

CIVIL PROCEDURE
CASES, PROBLEMS, AND EXERCISES
Fourth Edition

CHAPTER 8

[Updated June 2019]

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CHAPTER 8

ADVANCED JOINDER



A. IMPLADER

INTRODUCTORY PROBLEM 1

Consummate Cosmetics Corporation has recently developed a new face moisturizing cream. Consummate assigns Jean Gull, an employee in the company's marketing department, the daunting task of coming up with a name for the cream. Gull names the product "Fountain of Youth." Without consulting with the company president or board, Gull arranges for the cream to be distributed under that name to the public.

Soon after Fountain of Youth hits the shelves, Consummate Cosmetics is sued for false advertising by one its competitors. This competitor charges that use of the name "Fountain of Youth" falsely suggests the product will actually make skin look younger. The competitor also cites a statute that makes a company liable for false advertising caused by one of its employees in the course of that employee's duties.

Consummate does not dispute that the ad is a "false advertisement" as that term is used in governing law. However, it wants to bring three separate parties into this lawsuit. First, it seeks to bring in Jean Gull, claiming she was really responsible for the advertisement. Second, Consummate wants to bring in its insurance carrier. Although Consummate has a liability insurance policy, the insurance carrier has denied coverage, arguing the policy does not extend to false advertising.

Finally, Consummate wants to join Barry Sterr, an attorney who represents Consummate in many of its business dealings. Consummate has learned that Gull asked Sterr about the proposed product name. Without doing any research, Sterr assured Gull that the name would be perfectly acceptable. The bill for this work was sent to Consummate. Consummate argues that Sterr's malpractice in giving advice to an employee of the company led to this lawsuit and Consummate's likely liability to the competitor.

Can Consummate join any or all of these parties to the case? Assuming that at least one can be joined, what pleading should Consummate use to add it to the suit?

Governing Rule: Federal Rule 14.

INTRODUCTORY PROBLEM 2

Refer to the facts of Introductory Problem 1. Assume (without affecting the prior question) that Consummate successfully joins Gull and the insurance company.

The competitor now wants to file two claims against the new parties. First, it wants to file a false advertising claim against Gull based on her role in marketing the product. Second, it wants to add a claim against the insurance company. Under governing law, however, the competitor could not sue the insurance company directly at the present time. It could only sue the insurance company if it recovered a judgment against Consummate.

Gull also has a claim that she wants to bring against the competitor. Gull was injured when a tube of toothpaste manufactured by the competitor exploded, ruining her best suit.

Can the competitor and Gull bring any or all of their claims?

Federal Rule 20 (discussed in Chapter 2) allows a plaintiff injured by two or more people to join all of the actors as defendants in the same case. However, a plaintiff may be able to obtain full recovery without joining all responsible parties to the case. For example, if a debtor owes money to a creditor, and a bank or other party has guaranteed the debt, creditor may be able to obtain full recovery by suing only the debtor or the guarantor. In tort, some states hold tortfeasors “jointly and severally liable,” which means each defendant is responsible for all plaintiff’s damages even though the actions of others may have contributed to those injuries. Although Rule 20 allows the plaintiff to join the others, nothing in the Federal Rules requires it to join them (the mandatory joinder provisions of Rule 19, which are discussed later in this chapter, are extremely narrow and would not require joinder in either situation described above).

In many cases, a defendant who is forced to pay the entire amount of the injury may recover against the other responsible people. Depending on the situation, the defendant’s right is labeled one of *contribution* (partial reimbursement) or *indemnification* (full reimbursement). Defendant can, of course, wait until the original suit by plaintiff is complete, and bring a separate suit for contribution or indemnity. However, because it is often more efficient to take care of both the original claim and the claim for contribution or indemnity at the same time, Rule 14 allows the defendant to join the other responsible party or parties to the first action.

Do not assume that Rule 14 applies only to guarantees and joint tortfeasors. It allows the defendant to bring in an additional party whenever that party may be liable to defendant for all or part of defendant’s liability to plaintiff. Another common situation in which impleader may be proper is when one party agrees by contract to indemnify

another. A carrier who agrees to transport a dangerous substance, for example, might negotiate a term in the contract for carriage in which the party who ships the substance agrees to indemnify the carrier. If the carrier is sued, it may bring in the party who shipped the substance as a third-party defendant.

MITCHELL V. HOOD

614 Fed.Appx. 137 (5th Cir. 2015)

PER CURIAM

After losing a state judicial election to Ernestine “Teena” Anderson-Trahan, Kiana Aaron Mitchell sued Brett Hood, alleging that Hood distributed a defamatory postcard about Mitchell in the days immediately preceding the election. Hood impleaded Judge Anderson-Trahan as a third-party defendant, alleging that Judge Anderson-Trahan was responsible for placing Hood’s name on the election postcard. After being impleaded, Judge Anderson-Trahan moved to dismiss the case against her under Louisiana’s anti-SLAPP statute. . . .

I.

Mitchell and Judge Anderson-Trahan competed in a run-off in a Louisiana state judicial election that Judge Anderson-Trahan won by 266 votes. The day before the polls opened, approximately 3,000 residents of the jurisdiction received a postcard that accused Mitchell of violently attacking an “innocent pregnant woman.” The postcard—in an apparent attempt to comply with election laws—indicated that it was “Paid for by B. Hood.”

After the election, Mitchell hired an investigator and learned that “B. Hood” was Brett Hood of Washington, D.C. Mitchell then brought suit on four claims of “abuse of right.” Hood answered, admitting that the court had personal jurisdiction over him, but denied the allegations in Mitchell’s Complaint. . . .

Hood also filed a third-party complaint and impleaded Judge Anderson-Trahan and Kelvin McClinton as third-party defendants. Hood alleged that he met McClinton, a supporter of Judge Anderson-Trahan’s campaign, “through a social virtual football league.” Hood alleged that McClinton asked Hood if Judge Anderson-Trahan could use Hood as a “reference.” Hood asserted that he had no interest in the judicial election and no knowledge of, or participation in, the creation or distribution of the postcard. Hood then impleaded Judge Anderson-Trahan and McClinton under Rule 14 for fraud, misrepresentation, abuse of right, and injury to personal and professional reputation.

The following month, Mitchell amended her complaint to add McClinton. Mitchell’s amended complaint alleged that McClinton

conspired to injure Mitchell's reputation through participation in mailing the postcard. Mitchell did not add Judge Anderson-Trahan as a defendant. Mitchell's original complaint stated that "Anderson-Trahan has publicly denied association with the postcard" and "association with Hood and therefore is not made a party to these proceedings." However, Mitchell's amended complaint stated that "McClinton has admitted to Hood that . . . Anderson-Trahan was associated with the design, printing, and/or mailing of the postcard."

Judge Anderson-Trahan moved to dismiss Hood's claims under Louisiana's anti-SLAPP law, La.Code Civ. P. art. 971, which aims to limit lawsuits that seek to chill speakers' First Amendment rights. Mitchell argued that Judge Anderson-Trahan was not entitled to invoke Article 971 because Judge Anderson-Trahan . . . denied making the statements in the postcard [and accordingly was not being sued because she exercised her right to speak]. . . .

We granted leave to appeal under 28 U.S.C. § 1292(b). . . .

III.

Judge Anderson-Trahan argues that under Federal Rule of Civil Procedure 12, she may move to dismiss under Louisiana's anti-SLAPP statute because as the impleaded party she may assert any defense on behalf of Hood that Hood could raise himself. Before addressing this, or any other question, we first must decide if Judge Anderson-Trahan is a properly impleaded party who is permitted to remain as a third-party defendant at all. Because we conclude that Judge Anderson-Trahan was not properly impleaded under Rule 14, she is not a proper party to this case. Therefore, we need not decide whether the anti-SLAPP defense may be asserted by either a third-party defendant or by a party who does not embrace the speech.

Federal Rule of Civil Procedure 14 permits a defending party to, "as third-party plaintiff, [bring a claim against] a nonparty who is or may be liable to it for all or part of the claim against it." Fed.R.Civ.P. 14(a)(1). Impleader under Rule 14 is only proper if the claims asserted by the third party are derivative of the main claim—if the impleaded party is or may be liable for part of "the claim against [the original defendant.]" Impleader is not permitted because a third party may be liable to the original defendant for some other, independent reason. In other words, it is not enough that the impleaded claims arise from the same facts and events as the original claim; rather, for the impleaded claim to be proper, the potential liability of the third-party defendant must be contingent upon the outcome of the original claim.

Hood's claims against Judge Anderson-Trahan are not contingent upon Mitchell's claims against Hood. Mitchell initially sued Hood for a variety of claims, based on allegations that Hood designed, printed, and

distributed the postcard that attacked Mitchell with alleged false and defamatory statements. Hood then impleaded Judge Anderson-Trahan, bringing claims that Judge Anderson-Trahan was liable to Hood for fraud, misrepresentation, abuse of right, identity theft and invasion of privacy, because Judge Anderson-Trahan placed Hood's name and address on the postcard.

As a factual matter, whether Mitchell proves that Hood made defamatory statements in the postcard does not govern Hood's claims against Judge Anderson-Trahan. Hood's claims against Judge Anderson-Trahan for putting Hood's name on the postcard may succeed or fail in a scenario where Mitchell's claims against Hood succeed or a scenario where Mitchell's claims against Hood fail. Judge Anderson-Trahan is no more or less liable to Hood based upon Hood's liability to Mitchell.

Furthermore, Hood has not asserted that his claims against Judge Anderson-Trahan are derivative of Mitchell's claims against Hood. Hood does not seek damages from Judge Anderson-Trahan contingent upon his liability on Mitchell's claims. In fact, Hood specifically alleges that he has been harmed by Judge Anderson-Trahan simply by becoming embroiled in this conflict, and the existence of Mitchell's lawsuit, regardless of whether Mitchell prevails. Hood's claims against Judge Anderson-Trahan stand on their own, and Hood's amended complaint does not limit his claims to mitigating any damages that he may need to pay to Mitchell.

Because Judge Anderson-Trahan is not a properly impleaded party under Rule 14, she must be dismissed as a party. Therefore, we need not address whether Louisiana's anti-SLAPP statute may be raised by a third party on behalf of an original defendant. . . .

This case is REMANDED to the district court for proceedings not inconsistent with this opinion.

CITY OF ORANGE BEACH V. SCOTTSDALE INSURANCE CO., 166 F.R.D. 506 (S.D. Ala. 1996). In this case, a city had sued its insurance company for refusing to settle a previous lawsuit that had been filed against the city. That case resulted in a judgment of \$4.5 million against the city, an amount far in excess of the insurance policy's liability limits. The insurance company in turn attempted to implead the law firm that it had hired to represent the city in the suit. The insurance company claimed that the law firm was also negligent, thereby making it a joint tortfeasor.

The court refused to allow impleader. Even though the law firm may well have been a joint tortfeasor, Alabama law did not allow contribution among joint tortfeasors who were both "actively" negligent. It only allowed a claim for contribution by a "passive" joint tortfeasor against an "active" one. Because the insurance company itself was responsible for the decision,

it was an active tortfeasor. Therefore, the company had no legal claim against the attorneys for contribution.

The court also refused to allow the insurance company to use impleader to assert a malpractice claim against the law firm. It reasoned the malpractice claim was an independent liability owed by the firm to the insurance company, which was not logically connected with the underlying claim by the city against defendant insurer.

NOTES AND QUESTIONS

1. *Rule 14 and the Substantive Law.* Rule 14 does not itself *create* a right of indemnity or contribution. As *Mitchell* demonstrates, the party seeking impleader must show that such a right already exists in the substantive law. Rule 14 simply provides a procedure by which defendant's existing right of indemnity or contribution can be litigated along with the suit establishing defendant's liability. Courts dealing with impleader therefore will often spend considerable time analyzing the substantive law.

Generally, a substantive right to indemnity or contribution can arise in two ways. First, it can be created by contract. Insurance contracts are but one form of a contractual right; other examples include contracts of surety, payment or performance bonds, and indemnity agreements. Second, the law may imply a duty of indemnity or contribution. The law will often impose a right of indemnity when one party is held "vicariously" or "secondarily" liable for the actions of another, such as an employer's liability for acts of an employee. Contribution generally arises in tort cases.

2. "*Him not me.*" One situation where the substantive law proves important is where the defendant tries to argue the third party is solely responsible for the plaintiff's injury, and that defendant should bear no liability. In some ways *Mitchell* falls into this mold. Hood denied having anything to do with the postcard. Under substantive law, if Hood is held liable for defamation, Judge Anderson-Trahan would be under no duty to indemnify Hood, even if the holding was erroneous. Absent that duty to reimburse, impleader is improper.

Note, however, that in this situation Hood might have been able to effect impleader by pleading in the alternative. If he alleges in the alternative that he and Judge Anderson-Trahan jointly wrote the defamatory card, a right to contribution may exist. Of course, Hood could only recover if he proved this claim.

3. *Orange Beach*, the squib case, is an example of litigation arising from an unsuccessful settlement attempt. A liability insurer typically defends against claims that fall under the coverage of its policy and, as the potential payer under the policy, makes settlement decisions. The large jury verdict against the City of Orange Beach, and its subsequent suit alleging bad faith on the part of Scottsdale Insurance Company for its failure to settle the claim

against the city, illustrate the importance of carefully assessing a settlement offer and comparing it to potential jury verdicts.

4. Do you agree with the court in *Orange Beach* that the malpractice claim did not comply with Rule 14? In the operative part of its opinion, the court stated its reasoning:

While such malpractice claim is related to the Orange Beach claims against Scottsdale, the malpractice claim is separate and independent from the Orange Beach claim against Scottsdale. As stated above Scottsdale has an independent duty to its insured to exercise honest judgment with regard to the settlement of claims. If Scottsdale breached its duty it did so by its own actions or inactions. Therefore, Scottsdale could be found to have acted negligently or in bad faith regardless of whether Stone Granite was guilty of professional malpractice. In fact, Scottsdale could be victorious in the main claim even if Stone Granite committed the alleged professional malpractice. The above is true because advice of counsel is only one of the many factors that an insurance company must consider when denying to settle a claim. The claim for professional malpractice is not dependent upon Orange Beach's claims against Scottsdale for negligent and bad faith failure to settle a claim. Therefore, Count I is a separate and independent claim that cannot serve as a proper impleader claim under Rule 14(a).

