. As a result, the plaintiff was physically injured, lost wages or income, suffered physical and mental pain, and incurred medical expenses of $_____.

Therefore, the plaintiff demands judgment against the defendant for $_____, plus costs.

(Date and sign—See Form 2.)

Notes and Questions

1. What information about the plaintiff's claim against the defendant does this model complaint provide? What information that the defendant might want does it *not* provide? Why would Form 11 not call for the plaintiff to provide that information?

2. The corresponding form in the North Carolina state Rules of Civil Procedure is similar as to paragraphs 2 and 3, but in between them it contains a paragraph that states, "Defendant was negligent in that (a) defendant drove at an excessive speed, (b) defendant drove through a red light, (c) defendant failed to yield the right of way to plaintiff in a marked crosswalk." What is the point of this additional allegation? Why did the drafters of the North Carolina rules choose to include this allegation in their form complaint for negligence, even though the drafters of the federal rules did not?

3. In 2015, the drafters of the Federal Rules abrogated all the forms, including Form 11. Why would they do that?