Is the malpractice claim really separate and independent? If Scottsdale won the underlying suit, was there really "malpractice"? What damages would Scottsdale suffer if it won the suit against the city?

5. The growth of comparative negligence in tort can make it difficult to apply impleader. In recent years, many legislatures and courts have abandoned the traditional doctrine of joint and several liability, under which each defendant could be liable for the entire amount of the injury. They have substituted a system in which the court attempts to assign a precise percentage of fault to each defendant, and if appropriate, to the plaintiff. Each party is liable *only* for the percentage of injury it caused. Comparative negligence directly affects contribution and indemnity. For an in-depth analysis of California's comparative negligence rule and its effect in impleader, see *American Motorcycle Ass'n v. Superior Court*, 20 Cal.3d 578, 578 P.2d 899 (1978).

6. When a substantive right to indemnity or contribution does exist, Rule 14 promotes efficiency by allowing two suits that would otherwise be litigated back-to-back to be merged into a single proceeding. In addition to efficiency, however, this joinder may also help prevent the injustice that can result from separate lawsuits. There is no guarantee that two courts will decide the same basic facts in the same way. In some situations, splitting the dispute into two or more cases can result in unfairness.

Suppose, for example, that plaintiff is injured by a defectively-designed product. Rather than sue the manufacturer, plaintiff elects to sue the retail

store where she purchased the product. Many states would apply the doctrine of vicarious liability, and hold the retailer responsible for plaintiff's injury even though the retailer was not careless in any way. If the plaintiff demonstrates that the product was indeed defective, the retailer can be required to pay plaintiff's full damages.

The law also allows the retailer to seek full indemnity from the manufacturer. Absent impleader, the retailer would have to pursue its indemnity claim in a separate action. The problem, however, is that there is no way to guarantee the second case will come out the same way as the first. Suppose, for example, the manufacturer convinces the jury in the second case that the product was not defective. In this case, the retailer would end up paying for an injury for which it was not responsible.

Impleader helps to avoid this sort of unfairness by assigning one court the duty to determine the core issue of whether the product is defective. That determination applies not only to plaintiff's claim against defendant, but also to defendant's third-party claim.

7. Impleader does not always result in more efficiency. A court has the discretion to refuse to hear a third-party claim even though the claim complies with the requirements of Rule 14. A court will typically use this discretion when the new claim would make the case unduly complicated. For an example of a court dismissing a claim that satisfied Federal Rule 14, see *Hicks v. Long Island Railroad*, 165 F.R.D. 377 (E.D.N.Y. 1996).

8. Defendant's claim against a third-party defendant is treated as if it were a complaint. The third-party defendant is required to answer the third-party complaint, Rule 7(a)(6), and to bring any compulsory counterclaims that it may have against the defendant, Rule 14(a)(2)(B). In addition, once a third-party defendant is joined, plaintiff and the third-party defendant may be able to bring related (and in some cases even unrelated) claims they have against each other, Rule 14(a).

B. INTERVENTION

INTRODUCTORY PROBLEM

Pat holds a patent on the world's finest mousetrap, which uses a computer chip to ensure no mouse can escape. Jealous of Pat's success, Diane begins to produce and sell a similar mousetrap. Pat immediately sues Diane in federal court for patent infringement.

Diane obtains the computer chips for her trap from Interel, Inc. Interel produces only one model of chip, which was custom-designed for Diane's trap. Interel sells its entire output of chips to Diane. Therefore, Interel is justifiably concerned with Pat's suit against Diane. Although Interel is not liable directly to Pat—Pat's patent covers a trap that uses a chip, not the chip itself—Interel fears if Diane is held liable demand for its chip will disappear.

Is there any way Interel can become a party in Pat's lawsuit?

Governing Rule: Rule 24(a) and (b).

A plaintiff has considerable autonomy over who will be a party to a case. Plaintiff names the defendants, and may elect to sue fewer than all potentially liable parties. Moreover, even though plaintiffs with closely aligned interests *may* join as co-plaintiffs, nothing requires one plaintiff to allow another person to join his case.

Rule 24 is an exception to the basic principle of plaintiff autonomy. In some situations, a party may join a pending case even though plaintiff and the other parties would rather that person not be in the case. Of course, it would be inefficient to allow anyone to join a case merely because he wants to have a say in the outcome. Instead, Rule 24 limits intervention to people who are genuinely interested in the outcome of the case. If the person can convince the court that her interest is genuine, and that there is an overlap between her case and the one before the court, she may be able to *intervene by permission* under Rule 24(b). In some situations, a person's interest is so directly threatened that she can *intervene of right* under Rule 24(a). If a person satisfies Rule 24(a), she can join the case even if the parties and the court all agree they would prefer not to have her as a party.

CHILES V. THORNBURGH

865 F.2d 1197 (11th Cir. 1989)

CLARK, CIRCUIT JUDGE.

In November of 1985, Lawton Chiles, a United States Senator from Florida, filed an action against the Attorney General of the United States and several other Department of Justice (DOJ) officials, and the Secretary of the Department of Defense (DOD), alleging that the federal government was operating Krome Detention Center (Krome), a federal facility located in Dade County, Florida, illegally. After Senator Chiles' complaint was filed, Dade County and Bob Martinez, the Governor of Florida, were granted leave to intervene and filed complaints. Several Krome detainees, individual homeowners living near Krome, and a Homeowners' Association (the proposed intervenors) were not granted leave to intervene.

The district court dismissed the complaints, holding that all the plaintiffs and most of the proposed intervenors lacked standing and that the issues raised by the complaints presented nonjusticiable political questions. For the reasons which follow, we affirm in part, reverse in part, and remand the case to the district court. . . .

I

Krome is a minimum-security, short-term Bureau of Prisons (BOP) facility. Since the Mariel Boatlift of 1980, DOJ officials have used Krome to detain aliens awaiting processing, exclusion, or asylum. In 1981, several high-ranking DOJ officials, including the Attorney General and the Commissioner of the Immigration and Naturalization Service (INS), testified before Congress that Krome was not a long-term detention facility for aliens. . . .

When he questioned DOJ officials about the status of Krome in 1983, Senator Chiles was assured that Krome remained a temporary detention facility and that a permanent long-term detention facility would be ready by 1985.

Despite their assurances, DOJ officials used Krome as a long-term detention facility to hold large numbers of aliens, including convicted felons, indefinitely. Many of the felons held at Krome were aliens who had finished serving jail sentences for state and federal offenses committed in the United States and were waiting determination of their status by INS. In October of 1985, over forty alien felons rioted and escaped from Krome. Soon afterwards, the INS District Director stated publicly that the alien felons had to be removed from Krome for the protection of the other aliens. Although DOJ officials recognized that events such as the 1985 escape were the result of their policy of housing felons with nonviolent aliens, they did not transfer most of the felons from Krome. By 1986, the felons at Krome had formed gangs which preyed upon nonviolent aliens and regularly assaulted guards. DOJ officials hired improperly trained private security guards to protect the nonviolent aliens and maintain control of Krome.

The procedural history of this case is important to an accurate understanding of what is at issue on appeal. In 1985, Senator Chiles filed his complaint. Alleging the facts above, the complaint sought several forms of relief: (1) a declaratory judgment that the government's affirmative misrepresentations estopped the government from operating Krome as other than a minimum security, short term facility with a cap of 525 persons, none of whom would be felons ("the estoppel claim"); (2) declaratory and injunctive relief relating to the responsibilities and duties of DOJ, BOP, and INS with respect to Krome; and (3) a writ of mandamus ordering the government to (a) remove all alien felons from Krome and transfer them to medium security or maximum security federal facilities; (b) obey the cap on the number of aliens which can be detained at Krome; and (c) limit detention of aliens at Krome to short-term minimum security processing stays.

Dade County and Governor Martinez sought to intervene. Their complaints alleged the same facts and sought similar relief as Senator Chiles except that they did not assert a separate and distinct equitable estoppel claim. The district court allowed them to intervene. Subsequently,

three additional groups sought to intervene: detainees X and Y individually and as representatives of a class of non-felon detainees, the Kendall Federation Homeowners Association, and two individual homeowners, David Lowry and Dorothy Cissel. The intervenors sought the same relief as Senator Chiles. In an order of dismissal, the district court ended the lawsuit. The court found that Senator Chiles, the Governor, and Dade County did not have standing. He also denied the proposed intervenors right to intervene on the grounds that the detainees had adequate recourse through habeas corpus and that the homeowners and Homeowners Association had failed to allege an injury from the operation of Krome. Finally, the district court held that the case presented a nonjusticiable political question because it involved policy decisions which were entrusted to the Executive branch.

All plaintiffs and proposed intervenors appealed. . . .

II

. . . [The court held Dade County had standing to bring the claims, but not Senator Chiles or Governor Martinez. Therefore, it upheld the lower court's dismissal of the Senator's and Governor's claims.]

III

In their motions to intervene pursuant to Rule 24 of the Federal Rules of Civil Procedure, the proposed intervenors alleged that their liberty and property interests were violated by the government's operation of Krome. The district court denied the motions, holding that the detainees had adequate recourse through writs of habeas corpus and that the homeowners and the Homeowners' Association lacked standing. . . .

A party seeking to intervene as of right under Rule 24(a)(2) must show that: (1) his application to intervene is timely; (2) he has an interest relating to the property or transaction which is the subject of the action; (3) he is so situated that disposition of the action, as a practical matter, may impede or impair his ability to protect that interest; and (4) his interest is represented inadequately by the existing parties to the suit. If he establishes each of the four requirements, the district court must allow him to intervene.

A party seeking to intervene under Rule 24(b)(1)(B) must show that: (1) his application to intervene is timely; and (2) his claim or defense and the main action have a question of law or fact in common. The district court has the discretion to deny intervention even if both of those requirements are met, and its decision is reviewed for an abuse of discretion.

1.

In determining whether the detainees' motion to intervene was timely, we must consider the length of time during which the detainees knew or reasonably should have known of their interest in the case before moving

to intervene, the extent of prejudice to the existing parties as a result of the detainees' failure to move for intervention as soon as they knew or reasonably should have known of their interest, the extent of prejudice to the detainees if their motion is denied, and the existence of unusual circumstances militating either for or against a determination that their motion was timely. We must also keep in mind that "timeliness is not a word of exactitude or of precisely measurable dimensions. . . . We believe that the detainees' motion to intervene was timely. It was filed only seven months after Senator Chiles filed his original complaint, three months after the government filed its motion to dismiss, and before any discovery had begun. None of the parties already in the lawsuit could have been prejudiced by the detainees' intervention.

Under Rule 24(a)(2), the detainees' intervention must be supported by a "direct, substantial, legally protectable interest in the proceeding.' . . . In essence, the [detainees] must be at least . . . real part[ies] in interest in the transaction which is the subject of the proceeding." *Athens Lumber*, 690 F.2d at 1366 (citations omitted). The detainees' interest need not, however, "be of a legal nature identical to that of the claims asserted in the main action." *Diaz*, 427 F.2d at 1124. Our inquiry on this issue "is 'a flexible one, which focuses on the particular facts and circumstances surrounding each [motion for intervention].'" *United States v. Perry County Board of Education*, 567 F.2d 277, 279 (5th Cir.1978) (quoting *United States v. Allegheny-Ludlum Indus., Inc.*, 517 F.2d 826, 841 (5th Cir.1975), cert. denied, 425 U.S. 944, 96 S. Ct. 1684, 48 L. Ed. 2d 187 (1976)).

There is no doubt that the detainees satisfy the interest requirement of Rule 24(a)(2). The detainees are being held at Krome, the axis on which the lawsuit turns. They claim that the government's operation of Krome—e.g., its practice of keeping alien felons along with nonviolent alien detainees and its hiring of untrained security personnel—is in violation of minimum federal and state prison standards and threatens them with an imminent risk of harm. The detainees are analogous to prisoners who have standing to sue over the conditions of the institution where they are detained. By any imaginable yardstick, the detainees have a "direct, substantial, legally protectable interest" in the lawsuit challenging the operation of Krome and are asserting legal rights of their own.

The nature of the detainees' interest and the effect that the disposition of the lawsuit will have on their ability to protect that interest are closely related issues. "The second cannot be answered without reference to the first." *Hobson v. Hansen*, 44 F.R.D. 18, 30 (D.D.C.1968). We think the detainees are so situated that the disposition of the lawsuit will, as a practical matter, impair their ability to protect their interests. As we have already discussed, the detainees are confined in the institution whose operation is being challenged. There is therefore a conjunction of a claim to and an interest in the very transaction which is the subject of the main

action, and the *stare decisis* effect of a decision suggests the practical disadvantage requisite for intervention. Where a party seeking to intervene in an action claims an interest in the very property and very transaction that is the subject of the main action, the potential *stare decisis* effect may supply that practical disadvantage which warrants intervention as of right. The detainees' ability to litigate the government's operation of Krome in a separate lawsuit might be an exercise in futility if the instant lawsuit was decided in favor of the government.

Because the detainees' interest is similar to, but not identical with, that of Dade County, we must determine whether the detainees' interest is adequately represented. The Supreme Court has held that the inadequate representation requirement "is satisfied if the [proposed intervenor] shows that representation of his interest 'may be' inadequate" and that "the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n. 10 (1972). Thus, the detainees "should be allowed to intervene unless it is clear that [Dade County] will provide adequate representation." 7C C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 1909, at 319 (2d ed. 1986). The fact that the interests are similar does not mean that approaches to litigation will be the same. Dade County may decide not to emphasize the plight of the aliens held at Krome but focus instead on the effect that Krome has on those who live outside its walls. After all, Dade County is mainly concerned with the expenditures that have to be made because of Krome. We conclude that this possibility sufficiently demonstrates that the detainees' interests are not adequately represented.

Our foregoing discussion indicates that the district court erred in not allowing the detainees to intervene as of right under Rule 24(a)(2). We therefore reverse its ruling. On remand, the detainees are to be treated as original parties and stand on equal footing with the original parties.

2.

We need address only one of the requirements of Rule 24—inadequate representation—to dispose of the argument of the homeowners and the Homeowners' Association that they were entitled to intervene as of right. Unlike the detainees, the homeowners and the Homeowners' Association have an interest which is *identical* to Dade County: the prevention of riots and escapes from Krome and the protection of nearby residents. There is no indication whatsoever that the representation rendered by Dade County would be inadequate. *See Athens Lumber*, 690 F.2d at 1366 (where interest of proposed intervenor is the same as that of one of the parties, court can presume that the interest is adequately represented).

As to permissive intervention under Rule 24(b)(1)(B), we cannot say that the district court abused its discretion with regard to the homeowners and the Homeowners' Association. The duplicative nature of the claims and interests they asserted threatens to unduly delay the adjudication of the

rights of the parties in the lawsuit and makes it unlikely that any new light will be shed on the issues to be adjudicated. Having concluded that the homeowners and the Homeowners' Association were not entitled to intervene as of right, and that the district court did not abuse its discretion with regard to permissive intervention under the anomalous rule, we . . . dismiss the appeals of the homeowners and the Homeowners' Association. . . .

NOTES AND QUESTIONS

1. Read literally, Rule 24 provides for what appear to be two distinct types of intervention: *intervention of right* under Rule 24(a) and *permissive intervention* under Rule 24(b). In practice, however, a person seeking to intervene need not choose between intervention of right and permissive intervention. Instead, she may pursue both options by a single motion. If the court decides to permit intervention under the fairly easy standard of Rule 24(b), it is irrelevant whether the intervention was permissive or of right—the person is now a party. It is only when the court refuses permission that the distinction between Rule 24(a) and (b) becomes important. If the movant meets the Rule 24(a) standard for intervention of right, the court commits reversible error if it denies the motion to intervene.

2. *Permissive intervention.* Rule 24(b)(1) allows a court to approve a timely motion to intervene whenever the intervenor's claim or defense shares a common question of law or fact with the pending action. The "common question" standard is very easy to satisfy. The intervenor's claim need only share a single common question with the existing claims. Therefore, there are few cases involving challenges to a judge's decision allowing intervention under Rule 24(b)(1). For a discussion of the factors courts consider, compare *Security Insurance Co. of Hartford v. Schipporeit, Inc.*, 69 F.3d 1377 (7th Cir. 1995) and *In re Ethylene Propylene Diene Monomer Antitrust Litigation*, 255 F.R.D. 308 (D. Conn. 2009) (permissive intervention allowed in both) with *Donnelly v. Glickman*, 159 F.3d 405 (9th Cir. 1998) (permissive intervention denied because no common facts).

Even if the standards of Rule 24(b) are met, a court has the discretion to deny intervention. An appellate court will overturn a trial court's denial of permissive intervention only if it finds an abuse of discretion. *League of United Latin Amer. Citizens v. Wilson*, 131 F.3d 1297, 1307 (9th Cir. 1997). Because the trial judge is in the best position to evaluate whether allowing intervention will unduly complicate or bog down the case, denials of motions to intervene by permission are rarely overturned.

3. *Timeliness.* Both Rule 24(a) and 24(b) require a "timely" motion to intervene. As the court in *Chiles* indicates, there is no precise standard for determining timeliness. Courts consider all relevant factors. In *Smith v. Marsh*, 194 F.3d 1045 (9th Cir. 1999), for example, intervenors filed a motion to intervene fifteen months after the case was commenced. During those fifteen months, the parties had conducted substantial discovery, filed and argued

motions for summary judgment and jury trial (which the court had ruled on), and set a trial date six months following the motion to intervene. The court considered three factors in determining whether the motion to intervene was timely:

- (a) the “stage of the proceeding” at which intervenor files the motion,
- (b) whether the other parties would be prejudiced by the late intervention, and
- (c) any reasons justifying the delay.

Applying these factors to the case, the court upheld the trial court’s decision that the motion to intervene was not timely.

In practice, timeliness is more likely to be a disputed issue in a case of intervention of right. A judge dealing with a request for permissive intervention has discretion to deny intervention for reasons *other than* timeliness. In intervention by right, by contrast, timeliness is the *only* issue on which the judge may exercise any meaningful discretion in denying intervention.

4. *Intervention of right.* The threshold standard for intervention of right is that the intervenor has an “interest” that could be “impaired” by the pending dispute. Courts sometimes conflate these two issues, finding an interest whenever the party can show a significant potential detriment. However, although they may overlap to some extent, interest and impairment are two separate issues, involving separate considerations.

5. *Interest.* The intervening detainees in *Chiles* clearly had an “interest” within the meaning of Rule 24(a). By law, they were entitled to be confined in a facility that met certain basic standards. If the government was violating that law, the detainees could sue to force compliance.

But what about the homeowners and the homeowner’s association? Because the court found their interest was adequately represented by Dade County, it did not have to reach the issue of whether they had a sufficient interest. If the County had not already been a party, the court would have had to resolve that issue. Would the homeowners and the association have had enough of an interest to satisfy Rule 24? Although they might be “interested” in the outcome of the case, did they have an interest on par with that of the detainees? Is it necessary that an interest be something protected by law?

In *Donaldson v. United States*, 400 U.S. 517, 91 S.Ct. 534, 27 L.Ed.2d 580 (1971) (a case briefly discussed in *Chiles*), the Supreme Court held that Rule 24 requires an intervenor to have “a significantly protectable interest.” A number of lower courts have had to interpret this somewhat ambiguous phrase. As you might expect, the results in these cases are sometimes hard to reconcile. Two federal appellate cases illustrate how difficult this test can be to apply.

In *Curry v. Regents of the University of Minnesota*, 167 F.3d 420 (8th Cir. 1999), a number of students sued the University of Minnesota, claiming the University had violated their constitutional right to free speech by using the mandatory student fee to fund campus organizations that espoused views the plaintiff students did not support. Three of the campus organizations sought to intervene of right in the case. The organizations argued that if the students were to prevail, the organizations would lose a significant portion of their funding, which would affect their ability to operate. The court denied intervention, finding that the organizations did not have an “interest” within the meaning of Rule 24(a):

Although the Movants’ motion was timely, they have not established that they possess a recognized interest in this action’s subject matter. The Movants merely have asserted an economic interest, maintaining the quantum of their funding, in the outcome of this litigation. The Movants’ economic interest in upholding the current fee system simply does not rise to the level of a legally protectable interest necessary for mandatory intervention. See *Greene v. United States*, 996 F.2d 973, 976 (9th Cir.1993) (stating that an economic stake in the outcome of an action is not sufficient to demonstrate a “significantly protectable interest”).

Arakaki v. Cayetano, 324 F.3d 1078 (9th Cir. 2003) also dealt with an economic interest. That case dealt with Hawaii’s program of providing significant economic benefits, such as low-cost leases, to Native Hawaiians. A number of non-Native Hawaiians sued the state and various state agencies, alleging (among other things) that the policy violated the United States Constitution’s equal protection clause because it discriminated based on national origin. Several Native Hawaiians sought to intervene as of right in the case. The intervenors claimed they had an “interest” in continuing to receive benefits under the state program. The court agreed with the intervenors (who it collectively called “Hoohuli”, the name of one of the people seeking to intervene):

The district court observed that Hoohuli had a significantly protectable interest in the manner in which its tax dollars are used. A ruling in Plaintiffs’ favor would impair Hoohuli’s interest in the continued receipt of homestead leases. . . .

We agree with the district court that Hoohuli has a significantly protectable interest in the manner in which its tax dollars are used, specifically a continued receipt of benefits. Hoohuli, as lessees of Hawaiian homestead lands or applicants for such leases, have a stake in the outcome of Plaintiffs’ equal protection challenge. Consequently, Hoohuli’s protectable interest in the continued receipt of benefits supports intervention.

However, because the existing defendants adequately protected the intervenors’ interests, the court ultimately held the intervenors could not intervene as of right.

Is there any appreciable difference in the nature of the intervenors' interests in *Curry* and *Arakaki*? Does it matter that the Native Hawaiians were also taxpayers, and that their tax dollars helped fund the state program? Weren't the students in *Curry* also functionally equivalent to taxpayers, in that they had paid a mandatory student fee?

Other informative cases discussing the interest factor in intervention include *United States v. Alisal Water Corp.*, 370 F.3d 915 (9th Cir. 2004) (United States brought action against city water company to force company to comply with environmental laws; creditor with a lien on the water company's property did not have a sufficient interest to intervene as of right even though the value of its collateral might decrease); *Public Service Co. of New Hampshire v. Patch*, 136 F.3d 197 (1st Cir. 1998) (ratepayers did not have a sufficient interest to intervene as of right in action filed by certain electrical utilities against state public utilities commission to challenge commission's plan to require competition in electrical market); *Sierra Club v. U.S. Environmental Protection Agency*, 995 F.2d 1478 (9th Cir. 1993) (city could intervene in action by environmental group against EPA seeking to force the EPA to change the terms of city's existing license); and *Benjamin v. Department of Public Welfare*, 267 F.R.D. 456 (M.D. Pa. 2010) (residents of intermediate care facilities for mentally retarded had no significantly protectable interest in a case brought by other mentally retarded individuals to increase community-based (*i.e.*, outside of facilities) services. For a case with a more macabre twist, see *Fierro v. Grant*, 53 F.3d 338 (9th Cir. 1995) (unpublished) (prisoner on death row could not intervene of right in case challenging the constitutionality of California's method of execution; prisoner had no legally protectable interest in any particular method of execution).

6. The nature of a legally-relevant "interest" that justifies intervention under Rule 24(a) is clearly narrower than the type of "interests" one might have more generally in the way a dispute is resolved. One of the strengths of negotiation and mediation is that parties can take issues that would not be cognizable in court into account in a way that satisfies their broader interests. But sometimes there are advantages to defining a problem as a legal issue. Did it make sense for Senator Chiles to file a complaint rather than to pursue a settlement strategy in an attempt to resolve the problems at Krome? By filing the suit, he converted a political problem-solving process into a matter of determining legal rights. What else did he accomplish? Was it beneficial for his interests in this case?

What about the interests of the homeowners and Homeowners' Association? In addition to their interests in the outcome, did they have an interest in participating in the process? Should that be an important consideration? The court noted that the duplicative nature of their claims threatened to delay the adjudication of the rights of the other parties. Under the judge's analysis, both efficiency and fairness to the other parties weighed in favor of excluding their participation. Do you agree with this assessment? A more informal process such as multi-party mediation could have been able to

accommodate their participation. But even in a mediation, would the homeowners' participation necessarily be desirable?

7. *Impairment.* A person seeking to intervene must also show that her interest could be impaired. Note that the person need not demonstrate that impairment is certain to occur. Indeed, in most cases impairment will exist only if the case is decided in one particular way.

The most obvious situation in which an interest is impaired is when the court decision could result in actual, irrevocable harm to the intervenor. Suppose, for example, that a builder wants to tear down a historic structure in order to build a new building. When the city denies a permit to raze the building, the builder sues the city. Several citizens interested in historic preservation seek to intervene. If the builder prevails in his case against city, any interest these citizens have is bound to be impaired, as the building will be torn down.

The impairment in *Chiles* is less apparent. If the governor were to lose the case, conditions would not be improved. However, the detainees at Krome could then file their own action challenging the conditions. Because the detainees were not parties to the prior case, they would not be bound by claim or issue preclusion from bringing their own action.

Nevertheless, a victory for the federal government in *Chiles* would have some effect on a later suit by the detainees. Once one court finds that the conditions at Krome did not violate any legal norms, other courts would tend to respect that decision. The impairment in *Chiles*, then, is the *stare decisis* effect of the judgment.

How far does this sort of reasoning extend? Consider a twist on the historic preservation example set out just above. City designates several historic zones, and imposes severe building limits in those zones. X, who owns land in Zone A, sues City, claiming the restrictions constitute a taking for which X should be compensated. Y and Z seek to intervene in the case of right. Y and Z are both landowners, and like X seek compensation for a taking. Y's land is in Zone A, while Z's is in Zone B, located a few miles away. Are Y and Z equally impaired by the *stare decisis* effect of X v. City? Does it matter that Y's claim involves the same zone, while Z's involves a different zone?

Generally speaking, *stare decisis* will be a sufficient impairment only in cases like *Chiles*, where the parties and the intervenors are all fighting over the same place or thing. See, e.g., *Atlantis Development Corp. v. United States*, 379 F.2d 818 (5th Cir. 1967) (one party sued the United States to allow development of an artificial island, another person interested in developing the same island allowed to intervene of right).

8. Recall that Rule 42(b) allows a court to sever one or more claims from a pending case if trying all the claims together would prove unwieldy or confusing. A decision to sever is ordinarily within the discretion of the trial court, and will not be disturbed on appeal. Should a court have the discretion to sever a claim involving a party who has intervened as of right?

9. *Adequate representation.* Even if a person has a legally recognized interest that is impaired, she cannot intervene of right if one or more existing parties adequately looks out for that interest. As the court in *Chiles* indicates, it is relatively easy to show representation is inadequate. As long as the intervenor can show that the party's interests *may* diverge from her interests, this requirement is satisfied. For another case demonstrating the minimal burden of showing adequate representation, consider *Natural Resources Defense Council v. United States Nuclear Regulatory Comm.*, 578 F.2d 1341 (10th Cir. 1978) (challenge to a government requirement for uranium licenses; a party with an existing license held not to provide adequate representation for another person with a pending application for a license).

10. *Intervention and jurisdiction.* A person who intervenes becomes a full party to the action. As a result, intervention raises potential issues of jurisdiction and venue. However, personal jurisdiction and venue are not bars to intervention. By voluntarily joining the case, the intervenor consents to the court's exercise of jurisdiction over it. Similarly, courts ignore the residence and claims of the intervenor when determining venue. *Commonwealth Edison Co. v. Train*, 71 F.R.D. 391 (N.D. Ill. 1976).

Subject matter jurisdiction limitations, however, can prevent a person from intervening in a case. Of course, subject matter jurisdiction is mainly an issue in federal court. The intervening party will become a plaintiff or defendant in the action, according to her interest. A federal court must have jurisdiction over every claim presented to it in a case, including claims by or against intervenors. The court must therefore consider the federal jurisdiction provisions in title 28 to determine if the new composition of parties and claims destroys the court's jurisdiction.

In some cases, claims by or against an intervenor will independently qualify for federal subject matter jurisdiction because they are federal questions, or because the case satisfies the requirements of § 1332 for diversity. Even if a claim does not itself qualify for federal jurisdiction, the court may have authority to hear it by exercising its supplemental jurisdiction under § 1367. The court in *Chiles* never discusses the question of jurisdiction. Can you nevertheless deduce why the court had jurisdiction to hear the claims of the intervening detainees?

11. *Standing.* The *Chiles* court also discusses whether the intervenors have "standing" to bring the claims they hope to bring. Standing is a fundamental limitation on a court's power to decide a case presented to it. The doctrine applies in the federal system, as well as in many states. In the federal system, the standing requirement stems from the language of Article III of the Constitution, which provides that federal courts may hear only "cases" and "controversies." If the party bringing the claim has no standing to bring it, the court must dismiss the claim for lack of jurisdiction.

Any in-depth discussion of standing is best left to upper-level courses such as Constitutional Law and Federal Courts. For present purposes, all that matters is the relationship between standing and intervention. In a case

decided after *Chiles*, the Supreme Court held that if a party intervening as plaintiff seeks relief different than that sought by the original plaintiffs, the intervenors must have standing to bring their claim in federal court. *Chester v. Laroe Estates, Inc.*, ___ U.S. ___, 137 S.Ct. 1645 (2017).

12. *Refusal to intervene*. Nothing in the joinder rules allows a court to force someone to intervene. Could a court nevertheless provide a strong incentive to intervene by use of the doctrine of claim preclusion? In other words, if a party is offered a chance to intervene but refuses to do so, should she be barred from bringing her claim in a subsequent proceeding?

In *Martin v. Wilks*, 490 U.S. 755, 109 S.Ct. 2180, 104 L.Ed.2d 835 (1989), the Supreme Court held it would violate due process for a court to bar someone from litigating his rights merely because he did not intervene in a prior case that affected those rights. The rule applies even if the party has knowledge of the case, and even if the party is invited to intervene. After *Martin*, then, a necessary party who refuses to intervene is entitled to his day in court, even if that has to be in a later proceeding.

PROBLEMS

1. X, Y, and Z are involved in a three-car accident. X sues Y for his injuries. Z also feels Y is at fault, and would accordingly like to join with X in his suit. However, X steadfastly refuses to allow Z to join as a co-plaintiff. The judge recognizes the potential savings in time, and would like to allow Z to join. May the judge allow Z to join the case notwithstanding X's protests?

2. A recent scientific experiment shows that BSE, or "Mad Cow Disease," can mutate and affect chickens. To protect the large numbers of chicken-eating Americans, Congress enacts the Mad Chicken Disease Act. This Act prevents anyone from selling chickens or eggs unless they provide documentary proof that the chicken in question was never fed animal proteins (it is thought that BSE is passed through the consumption of certain animal parts). The Act is administered by the United States Department of Agriculture ["USDA"].

X, a chicken rancher, immediately sues the USDA in federal court. X argues the Act is unconstitutional because it applies retroactively to chickens that a rancher acquired before the Act was passed. X argues that prior to the Act, no rancher thought it was necessary to keep records of what they fed their chickens.

Y, another chicken rancher, seeks to intervene in the case. The court denies permissive intervention. Y, however, claims he can intervene as of right. Like X, Y sells his chickens to a large processing plant, which in turn distributes them to grocery stores. May Y intervene as of right?

3. Same facts as Problem 2, except that X sells to a different processor that produces only dog food.

C. NECESSARY PARTIES

INTRODUCTORY PROBLEM

At the end of every semester, Professor Bohrene awards the coveted “Golden Rules Award” in his Civil Procedure class. The award earns the recipient a \$100 cash prize, paid by the law school. In addition, the recipient is honored at the law school’s prestigious and swanky Honors Banquet. According to the stated criteria, the award goes to the student with the “highest final grade” in the course. This past semester, however, a dispute arose concerning who ought to receive the award. Campbell received the highest grade on her final exam. However, Professor Bohrene also decided to award extra credit for class participation. Because Hartley spoke out more often, her grade in the course is actually higher than Campbell’s. Professor Bohrene exercises his professorial discretion and awards the Golden Rules Award to Campbell, reasoning that “highest final grade” means highest grade on the final exam. Bohrene asks Assistant Dean Penny Wise to prepare a \$100 check payable to Campbell, and begins to prepare his speech singing Campbell’s praises for the upcoming Honors Banquet.

Professor Bohrene’s discretion lands him in the middle of a lawsuit, as Hartley immediately sues him in federal court. Hartley asks the court to issue an order barring Bohrene from awarding the Golden Rule Award to Campbell, and requiring him to give it to her instead. Hartley also seeks \$100 in damages for failure to receive the cash prize associated with the award.

Professor Bohrene is worried about the implications of the lawsuit. First, he thinks Campbell should also be a party to the case. After all, if Hartley should prevail, Bohrene is sure Campbell will bring her own suit against him for either damages or a conflicting injunction. In addition, Bohrene feels Assistant Dean Wise should be in the case. According to law school rules, only Wise has the authority to pay out law school funds.

Is there any way Bohrene may join Campbell and Wise to this suit? Failing that, is there any way he can object to Hartley’s failure to join Campbell and Wise?

Governing Rule: Federal Rule 19.

Litigation sometimes has collateral effects. Take a case in which X sues Y. Although only X and Y are legally bound by the court’s decision, the consequences of that decision may affect others. For example, suppose X sues Y to force Y to install expensive scrubbers on its factory. If X prevails, the decision will have a legal effect only on Y, but will also have a practical effect on both Y’s employees (certainly an economic effect; possibly also health effects) and others who live in the community.

Intervention under Rule 24 responds to these concerns by allowing a party threatened with collateral effects to join the case and protect her

interest. But intervention is not a panacea. In many cases, a party may choose not to intervene because of cost or other considerations. Even when a party wants to join, intervention may not be an option if the intervening party would destroy diversity jurisdiction. What should a court do when an interested person is not in the case? Should the threat to the third person's interest cause the court to refuse to hear the case?

DAWAVENDEWA V. SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT

276 F.3d 1150 (9th Cir. 2002)

TROTT, CIRCUIT JUDGE.

OVERVIEW

Harold Dawavendewa ("Dawavendewa") sued the Salt River Project Agricultural Improvement and Power District ("SRP") for employing a hiring preference policy in violation of Title VII of the Civil Rights Act of 1964. In particular, he alleged that SRP's lease with the Navajo Nation ("Nation") required it to preferentially hire Navajos at the Navajo Generating Station ("NGS"). The district court dismissed Dawavendewa's complaint for failure to join the Nation as an indispensable party. . . .

BACKGROUND

SRP operates NGS on reservation lands leased directly from the Navajo Nation. As required by its lease, SRP extends employment preferences to qualified local Navajos at NGS.³

Dawavendewa, a member of the Hopi Tribe, lives less than three miles from the Navajo reservation. Dawavendewa applied for employment as an Operator Trainee at NGS. After a qualifications test, Dawavendewa ranked ninth out of twenty applicants. Yet, because Dawavendewa is not affiliated with the Nation, he was never interviewed for the Operator Trainee position.

Dawavendewa filed a complaint in district court accusing SRP of discriminating against him on the basis of his national origin in violation of Title VII. Dawavendewa's complaint asserted no causes of action against the Nation or tribal officials, and they are not parties to this litigation. . . .

SRP moved to dismiss Dawavendewa's complaint for failure to join the Nation as an indispensable party. The district court ruled that the Nation was an indispensable party and granted SRP's motion.

³ The lease provision at issue reads as follows: Lessees agree to give preference in employment to qualified local Navajos, it being understood that "local Navajos" means members of the Navajo Tribe living on land within the jurisdiction of the Navajo Tribe. . . . In the event sufficient qualified unskilled, semi-skilled and skilled local Navajo labor is not available, or the quality of work of available skilled or semi-skilled workmen is not acceptable to Lessees, Lessees may then employ, in order of preference, first, qualified non-local Navajos, and second, non-Navajos.

Dawavendewa appeals that determination.

STANDARD OF REVIEW

We review a district court's decision to dismiss for failure to join an indispensable party for abuse of discretion.

DISCUSSION

Application of Federal Rule of Civil Procedure 19 determines whether a party is indispensable. The inquiry is a practical, fact-specific one, designed to avoid the harsh results of rigid application. We must determine: (1) whether an absent party is necessary to the action; and then, (2) if the party is necessary, but cannot be joined, whether the party is indispensable such that in "equity and good conscience" the suit should be dismissed.

I. Necessary Party

In determining whether the Nation is necessary under Rule 19, we consider whether, in the absence of the Nation, complete relief can be accorded to Dawavendewa. In the alternative, we consider whether the Nation claims a legally protected interest in the subject of the suit such that a decision in its absence will (1) impair or impede its ability to protect that interest; or (2) expose SRP and Dawavendewa to the risk of multiple or inconsistent obligations by reason of that interest. See Fed. R. Civ. P. 19(a)(1). If the Nation satisfies either of these alternative tests, it is necessary to the instant litigation.

A. In the Absence of the Navajo Nation, Complete Relief Cannot Be Accorded To Dawavendewa

Even if ultimately victorious in federal court, Dawavendewa cannot be accorded complete relief in the absence of the Nation. Dawavendewa seeks injunctive relief to ensure his employment at SRP and to prevent SRP from employing the Navajo hiring preference policy required by its lease with the Nation. Yet only SRP and Dawavendewa—and not the Nation—would be bound by such an injunction. The Nation could still attempt to enforce the lease provision in tribal court and ultimately, even attempt to terminate SRP's rights on the reservation. The district court correctly observed that "if SRP were to ignore [the] injunction, [Dawavendewa] and others like him would not receive the employment they seek," whereas "if SRP were to comply with the injunction, the Navajo Nation would be likely to take action against SRP under its lease."

We faced a similar situation in *Confederated Tribes [v. Lujan]*, 928 F.2d 1496 (9th Cir. 1991), where we addressed an action brought by various Indian Tribes against federal officials challenging the United States' continued recognition of the Quinault Indian Nation as the sole governing authority of the Quinault Indian Reservation. In affirming the district court's dismissal of the case for failure to join the Quinault Nation as an

indispensable party, we held that “success by the plaintiffs . . . would not afford complete relief to them” because “judgment against the federal officials would not be binding on the Quinault Nation, which could continue to assert sovereign powers and management responsibilities over the reservation.” 928 F.2d at 1498.

Dawavendewa stands in the same position as the . . . various Indian Tribes in *Confederated Tribes*: he is not assured complete relief even if victorious. Indeed, if the federal court granted Dawavendewa’s requested injunctive relief, SRP would be between the proverbial rock and a hard place—comply with the injunction prohibiting the hiring preference policy or comply with the lease requiring it. If, in resolving this quandary, SRP declines to abide by the injunction and instead continues to comply with its lease obligations, Dawavendewa would not be accorded complete relief. Thus, under Rule 19(a)(1), the Nation is a necessary party.

B. Impairment of the Nation’s Legally Protected Interest

The Nation is also a necessary party to Dawavendewa’s action against SRP under the second prong of Rule 19(a)(1). Under Rule 19(a)(1)(B), an absent party is necessary if it claims “an interest relating to the subject of the action,” and disposition of the action in its absence may “as a practical matter impair or impede [its] ability to protect that interest.” Fed. R. Civ. P. 19(a)(1)(B)(i).

Here, the Nation claims a legally protected interest in its contract rights with SRP. In *Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1325 (9th Cir. 1975), we observed that, “no procedural principle is more deeply imbedded in the common law than that, in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable.” Accordingly, we held unequivocally that the Hopi Tribe was a necessary (and indispensable) party to a suit by an individual challenging a lease between the Hopi Tribe and the Peabody Coal Company simply by virtue of being a signatory to the lease.

Quite similar to . . . *Lomayaktewa*, the instant litigation threatens to impair the Nation’s contractual interests, and thus, its fundamental economic relationship with SRP. The Nation strenuously emphasizes the importance of the hiring preference policy to its economic well-being. In fact, the Nation asserts that “[without the hiring preference provision], the Navajo Nation leadership would never have approved this lease agreement.” . . .

In addition, a judgment rendered in the Nation’s absence will impair its sovereign capacity to negotiate contracts and, in general, to govern the Navajo reservation. . . . [T]he Nation has an interest in determining the appropriate balance between alternative lease terms. Nation Amicus Br. at 7 (“[The lease] has cost Navajo water, Navajo coal, Navajo prime land, and the inevitable pollution of the Navajo homeland. It is a bargained for

price that the Navajo Nation alone paid in return for jobs for the Navajo people.”).

Undermining the Nation’s ability to negotiate contracts also undermines the Nation’s ability to govern the reservation effectively and efficiently. Thus, as a result of its multiple economic and sovereign interests, the Nation sufficiently asserts claims relating to this litigation which may be impaired in its absence. Under Rule 19(a)(2)(I) the Nation is, therefore, a necessary party.

C. The Substantial Risk of Inconsistent or Multiple Obligations by Virtue of the Nation’s Legally Protected Interests

Any disposition in the Nation’s absence threatens to leave SRP subject to substantial risk of incurring multiple or inconsistent obligations. As explained above, although an injunction may compel SRP to stop its hiring preference policy and to hire Dawavendewa, an injunction would not bind the Nation, which could continue to enforce the hiring preference policy required by the lease. This scenario leaves SRP facing intractable, mutually exclusive alternatives and thus, subjects SRP to the substantial risk of facing multiple, inconsistent obligations. Thus, we determine that the Nation is also a necessary party under Rule 19(a)(1)(B)(ii). . . .

II. Tribal Sovereign Immunity

Having determined that the Nation is thrice over a necessary party to the instant litigation, we next consider whether it can feasibly be joined as a party. We hold it cannot. Federally recognized Indian tribes enjoy sovereign immunity from suit, and may not be sued absent an express and unequivocal waiver of immunity by the tribe or abrogation of tribal immunity by Congress.

In this case, the Nation has not waived its tribal sovereign immunity and Congress has not clearly abrogated tribal sovereign immunity in Title VII cases. . . .

III. Indispensable Party

The Nation is a necessary party that cannot be joined due to its tribal sovereign immunity. Accordingly, we consider whether the Nation is indispensable such that Dawavendewa’s action must be dismissed. See Fed. R. Civ. P. 19(b). A party is indispensable if in “equity and good conscience,” the court should not allow the action to proceed in its absence. To make this determination, we must balance four factors: (1) the prejudice to any party or to the absent party; (2) whether relief can be shaped to lessen prejudice; (3) whether an adequate remedy, even if not complete, can be awarded without the absent party; and (4) whether there exists an alternative forum. If no alternative forum exists, we should be “extra cautious” before dismissing the suit.

If the necessary party enjoys sovereign immunity from suit, some courts have noted that there may be very little need for balancing Rule 19(b) factors because immunity itself may be viewed as “one of those interests ‘compelling by themselves,’” which requires dismissing the suit. *Wichita & Affiliated Tribes v. Hodel*, 788 F.2d 765, 777 (D.C. Cir. 1986); see also *Enterprise Mgmt. Consultants, Inc. v. United States*, 883 F.2d 890, 894 (10th Cir. 1989). Cognizant of these out-of-circuit decisions, the Ninth Circuit has, nonetheless, consistently applied the four part balancing test to determine whether Indian tribes are indispensable parties.

A. Prejudice—The prejudice to the Nation stems from the same impairment of legal interests that makes the Nation a necessary party under Rule 19(a)(2)(I). A decision rendered in this case prejudices the Nation’s economic interests in the lease with SRP, namely its ability to provide employment and income for the reservation. A decision so rendered would also prejudice the Nation’s sovereign interests in negotiating contractual obligations and governing the reservation.

Furthermore, the absence of the Nation prejudices SRP by preventing the resolution of its lease obligations. As explained by the district court, “SRP could be faced with an irreconcilable conflict between SRP’s obligations to Dawavendewa and others similarly situated and SRP’s obligations to the Navajo Nation under the lease.” . . .

B. Shaping Relief—No relief mitigates the prejudice. Any decision mollifying Dawavendewa would prejudice the Nation in its contract with SRP and its governance of the tribe. This factor weighs in favor of dismissal.

C. Adequate Relief—No partial relief is adequate. Any type of injunctive relief necessarily results in the above-described prejudice to SRP and the Nation. An award of damages would not resolve SRP’s potential liability to other plaintiffs or address the Nation’s contention that Title VII does not apply on the reservation.

D. Alternative Forum—Finally, we note that in *Lomayaktewa* . . . we determined that the plaintiff would be without an alternative forum to air his grievances. Nevertheless, . . . we determined that the absent Indian Tribe was indispensable and dismissed the case.

Dawavendewa, on the other hand, may have a viable alternative forum in which to seek redress. Sovereign immunity does not apply in a suit brought by the United States. Moreover, recently, in *EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1075 (9th Cir. 2001), we held that because no principle of law “differentiates a federal agency such as the EEOC from ‘the United States itself,’” tribal sovereign immunity does not apply in suits brought by the EEOC.

At the eleventh hour, the EEOC moved to intervene in an effort to salvage Dawavendewa’s case and possibly combine it with other pending

litigation. Although we denied that motion, we note that nothing precludes Dawavendewa from refileing his suit in conjunction with the EEOC.

Recognizing the resources and aggravation consumed in relitigating, however, we determine that factor four remains in equipoise. Balancing these four factors, we find the Nation is indispensable, and in “equity and good conscience,” this action should not proceed in its absence. . . .

CONCLUSION

We affirm the district court’s decision to dismiss Dawavendewa’s complaint for failure to join the Nation as an indispensable party.

NOTES AND QUESTIONS

1. You may have been surprised to see that the plaintiff in *Dawavendewa* was claiming discrimination on the basis of national origin rather than discrimination based on race. That claim reflects the somewhat unique status of Indians in United States law. Federally-recognized Indian tribes are treated as sovereign, with limited rights of self-governance. The employment preference at issue in *Dawavendewa* turned on membership in the tribe, not ethnicity. Although membership in a tribe may turn in part on a person’s heritage, one’s status as an “Indian” (that is, a member of a recognized tribe) is considered a political, rather than racial, classification. *Cf. Morton v. Mancari*, 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974).

The sovereign status of Indian tribes also plays a part in another significant aspect of the case. Indian tribes have a form of sovereign immunity that shields them from all suits in state court, and virtually all suits in federal court. Because of the tribe’s immunity, the parties could not force the tribe into the case. The court accordingly had to decide whether the case could proceed without the tribe as a party.

2. *Necessary party as a defense.* Who invoked Rule 19 in *Dawavendewa*, and how did they invoke it? Unlike other joinder rules, Rule 19 arises as a *defense* in the case. Like the defenses of subject matter jurisdiction or failure to state a claim, a party invokes Rule 19 to object to the claim brought against it. The party is objecting because that claim also involves the rights of third persons who have not been made parties to the suit. Because of the collateral effects of the case, the party who raises the defense of failure to join a necessary party is asking the court to order that the third persons be joined to the case—and if such joinder cannot be effected, that the case be dismissed.

If the person is necessary and can be joined, in many cases the actual joinder will occur not under Rule 19, but under some other rule, usually Rules 20 or 24. However, as discussed below in note 9, Rule 19 also provides a way to join a party to the case in situations not covered by any other joinder rule. Thus, although primarily a defense, Rule 19 also serves as a joinder rule in some cases.

3. Like the defenses of lack of jurisdiction or venue, and failure to state a claim, the Federal Rules allow a party to challenge failure to join a necessary

party by a pre-answer Rule 12(b) motion. However, unlike many Rule 12(b) defenses, the necessary party defense is not lost by omitting it from a pre-answer motion or the answer. Under Rule 12(h)(2), the party can raise the necessary party defense as late as the trial. Therefore, as far as timing is concerned, a necessary party defense is more like the defense of failure to state a claim than it is like the defense of improper venue. Is there any justification to allow a party to wait until trial to raise a defense of failure to join a necessary party?

4. Rule 19 uses a functional three-part test. First, the court asks whether a person should be joined to the case. If the answer is yes, the person is considered necessary and must be made a party to the case if possible. Second, the court determines if the person can be joined. Third, and only if the necessary party is not joined, the court considers whether it should dismiss the case, applying the factors used in Rule 19(b). If the court decides it cannot proceed without the missing person, the person is deemed indispensable. Note that under the Rule 19 analysis, the terms “necessary” and “indispensable” are little more than conclusory labels. In fact, you might be better off leaving the word “indispensable” out of your analysis altogether.

5. *Step 1: Rule 19(a)*. Rule 19(a) specifies three different tests for determining if a person should be joined. The court in *Dawavendewa* analyzes all three. Was that analysis necessary? Does the rule require that the missing person meet all three tests, or will meeting one of the three suffice?

6. *Intervention of right and Rule 19(a)*. Compare Rule 19(a)(1)(B)(i) to Rule 24(a)(2), which governs intervention of right. The similarity is striking. Moreover, both rules were revamped in 1966 to include this similar language. Does this symmetry mean the two rules are interpreted the same way? The Advisory Committee that drafted the amendments certainly thought so:

The amendment provides that an applicant is entitled to intervene in an action when his position is comparable to that of a person under Rule 19(a)(1)(B), as amended, unless his interest is already adequately represented in the action by existing parties.

Advisory Committee Notes to 1966 Amendments to Rule 24. Most courts also interpret the two rules in the same way. *See, e.g., Atlantis Development Corp. v. United States*, 379 F.2d 818, 825 (5th Cir. 1967) (“Although this is question-begging and therefore not a real test, this approach shows that the question of whether an intervention as a matter of right exists often turns on the unstated question of whether joinder of the intervenor was called for under new Rule 19.”); *Metropolitan Life Ins. Co. v. Ditmore*, 729 F.2d 1, 9 (1st Cir. 1984).

However, as the Advisory Committee notes indicate, there is one significant difference between the two rules. Although a party who can intervene of right may always be necessary under Rule 19(a)(1)(B)(i), the converse is not true. A party who is necessary under Rule 19(a)(1)(B)(i) cannot intervene of right if her interests are adequately represented by one or more existing parties. Does that difference make sense? Why should the parties be forced to add that person to the case, which can raise personal jurisdiction and

venue problems, when the person is willing to intervene and thereby waive any personal jurisdiction and venue objections? On the other hand, would permissive intervention solve the problem in such a case?

Note that even though Rule 19 does not mention adequate representation, some courts will consider whether a necessary party's interests are adequately represented when applying the rule. However, it is unclear whether adequate representation affects whether the party is even necessary under Rule 19(a), or merely whether the court should dismiss under Rule 19(b). For an excellent discussion of this issue, see *Glancy v. Taubman Centers*, 373 F.3d 656, 666–70 (6th Cir. 2004) (after surveying practice in other circuits, considers representation for purposes of Rule 19(b)).

Incidentally, there is a third Federal Rule that uses language similar to Rules 19(a)(1)(B)(i) and 24(a)(2). Rule 23(a) lists various situations in which a case may be certified as a class action. One of these situations, covered by Rule 23(b)(1)(B), is when “prosecuting separate actions by or against individual class members would create a risk of . . . adjudications with respect to individual class members that, as a practical matter, . . . would substantially impair or impede their ability to protect their interests.” In essence, this Rule allows for use of the class action device when the case involves so many necessary parties that joinder of all of them as individual parties is impracticable. Class actions are covered in Part E of this Chapter. Is there a difference between Rule 23(b)(1)(B)'s requirement of *substantial* impairment and the requirement of Rules 19(a)(1)(B)(i) and 24(a)(2)?

7. Is there something facile about the way the *Dawavendewa* court deals with the issue of impairment of the Nation's interest? In Part I.A, the court notes that because the Navajo Nation would not be bound by a judgment rendered in its absence, Dawavendewa could not obtain the relief he wanted. In Part I.B, however, the court notes that the suit affects the Nation's interest in enforcing its contract. If the Nation is not bound by the judgment, would it not be free to sue SRP for enforcement of the lease? Does the impairment arise from the simple fact that the Nation may now have to go to court to enforce its contractual rights? Or is this another example of how *stare decisis* can be enough to impair someone's interest?

8. Plaintiff in *Dawavendewa* sought injunctive relief. What if plaintiff had sought only damages? Would the Navajo Nation still be a necessary party? Is the presence of the Nation required for defendant to pay damages? Would a judgment for damages leave defendant exposed to double liability?

If you understand why the Navajo Nation would not have been a necessary party in a suit for damages, can you conceive of any situation where a party would be necessary in a suit seeking only damages?

9. *Step 2: Joining the necessary party.* Any person deemed necessary under one or more of the three criteria set out in Rule 19(a)(1) must be made a party if possible. When would it *not* be possible to join the person? The joinder rules are rarely the issue. If the missing person should be a defendant, the

plaintiff can use Rule 20 to join her. Do you see why a person who is a necessary defendant will always meet the requirements of Rule 20?

If the necessary party should be a plaintiff, things are slightly more difficult. Admittedly, nothing in the other joinder rules allows a current plaintiff unilaterally to add another plaintiff. However, the plaintiff can offer to allow the person to join as co-plaintiff under Rule 20. As the alternative may be dismissal of the case, most plaintiffs will be willing to allow the party to join. Similarly, as discussed above in Note 6, the person will normally be able to intervene of right, or the court may invite the person to intervene by permission under Rule 24(b). If the case will affect the person's rights, the person may well accept the invitation. Even if the necessary party refuses to join as a plaintiff, Rule 19(a)(2) allows the court to make the person an "involuntary plaintiff." This provision is the one exception to the basic principle, set out in Note 2 above, that Rule 19 is a defense rather than a joinder rule. Finally, in some cases interpleader (discussed in the next section) will be available.

The more likely obstacles to joinder of the necessary party are jurisdiction and venue.¹ Subject matter jurisdiction problems arise mainly in federal court, especially when jurisdiction over the pending case is based on diversity. Adding the necessary party may destroy complete diversity. Moreover, supplemental jurisdiction may not be an option because of the § 1367(b) diversity exception to supplemental jurisdiction. That exception prohibits the use of supplemental jurisdiction over certain claims involving joinder under listed rules. Section 1367(b) specifically includes Rule 19 among that list ("claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 . . . or over claims by persons proposed to be joined as plaintiffs under Rule 19 . . .").

Personal jurisdiction problems are also fairly common. A necessary party who voluntarily intervenes or joins the complaint as a co-plaintiff waives any personal jurisdiction problems. However, personal jurisdiction is an issue if the necessary party is joined as a defendant or an involuntary plaintiff. In these situations, if the necessary party does not have contacts with the chosen forum, the court cannot join her to the case either as a new defendant or as an involuntary plaintiff.

Rule 19 specifically deals with venue. If the addition of the necessary party destroys venue, and the necessary party objects to venue, Rule 19(a)(3) provides that the court will dismiss the party from the action. However, because the necessary party is not in the case, the court must then turn to the

¹ Note that subject matter jurisdiction and personal jurisdiction are issues notwithstanding some ambiguous language in the introductory clause of Rule 19(a)(1). That clause seems to say a person is not necessary if the court cannot assert jurisdiction over the person or the subject matter. Courts simply ignore this language. If a party otherwise meets the standard of Rule 19(a)(1), the party should be joined. If subject matter and/or personal jurisdiction are not present, the court then considers whether to dismiss under Rule 19(b). Indeed, a contrary reading would suggest that a court could always keep a case if it could not exercise subject matter jurisdiction or personal jurisdiction after joinder, and would only consider dismissing if the person could not be joined because of venue.

third part of the analysis, and determine whether to keep the remainder of the case.

10. *Step 3: Deciding whether to dismiss.* If a person should be joined, but cannot be joined because of lack of jurisdiction or venue, Rule 19(b) requires the court to determine whether it can continue to hear the remainder of the case. That rule also lists four factors for the court to consider in making that determination. Review the *Dawavendewa* court's discussion of the four factors, and see if you understand what each involves.

Note that although the second factor—altering the nature of the judgment—did not solve the problem in *Dawavendewa*, in other cases it can prove quite useful. For example, suppose P sues D for an order requiring D to deliver a valuable jewel. The jewel, however, has already been conveyed to X. X is a necessary party to this suit. However, if damages would fully compensate P for her loss, the court can alter the form of relief and obviate the necessary party problem.

Another option under this second factor would be for the court to order the party raising the Rule 19 objection to *interplead* the existing and missing parties. As you will see in Part D of this Chapter, interpleader is a useful joinder device that can solve many necessary party problems. For some reason, however, courts rarely force parties to interplead.

PROBLEMS

1. P is seriously burned when his toaster malfunctions. P sues D Corp., the company that manufactured the toaster. D argues that R, the retailer who sold the toaster to P, should be joined to the case as an additional defendant. D's defense rests entirely on its assertion that R stored the toaster in a damp storeroom, leading to excess condensation that caused the toaster to short circuit in P's home. Is R a necessary party? If R is necessary and cannot be joined, should the case be dismissed?

2. Same facts as Problem 1, except that the suit occurs in a jurisdiction that uses comparative fault. D realizes the jury may find it partially at fault for designing a toaster that was susceptible to condensation. However, D argues it is necessary to join R to the case in order for the jury accurately to apportion fault. D correctly points out that if the jury in this case found D, for example, 80% negligent, the jury in a separate case against R might find R only 10% at fault. D argues the possibility of inconsistency makes it necessary for P to sue both defendants simultaneously. Is R a necessary party? If R is necessary and cannot be joined, should the case be dismissed?

3. D Corp. is involved in another case. For many years, D has sold toasters by phone order. D holds the toll-free number 800-TOASTER for its phone order operations. D has advertised its phone order service extensively for many years. All ads prominently display the 800 number.

Earlier this year, Kitchens Online, an internet seller, registered a number of domain names. One of these domain names was www.800toaster.com. A

number of D Corp.'s customers happened onto this site, assuming it was operated by D Corp. Customer confusion is exacerbated by the fact that D Corp. and Kitchens Online are citizens of the same state. To stop the confusion, D has sued Network Solutions, Inc. ("NSI"), the company that allocates domain names, in federal court for an injunction requiring NSI to transfer the 800toaster.com domain name from Kitchen Solutions to D. D relies solely on state law for its claim. NSI moves to dismiss for failure to join Kitchens Online. Is Kitchens Online a necessary party? If Kitchens Online is necessary, how would it be joined to the case? If Kitchens Online is necessary and cannot be joined, should the case be dismissed?

4. Same as Problem 3, except that D Corp. sues for damages rather than an injunction.

D. INTERPLEADER

INTRODUCTORY PROBLEM

Truth is sometimes stranger than fiction. Consider the following facts from the actual case of *Republican National Committee v. Taylor*, 299 F.3d 887 (D.C. Cir. 2002):

In December 1995, the Republican National Committee ran an advertisement in the newspapers *USA Today* and *Roll Call*. . . . Prominently featured at the top of the ad is a photograph of Haley Barbour, then chair of the RNC, holding an oversized check for one million dollars, payable to "your name here." Next to and below Barbour's image, the following text appears:

Heard the one about Republicans 'cutting' Medicare? The fact is Republicans are increasing Medicare spending by more than half. I'm Haley Barbour, and I'm so sure of that fact I'm willing to give you this check for a million dollars if you can prove me wrong.

The advertisement goes on to assert that under the Republican plan, the government would increase Medicare spending over the next seven fiscal years, culminating in a 2002 expenditure 62% higher than that in 1995. . . .

The ad then invites readers who disagree with the [statement] to check a box labeled "I don't believe you, Haley" and return the coupon with their analyses of "why you are wrong" to the RNC's Washington, D.C. address.

Approximately eighty people across the country did not believe Haley and mailed in claims for the million-dollar prize. The RNC responded to each claimant by sending him or her a form letter rejecting the claim as incorrect, and enclosing a Congressional Budget Office report. . . . [O]ne rejected claimant filed a breach of contract suit in the Superior Court of the District of Columbia. . . .

The RNC . . . [claims]: (1) that the advertisement was merely a “parody” and not binding on the RNC; and (2) that even if the ad were an offer to contract, the Challenge Statement was not false.

In this situation, the RNC quite rightly fears that multiple lawsuits will be filed against it all over the country. Is there anything the RNC can do to force all claimants to litigate their claims in the same action? Does it matter that no single state could exercise personal jurisdiction over all of the claimants?

Governing Rules: Federal Rule 22; 28 U.S.C. §§ 1335, 1397, 2361. *Note:* Although the RNC invoked these rules in the actual case, the court does not discuss whether the case satisfied those rules.

STAR INSURANCE CO. V. CEDAR VALLEY EXPRESS, LLC

273 F.Supp.2d 38 (D.D.C. 2002)

SULLIVAN, DISTRICT JUDGE.

Pending before the Court are plaintiff’s motion to interplead defendants pursuant to 28 U.S.C. § 1335 and deposit the interpleaded funds into the registry of the Court, as well as plaintiff’s motion for a preliminary injunction. . . .

I. BACKGROUND

Plaintiff, Star Insurance Company, a Michigan corporation, alleges that on September 20th, 2000, . . . it issued Property Broker’s Surety Bond No. SA3158428 to defendant Cedar Valley Express, LLC, an Iowa corporation. It further alleges that approximately 35 parties, consisting of corporations located in at least 13 different states, have asserted adverse and conflicting claims against the bond, which, in the aggregate, exceed the bond’s penal sum of \$10,000. Asserting that it is unable to adjudicate the parties’ claimed interests in the proceeds of the bond, and that it will therefore be exposed to unnecessarily vexatious and duplicative litigation, plaintiff has filed this action pursuant to the Federal Interpleader Act, 28 U.S.C. § 1335.

II. PLAINTIFF’S MOTION TO FILE INTERPLEADER

. . . An action in the nature of interpleader is proper where a party is exposed to multiple claims on a single obligation, and wishes to obtain adjudication of such claims and its obligation in a single proceeding. Interpleader is an equitable remedy that may be used to achieve an orderly distribution of a limited fund, usually on a ratable basis. Such an action may be brought in a U.S. District Court under the Federal Interpleader

Act, 28 U.S.C. § 1335, provided the jurisdictional requirements set out therein are established.¹

Generally speaking, there are two stages in an interpleader action. The first stage involves a determination of whether the plaintiff has met the statutory prerequisites for the invocation of the interpleader remedy.² The District Court's exercise of jurisdiction over a statutory interpleader action requires that: (1) the plaintiff have custody of the disputed property, which must exceed \$500 in value; (2) the plaintiff deposit the disputed property into the registry of the court; and (3) two or more adverse claimants of diverse citizenship claim or may claim an interest in the disputed property. 28 U.S.C. § 1335.

The District Court's jurisdiction in a statutory interpleader action is premised on diversity of citizenship. However, complete diversity is not required, and the courts have adopted a standard of "minimal diversity," under which it is sufficient that at least two opposing claimants be of diverse citizenship. *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 530 (1967). Therefore, jurisdiction is proper in a case where, as here, some claimants share citizenship with each other, the plaintiff, or both, so long as at least two of the claimants are citizens of different states.

Additionally, the statute requires that claimants be "adverse" to each other, although their claims need only be independent of each other, and need not have a common origin or be identical. 28 U.S.C. § 1335(b). Claimants need not have obtained a judgment with respect to the subject matter of the interpleader action, nor does it appear that they need to have actually initiated legal action against the stakeholder with respect to the disputed property. The adversity requirement is met so long as the stakeholder has a "bona fide" fear of adverse claims arising with respect to the res." *New Jersey Sports Prod., Inc. [v. Don King Prod., Inc.]*, 15 F.Supp.2d 534 (D. N.J. 1998) at 541.

Although the party seeking to institute an interpleader action bears the burden of demonstrating that the statutory requirements are satisfied, there is no set procedure governing how the court is to decide the jurisdictional question. . . . All parties must receive notice and an opportunity to be heard on the issue of the appropriateness of an interpleader action before a court's final determination with respect to jurisdiction.

¹ Such an action is known as "statutory interpleader," to distinguish it from "rule interpleader," an action brought pursuant to Fed.R.Civ.P. 22, which implicates different jurisdictional requirements.

² The second stage of an interpleader action consists of a determination of the respective rights of the claimants to the disputed property. . . . Once a court determines that interpleader is appropriate, it may discharge the stakeholder-plaintiff from the action if it is disinterested in the distribution of the subject matter, permanently enjoin the parties from prosecuting any other claim relating to the subject matter, and make any other order it deems appropriate to the resolution of the issues. 28 U.S.C. § 2361.

Even if all of the jurisdictional requirements are established, acceptance of jurisdiction over a statutory interpleader action is by no means mandatory: “the mere fact that [a court] possesses jurisdiction over the subject matter of an equitable action of interpleader does not require that the [c]ourt should exercise that jurisdiction . . . some courts have, in their discretion, dismissed interpleader actions for want of equity because an adequate remedy at law existed, even though the required jurisdictional facts were proven.” *Prudential Ins. Co. of Am. v. Shawver*, 208 F.Supp. 464, 469 (W.D.Mo.1962).

However, a court may provisionally accept jurisdiction over an action in the nature of interpleader where the plaintiff has alleged that the jurisdictional requirements of Section 1335 are met, and the plaintiff has deposited an appropriate sum with the registry of the court. The court may then issue nationwide service of process for all claimants to the disputed property pursuant to 28 U.S.C. § 2361.⁴ Where potential claimants are unknown, notice by publication may be required. The court may subsequently require the parties to brief any jurisdictional issues before it renders its final decision with respect to whether plaintiff has met the statutory requirements for bringing an action in the nature of interpleader, and whether it chooses to exercise that jurisdiction.

Plaintiff in this case has requested permission to deposit with the court registry the full penal value of a \$10,000 bond, against which it alleges the putative defendants, at least two of whom appear to be citizens of different states, have asserted adverse claims. The complaint therefore appears, on its face, to meet the jurisdictional requirements of Section 1335, rendering it proper for this Court to provisionally accept jurisdiction over the action, order the plaintiff to deposit \$10,000 into the court registry, and issue summons to all claimants named in the complaint.

The Court is permitting plaintiff to proceed with an action in the nature of interpleader pursuant to 28 U.S.C. § 1335 on a provisional basis only. The Court will make a final determination with respect to whether the jurisdictional requirements of 28 U.S.C. § 1335 have been met once all parties have been afforded notice of the action and an opportunity to be heard on the jurisdictional issues.

III. PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

. . . The Federal Interpleader Act authorizes a U.S. District Court to enter both preliminary and permanent injunctions restraining claimants from instituting or prosecuting any proceeding in any state or federal court affecting the subject matter of an interpleader action. 28 U.S.C. § 2361. The Court has “extensive discretion under Section 2361 with respect to the

⁴ Although 28 U.S.C. § 2361 provides for issuance of process addressed to and served by the United States marshals for the respective districts where the claimants reside or may be found, it appears to be the practice of plaintiffs in interpleader actions to directly serve process on claimants, without burdening the U.S. marshals.

issuance and scope of the order.” 7 Wright, Miller & Kane, *Federal Practice & Procedure: Civil* § 1717.

A preliminary injunction may be issued without notice to the putative defendants in the action, for Fed.R.Civ.P. 65 does not modify Section 2361, which in turn provides for entry and of a preliminary injunction order at the same time as summons are issued by the court.

However, “[t]his does not mean . . . that the practice under Section 2361 should be without any notice or provision for hearing in all cases. The practice in actions under the Interpleader Act is still governed by principles of equity practice.” *Shawver*, 208 F.Supp. at 470. Therefore, courts are urged to exercise judicial discretion and restraint when issuing such orders, balancing equitable considerations against temporal and spatial constraints which may weigh against notice and a hearing. “A request for an injunction may be refused if there is no real threat of litigation relating to the subject matter of the interpleader suit or if a previously commenced action will afford the parties effective relief.” 7 Wright, Miller & Kane, *Federal Practice & Procedure: Civil* § 1717. . . .

A number of policy considerations underlying the adoption of the interpleader statute weigh in favor of immediately granting a provisional preliminary injunction without notice to the claimants, as requested by plaintiff in this case. The Supreme Court has emphasized that the difficulties posed in a case where an earlier claimant may appropriate all, or a disproportionate slice, of a fund before fellow claimants are able to establish their claims, potentially leading to a “race to judgment” and unfairness to some claimants, “were among the principal evils the interpleader device was intended to remedy.” *Tashire*, 386 U.S. at 533. This Circuit has stated that “the interpleader statute is liberally construed to protect the stakeholder from the expense of defending twice, as well as to protect him from double liability.” *New York Life Ins. Co. v. Welch*, 297 F.2d 787, 790 (D.C.Cir.1961). . . . Maintenance of the status quo while jurisdictional questions are resolved through issuance of a provisional preliminary injunction is one means of vindicating the policy considerations underlying the Federal Interpleader Act.

Courts have also considered the counterbalancing policy in favor of vindicating of claimants’ interest in pursuing claims in the forum of their choice. This interest carries greater weight once a claimant has already instituted an action, or when the plaintiff seeks an injunction extending to suits against an insured party, stakeholder, or both, rather than one restricted to potential actions regarding the disputed *res*.

The plaintiff in this case does not seek to preclude actions unrelated to the bond against itself or Cedar Valley Express, the bond principal. Therefore, any factors that would counsel against the use of the Court’s “extraordinary powers” under Section 2361 do not carry substantial weight

in the determination of whether a preliminary injunction should issue in this case.

. . . [T]he Court reiterates that this preliminary injunction is issued on a provisional basis only, and will remain in effect only until jurisdictional questions are resolved. At that point, the injunction's continued operation will be revisited upon proper motion of counsel or of this Court. . . .

ORDER

Upon careful consideration of plaintiff's motion to file interpleader action and motion for preliminary injunction and the applicable statutory and case law, it is hereby ORDERED that plaintiff's motion to file interpleader action, and to deposit funds into the registry of the court is GRANTED until further order of this Court; and it is FURTHER ORDERED that and plaintiff's motion for a preliminary injunction is GRANTED until further order of this Court; and it is FURTHER ORDERED that plaintiff shall deposit into the registry of the Court funds equivalent to \$10,000 penal value of Property Broker's Surety Bond No. SA3158428 issued by the plaintiff to defendant Cedar Valley Express, LLC; and it is FURTHER ORDERED that the Clerk of the Court shall receive and invest these funds so that interest may accrue, for ultimate disposition by order of this Court in the above-captioned case; and it is FURTHER ORDERED that plaintiff shall serve a copy of this order on all defendants named in this action; and it is FURTHER ORDERED that all defendants named in this action are hereby ENJOINED from instituting or prosecuting any action in any state or federal district court affecting plaintiff's surety obligations under Property Broker's Surety Bond No. SA3158428 until further order of this Court; and it is FURTHER ORDERED that all parties to this matter shall file submissions addressing the basis for this Court's jurisdiction under 28 U.S.C. § 1335, as well as the necessity and propriety of the continued operation of the preliminary injunction hereby issued, by no later than NOVEMBER 1, 2002.

Overview of Interpleader

If you feel at this juncture that interpleader is hopelessly complex, rest assured you are not alone. Many law students find interpleader somewhat daunting at first. Part of the confusion stems from interpleader's several idiosyncrasies. First, interpleader has its own *language*, with the courts referring to the parties as "claimants" and "stakeholders" rather than the more familiar plaintiff and defendant. Second, it can be difficult for the novice to figure out exactly when the joinder device of interpleader is proper. Finally, as if matters were not complicated enough, special rules govern jurisdiction and venue in certain interpleader cases.

Notwithstanding these idiosyncrasies, interpleader is no more difficult than any of the other devices covered in this Chapter. In fact, it is based on many of the same core concerns. Before diving into the details, it may be helpful to take a look at the big picture.

Conceptually, interpleader is designed to deal with situations where more than one person claims the same “thing,” but by law only one (or at least fewer than all) of those people is entitled to receive that thing. In this respect, interpleader is a corollary to the necessary party and intervention of right rules, which can also cover this situation. If each of the people claiming the thing is allowed to proceed in a separate action, the person who possesses that thing might be exposed to multiple liability.

That basic nature of interpleader gives rise to the special language. The *stake* is the thing over which the parties are fighting. The *stakeholder* is the party who possesses the stake. The *claimants* are those who claim all or part of the stake.

Historically, the stakeholder could not use interpleader if he also claimed any interest in the stake. This requirement has been relaxed in modern practice. Now, the stakeholder can claim that none of the claimants is entitled to the stake, and that he should be allowed to keep it.

As a joinder device, interpleader allows the stakeholder to join all the claimants into a single action, allowing one court to determine who owns the stake. In cases where the stakeholder admits she owes the stake to *someone*, the stakeholder drops out of the suit and the claimants fight among themselves for the stake. If the stakeholder claims it should get to keep all or part of the stake, the stakeholder remains in the suit and asserts its claim.

In many cases, the claimants are scattered across the United States, or in other nations. This feature of interpleader raises potentially difficult problems of subject-matter jurisdiction, personal jurisdiction, and venue. Because interpleader can prove to be a very useful device in the proper case, Congress responded by enacting special jurisdiction and venue laws for interpleader actions, which make it much easier to bring a diversity-based interpleader action in federal court.

Rule 22 of the Federal Rules also deals with interpleader. However, as footnote 1 in *Star Insurance* indicates, Rule 22 is *independent* of the federal statutes. In other words, there are two distinct types of interpleader, “statutory” and “Rule.” Rule 22(b) confirms this notion. Statutory interpleader, which is available only in federal court, is authorized by 28 U.S.C. § 1335. §§ 1335, 1397, and 2361 contain the special jurisdiction and venue rules enacted by Congress to make interpleader easier. Rule interpleader, governed by Rule 22, is subject to the usual rules governing jurisdiction and venue. Because of these differences, it will often be much

easier for a stakeholder to bring a particular action as one of statutory interpleader rather than Rule interpleader.

With these basic principles in mind, it may help to divide any question of interpleader into three distinct sub-questions. First, is the dispute a proper one for use of interpleader? Second, if interpleader is proper, can the action be heard in the selected court given subject matter jurisdiction, personal jurisdiction, and venue limitations? And third, if the court can hear the interpleader action, what does it do? May it prevent parallel cases involving one or more of the claimants from proceeding? How does it decide who receives the stake? The following discussion deals with each of these issues in turn.

1. WHEN A PARTY MAY USE INTERPLEADER

As discussed above, interpleader deals with situations where several people have filed inconsistent claims to the same “thing.” This basic principle applies with equal force to both statutory and Rule interpleader cases. In fact, the question of whether interpleader is proper in a case is exactly the same under both types of interpleader.

When multiple claims to the same stake are litigated in separate cases, the piecemeal litigation poses a threat to both the stakeholder and one or more claimants. The threat to the stakeholder is that both courts will require that the stake be paid or turned over to the respective claimants, resulting in double liability. The threat to the claimants is that a victory for one claimant will effectively bar other claimant’s claims to the stake. By allowing all claims to be litigated in a single action, interpleader both prevents inconsistent results and offers the promise of greater efficiency. However, as the following cases demonstrate, efficiency alone will not suffice. It is not enough for the stakeholder to show she is subject to “multiple claims.” Instead, she must demonstrate that those multiple claims could lead to legally unacceptable results.

INDIANAPOLIS COLTS V. MAYOR AND CITY COUNCIL OF BALTIMORE, 741 F.2d 954 (7th Cir. 1984). In 1984, the Baltimore Colts, a National Football League team, began negotiations with Indianapolis to move the team to that city. The team signed a lease with CIB, which operated the Hoosier Dome in Indianapolis. Shortly thereafter, the City of Baltimore began eminent domain proceedings against the team, seeking to take over ownership and thereby keep the team in Baltimore. The Colts then filed an interpleader action in the Southern District of Indiana. The Colts argued that they faced multiple liability, for if the eminent domain proceedings were successful, the team would be forced to breach its lease with CIB. The court of appeals disagreed:

A basic jurisdictional requirement of statutory interpleader is that there be adverse claimants to a particular fund. The CIB and Baltimore are not claimants to the same stake. Baltimore seeks

ownership of the Colts franchise, whereas the CIB has no claim to ownership of the franchise. Instead, the CIB has a lease with the Colts that requires the team to play its games in the Hoosier Dome and imposes other obligations to ensure the success of the enterprise. . . .

Interpleader is a suit in equity. Because the sole basis for equitable relief to the stakeholder is the danger of exposure to double liability or the vexation of conflicting claims, the stakeholder must have a real and reasonable fear of double liability or vexatious, conflicting claims to justify interpleader.

FIRST INTERSTATE BANK OF OREGON, N.A. v. HOYT & SONS RANCH PROPERTIES NEVADA, LTD., 891 F.Supp. 543 (D. Or. 1995). Hoyt maintained a checking account at First Interstate Bank of Oregon (“FIOR”). The Internal Revenue Service levied on the account, claiming Hoyt owed over \$1,000,000 in overdue taxes. When FIOR notified Hoyt that it planned to honor the levy, Hoyt threatened to sue FIOR. FIOR then attempted to interplead the United States and Hoyt. The federal government objected to use of the interpleader device. It pointed out that a federal statute, 26 U.S.C. § 6332(e), would shield FIOR from any liability to Hoyt if it honored the levy. Therefore, the government claimed, FIOR could not be held liable to both the IRS and Hoyt. The court disagreed, holding that interpleader was proper:

[I]nterpleader is to be granted in instances where a stakeholder faces a legitimate fear of multiple litigation, irrespective of the merits of the competing claims. See generally 3A James Wm. Moore & Jo D. Lucas, Moore’s Federal Practice §§ 22.02[1] (2d ed. 1994) (typically, one or more of the claims will be void of merit, “but that alone may not relieve the stakeholder of a substantial risk of vexatious litigation”). The record before this court clearly reflects that FIOR faced a real possibility of defending an unwanted lawsuit had it simply remitted the disputed funds to the IRS. Indeed, Hoyt explicitly informed FIOR that by honoring the levy it would be inviting litigation. . . .

In sum, because FIOR legitimately feared that the competing claims to the disputed funds might expose it to multiple liability or multiple litigation, and because FIOR instituted this interpleader action in good faith to resolve the competing claims, it is entitled to be discharged from liability.

NOTES AND QUESTIONS

1. The *Star Insurance* opinion does not address whether interpleader was proper. Do you see why interpleader was clearly available in that case?

2. While carelessly careening down a city street one day, Reckless Rex causes a multiple vehicle pileup. Total damages exceed \$1,000,000, and it is clear Rex is solely at fault. Rex's recklessness applies with equal force to his investment portfolio, leaving him with only \$5,000 in assets to his name. In addition, Rex has a liability insurance policy with GALCO, with a policy limit of \$10,000 per person and \$30,000 per incident. Based on the discussion in *Indianapolis Colts* and *First Interstate Bank*, may Rex and/or GALCO interplead the ten victims of the accident, to avoid paying out more than \$5,000 and \$30,000, respectively?

3. If you recognized that the insurance company in the prior note has a much stronger argument for interpleader than Rex, you are well on the way to understanding interpleader. But before you conclude that interpleader will be available in all types of insurance cases, consider another feature of liability insurance. When you purchase a policy of liability insurance, you are purchasing much more than a right to indemnity for any liability you may incur. In addition, the insurance company agrees to defend you from any lawsuits, including paying your attorneys' fees. In many cases this duty to defend is far more valuable than the amount of indemnity. Should the insurance company be able to avoid this important obligation by turning over the policy limits to the court and washing its hands of the whole mess? See *Emcasco Insurance Co. v. Davis*, 753 F.Supp. 1458 (W.D. Ark. 1990).

4. Not all courts agree with *First Interstate Bank* that a threat of multiple inconsistent litigation is enough to invoke interpleader. Some only allow interpleader if there is a chance the stakeholder might actually be subjected to multiple liability. See, e.g., *Alfa Financial Corp. v. Key*, 927 F.Supp. 423 (M.D. Ala. 1996); *Mt. Hawley Ins. Co. v. Federal Savings & Loan Insurance Corp.*, 695 F.Supp. 469 (C.D. Cal. 1987). Similarly, a stakeholder who delivers or pays the stake to one of the claimants may no longer bring an interpleader action. *Lincoln National Life Insurance Co. v. Barton*, 250 F.R.D. 388 (S.D. Ill. 2008) (insurance company that paid the proceeds of the policy to claimants no longer "holds" a "stake", and accordingly cannot avail itself of interpleader).

5. As the *Star Insurance* case indicates, a party who desires to use interpleader need not wait until all the claimants have actually filed suit. A reasonable apprehension of multiple suits suffices.

6. How does the stakeholder actually effect interpleader? If the stakeholder has already been sued by one or more claimants, Rule 22 makes it clear she may file the interpleader as a counterclaim or cross-claim in that suit. In the alternative, the stakeholder may initiate a new action of interpleader, even if he stakeholder has already been sued in one or more separate actions in a different court.

In addition, the stakeholder may be required to deposit the stake with the court. On this issue, there is a slight, but potentially important, difference between statutory and rule interpleader. Deposit of the stake is explicitly required by § 1335(a)(2) in statutory interpleader cases. In Rule interpleader,

by contrast, it is up to the discretion of the court whether to require deposit. *Lincoln National Life Insurance Co. v. Barton*, 250 F.R.D. 388 (S.D. Ill. 2008). This difference might prove important to a stakeholder who is fairly certain he is entitled to keep the stake, and wants to use or invest it during the pendency of the case.

2. JURISDICTION AND VENUE

The most important differences between Rule and statutory interpleader relate to subject matter jurisdiction, personal jurisdiction, and venue. In a Rule interpleader case, the usual jurisdiction and venue rules apply. Therefore, for example, a plaintiff may bring a Rule interpleader case in federal court only if the case either arises under federal law (which is rare) or if diversity exists. Because of the \$75,000 amount in controversy requirement and the complete diversity requirement, however, satisfying the requirements for diversity can be difficult. Under the complete diversity rule, diversity jurisdiction is unavailable if even one claimant is a citizen of the same state as the stakeholder.

Personal jurisdiction can prove an even more formidable obstacle, at least where the claimants are from different states. At first glance, it would seem that a court located in the state in which the stake is situated could use *in rem* jurisdiction in interpleader, given that the court is being called upon to determine competing rights in that stake. However, courts have rejected the use of *in rem* jurisdiction in interpleader, concluding that the action is personal in nature. *Metropolitan Property and Casualty Ins. Co. v. Shan Trac, Inc.*, 324 F.3d 20 (1st Cir. 2003); *Humble Oil & Refining Co. v. Copeland*, 398 F.2d 364, 368 (4th Cir. 1968). Therefore, regardless of whether the stakeholder brings a Rule interpleader case in state or federal court, there must be minimum contacts (other than the stake) between every claimant and the chosen forum. To make matters even more difficult, many “laundry list” state long-arm statutes contain no specific provisions authorizing service in interpleader cases.

Venue can also pose serious problems in a Rule interpleader case. If the stakeholder is the plaintiff, venue would be proper only in a district where all the claimants reside or a significant portion of the events or omissions giving rise to the claims occurred.

Now carefully read §§ 1335, 1397, and 2361, the provisions governing statutory interpleader. These sections significantly relax the requirements for diversity jurisdiction, personal jurisdiction, and venue in statutory interpleader actions brought in federal court. *Star Insurance* contains a good discussion of how the statutes modify the ordinary rules of jurisdiction and venue. You may also find the following chart helpful.

<i>Attribute</i>	<i>Rule interpleader</i>	<i>Statutory interpleader</i>
Determining diversity	Complete diversity between the stakeholder on one side, and all claimants on the other	Minimal diversity among claimants; satisfied if any one claimant is diverse from any other claimant
Amount in controversy (value of stake)	greater than \$75,000	at least \$500
Personal Jurisdiction	all claimants must have minimum contacts with state, and state must allow service	nationwide service (§ 2361), not bound by state limits (Rule 4(k)(1)(C))
Venue based on residence	where <i>all</i> defendants reside	where <i>any</i> claimant resides

AMERICAN FAMILY MUTUAL INS. CO. V. ROCHE

830 F.Supp. 1241 (E.D. Wis. 1993)

RANDA, DISTRICT JUDGE.

[Roche, an individual, was involved in an automobile accident with four other people (the “Grimms”). Roche had a liability insurance policy with American Family Mutual Insurance Company. Because the Grimms’ claims exceed the policy limits, American Family brought a statutory interpleader action against Roche (a Wisconsin citizen) and the Grimms (all Illinois citizens) in federal court. The Grimms challenged subject-matter jurisdiction, arguing the case did not satisfy § 1335.]

As for diversity, the statute “has been uniformly construed to require only ‘minimal diversity,’ that is, diversity of citizenship between two or more claimants, without regard to the circumstance that other rival claimants may be co-citizens.” *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 530, 87 S.Ct. 1199 (1967). “Minimal diversity” is also determined without regard to the stakeholder’s citizenship; that is, without regard to the circumstance that the stakeholder and one of the claimants may be co-citizens. . . .

The foregoing principles narrow the possible bases for the Court’s jurisdiction. Assuming for purposes of the motion that the combined value of the Grimms’ claims exceeds the policy limits of \$300,000, each Grimm would be adverse to the others because each would be competing for portions of a fund that is not large enough to satisfy them all. But while each would be adverse, they would not be diverse, because all of the Grimms reside in Illinois. . . . Thus, jurisdiction is proper only if American Family and the Grimms (who are diverse) can be considered adverse to

each other, or if Roche and the Grimms (who are also diverse) can be considered adverse to each other. Neither group can be so considered.

Since the interpleader statute was amended to expressly include “bills in the nature of interpleader”, it is clear that the fact that American Family denies any liability whatsoever, and is therefore not a neutral or disinterested stakeholder, cannot destroy this Court’s jurisdiction. . . . [It is also] clear that the citizenship of American Family, as a stakeholder, cannot destroy jurisdiction. What remains unclear, however, is whether the citizenship of American Family, as an interested stakeholder, can create jurisdiction under the statute. American Family claims it can. It reasons that by denying liability it has become a “claimant” to the fund both adverse and diverse to the Grimms. The Supreme Court has not yet answered this interesting question. . . .

The few courts that have addressed the issue favor letting an interested stakeholder’s citizenship create jurisdiction under the statute. . . .

The judicial tendency to expand the jurisdiction of federal interpleader relief when issues such as these arise is somewhat understandable. Because § 1335 developed in equity and is a piece of “remedial legislation,” courts generally construe it liberally with an eye towards doing justice. Nevertheless, this Court disagrees with other courts and commentators who would hold that American Family’s citizenship can be used to create interpleader jurisdiction. . . .

[O]ur first consideration must be the language of the statute itself. The statute requires “two or more adverse claimants, of diverse citizenship. . . .” 28 U.S.C. § 1335(a)(1). What is a claimant? In the insurance context, a claimant is one who is “claiming or may claim to be entitled to . . . any one or more of the benefits arising by virtue of . . . [the] policy. . . .” Can American Family truly be said to claim an entitlement to the benefits of its own policy? Such a position might be defensible if American Family was exercising its subrogation rights or some other “benefit” inuring to itself. But liability coverage? That is a benefit inuring to its insured and those injured by the insured. As such, Roche may claim an entitlement to the benefit. The Grimms may claim an entitlement to the benefit. But American Family cannot. American Family denies the existence of the benefit. The same applies if we focus, as American Family does, on the “fund” at issue, i.e., the \$300,000 proceeds of the policy. As stated earlier, “to satisfy the adversity requirement for an interpleader action, the interpleader claims must be adverse to the fund and adverse to each other.” *Industrial Bank*, 763 F.Supp. at 634. By denying that coverage exists American Family has clearly stated a claim that is adverse to the Grimms, but how is it adverse to “the fund”? American Family owns “the fund”. It seeks to preserve its ownership of “the fund”. Indeed, from American Family’s perspective, “the fund” does not even exist. It is simply a fiction

used as an analytical reference for its potential liability to the real claimants, a liability which American Family denies, and which would in any event be paid out of its general assets. There is no separate, distinguishable “fund” of dollars which American Family now seeks to obtain and add to its own general fund of dollars. The two are the same.

. . . While there are those who might view the foregoing considerations as “metaphysical objections at best”, 7 Wright, Miller & Kane at 547, it is a metaphysics compelled by the language of the statute itself, which is the sole source of this Court’s jurisdiction. It is also a metaphysics which has (as does all good metaphysics) sound practical consequences. The federal interpleader statute is best viewed as a unique exception to the federalist notion, rooted in exceedingly good policy, that federal courts are courts of limited jurisdiction. That is, the interpleader statute allows a federal court to provide a federal remedy in a dispute which is almost always going to be governed by state law and which is often based on nothing more than a “minimal diversity” between the disputing parties. This unique exception can be justified in those situations where the only way for the dispute to be finally decided by a single decision emanating from a single court is to allow a federal forum with nationwide service of process. But because alternatives exist, allowing federal interpleader relief based solely on the stakeholder’s citizenship sets a dangerous precedent. It would permit a Rule 22 interpleader action absent the necessary jurisdictional amount and thereby alter the prerequisites of federal jurisdiction by judicial decision. . . .

[The court also refused to consider Roche’s Wisconsin citizenship in determining whether diversity existed, concluding that Roche’s interest was not adverse to those of the Grimms. However, the court noted that jurisdiction might be available if the case had been brought as a Rule interpleader case, as American Family was diverse from all of the Grimms and Roche and the policy limits of \$300,000 met the amount in controversy requirement.]

NOTES AND QUESTIONS

1. In most other types of joinder, Congress has refrained from tinkering with the complete diversity rule, the limitations on service, and the requirements for venue. Why did Congress make such a significant exception in the case of interpleader? Is there any compelling reason not to relegate these cases to state courts, as often occurs in intervention cases where complete diversity is lacking? Is it relevant that insurance companies are the main beneficiaries of interpleader?

2. *American Family* recognizes that it is adopting the minority rule. Most courts hold that for purposes of determining diversity under § 1335, a stakeholder who claims that none of the other claimants should receive the stake is also treated as a claimant.

Are interested stakeholders treated as claimants when determining venue? If so, an interested stakeholder could always bring an interpleader action in the state where he resides, as § 1397 provides venue is proper in a statutory interpleader action wherever any claimant resides. In *New Jersey Sports Prod., Inc. v. Don King Prod., Inc.*, 15 F.Supp.2d 534 (D. N.J. 1998), the court held that an interested stakeholder would not be deemed a claimant for purposes of § 1397. Can these different treatments of interested stakeholders be reconciled? Does it matter that § 1335 speaks in terms of *adverse* claimants, while § 1397 merely mentions claimants? What about the fact that subject-matter jurisdiction is ultimately limited by the United States Constitution, while venue is a limit Congress created as a convenience to the litigants?

3. So far, our discussion of subject-matter jurisdiction in interpleader has concentrated only on diversity. In ordinary cases, however, federal question jurisdiction also provides a way to get a case into federal court. Can a party use federal question jurisdiction in an interpleader case? The question is more difficult than it may seem at first glance. First, although federal laws such as ERISA (the law that governs employee retirement plans) may determine the claimants' rights to the stake, in a technical sense those federal laws do not give rise to the stakeholder's "claim"—its request for interpleader relief. Nevertheless, some courts have allowed federal question jurisdiction when federal law controls who is entitled to the stake. In *Commercial Union Insurance Company v. United States*, 999 F.2d 581 (D.C. Cir. 1993), for example, the court held that interpleader should be treated like a declaratory judgment for purposes of determining federal question jurisdiction. In declaratory judgment cases a court ignores the declaratory relief, and instead tries to determine what action would have eventually been brought. If that later action would be a federal question, the declaratory judgment is also treated as a federal question. By analogy, if federal law controls the rights of the claimants in an interpleader case, the case presents a federal question, because those claimants could eventually bring a federal question case against the stakeholder.

Federal question jurisdiction is clearly available in Rule interpleader cases. However, *Commercial Union* also suggests that it is not available in statutory interpleader cases. The court's rationale is that § 1335 is itself a jurisdictional statute, which as written ignores whether the claims arise under federal or state law. If that suggestion is correct, it means the advantageous personal jurisdiction and venue rules are unavailable in cases where the minimum diversity or amount in controversy requirements of § 1335 are not met, even if that case arises under federal law.

4. Recall that under the probate exception to diversity, federal courts will not hear probate cases brought under their diversity jurisdiction. Probate, however, is a fertile breeding ground for conflicting claims, and therefore a common situation in which interpleader may arise. Does the probate exception also apply to cases under the "minimal" diversity standard of § 1335? At least one court has held that interpleader is an exception to the probate exception.

American Financial Life Ins. and Annuity Co. v. Youn, 7 Fed.Appx. 913, 2001 WL 369826 (10th Cir.) (unpublished).

3. ENJOINING OTHER LITIGATION

The primary aim of interpleader is to protect the stakeholder from inconsistent judgments. If two or more courts are allowed to determine who owns the stake in separate proceedings, there is no guarantee they will reach the same result. Filing the interpleader action allows the stakeholder to submit all claims in orderly fashion to a single factfinder.

However, merely filing the interpleader action does not by itself halt any other proceedings that may affect the stakeholder's liability concerning the stake. Even if the stake is deposited with the court hearing the interpleader action, other courts may continue to adjudicate the stakeholder's liability to one or more of the claimants. Ideally, then, the stakeholder needs a mechanism to stop other courts from proceeding any further. The most obvious way to accomplish this goal would be for the interpleader court to enjoin the filing or continued prosecution of other actions. When another action is already pending in *state* court, however, the Anti-Injunction Act, 28 U.S.C. § 2283, poses a potential problem. As a general rule, the Anti-Injunction Act prohibits a federal court from issuing an injunction against a pending state proceeding.

On the other hand, the Anti-Injunction Act does contain certain exceptions. First, it allows for an injunction when expressly authorized by some other federal statute. Congress made use of this exception in § 2361. Read that statute and identify the language allowing a court to enjoin state proceedings notwithstanding the Anti-Injunction Act.

Of course, § 2361 applies only to statutory interpleader. What about *Rule* interpleader cases? Although no statute expressly authorizes an injunction in *Rule* interpleader cases, many courts allow such injunctions under another exception to § 2283, which allows injunctions "where necessary in aid of [the federal court's] jurisdiction". Is enjoining a state-court proceeding really necessary to preserve a federal court's jurisdiction over a *Rule* interpleader case?

Finally, as *Star Insurance* indicates, merely because a federal court has the power to enjoin state proceedings does not mean the stakeholder is entitled to an injunction. Instead, the court will determine whether parallel litigation poses a real threat to the stakeholder's rights. If no parallel litigation is likely, or if that parallel litigation adequately protects the stakeholder's interests, the court may well deny the injunction.

4. THE SUBSEQUENT PROCEEDING

Rule 22 and the statutes governing interpleader go into considerable detail on the issues of when interpleader is available, what a party must

do to commence an interpleader case, and which court may hear the case. But what happens once interpleader is underway? Somewhat surprisingly, neither Rule 22 nor the statutes specify what a court is supposed to do in order to resolve the interpleader case. As a result, the courts have been forced to fill in the gaps.

In some situations, the court's task is obvious. Suppose, for example, the mother of three boys dies and her will leaves her entire estate to "my favorite son." If the executor interpleads the three sons, the court's task is to determine which son was her favorite at the time she signed the will. The favorite gets the entire estate.

Now consider a variation on that theme. Suppose the same executor faces claims by the decedent's creditors in the amount of \$200,000, but the total value of the estate is only \$50,000. Clearly, the court's first task is to determine whether all the claims are valid. If the court finds the total liability is actually less than \$50,000, every creditor with a legitimate claim gets paid in full. But what if the court finds that all the claims are valid, so the estate owes the full \$200,000? How should it distribute the limited funds?

Most courts distribute the funds *pro rata*, so that in our hypothetical situation each creditor would get twenty five cents for every dollar it claims. *See, e.g., Heller Financial, Inc. v. Prudential Ins. Co. of America*, 371 F.3d 944 (7th Cir. 2004); *Commercial Union Ins. Co. v. United States*, 999 F.2d 581 (D.C. Cir. 1993). However, if one creditor would have a priority under state law, courts will respect that priority in interpleader, which means the party with the priority is paid in full before any junior creditor receives anything. *Texaco, Inc. v. Ponsoldt*, 118 F.3d 1367 (9th Cir. 1997). Some courts hold that if one or more creditors has obtained a judgment that can be levied against the fund, the creditors should be paid in the order in which they obtained their judgments. *Great American Ins. Co. v. Spraycraft, Inc.*, 844 F.Supp. 1188 (S.D. Ohio 1994).

If the stakeholder is truly disinterested, many courts will allow it to recover its costs and attorney's fees. *Estate of Ellington v. EMI Music Publishing*, 282 F.Supp.2d 192 (S.D.N.Y. 2003); *Unum Life Ins. Co. of America v. Kelling*, 170 F.Supp.2d 792 (M.D. Tenn. 2001). The rationale is that the stakeholder saved the claimants considerable time and expense by bringing the interpleader action.

PROBLEMS

1. Landlord and X enter into a lease agreement under which X will lease an apartment commencing in September. The lease is conditioned on X "submitting a security deposit by August 15." On August 20, Landlord has still not received the security deposit. Landlord therefore enters into another lease agreement under which she leases the same apartment to Y.

On September 1, both X and Y show up with their possessions, ready to move into the apartment. X claims he “submitted” the check to Landlord by mailing it well before August 15. Although Landlord feels the lease was not effective unless Landlord received the check, he is nevertheless unsure whether the law is on his side. May Landlord interplead X and Y?

2. Landlord leases an apartment to X. After the lease is complete, Landlord is prepared to return the security deposit to X. Before he returns the deposit, however, Landlord is sued by Y. Y claims to be one of X’s creditors, and claims he has a court order garnishing all debts owed to X. If Y is telling the truth, Landlord must pay him the security deposit. However, Landlord is sure that Y is lying. May Landlord interplead X and Y? Assuming for a moment that interpleader is proper, must Landlord file a new action, or may he file a pleading or motion converting Y’s suit into an interpleader action?

3. While walking in a mall in Des Moines, Iowa, Brown finds a CD-ROM lying on the floor. Because the CD-ROM has no visible identifying information, Brown puts it into his computer to see what it contains. Brown is quite surprised to discover that the CD-ROM contains a database of the buying habits of everyone in Des Moines. Although the physical CD-ROM has a value of only thirty cents, any marketing firm would be willing to pay \$50,000 for the database.

Brown takes out a newspaper advertisement to try to discover the true owner of the database. Three people respond; Abramson, a citizen of Kentucky, Cross, a citizen of Minnesota, and Deason, a citizen of Ohio. Each claims to be the sole owner of the database.

Brown, a citizen of Illinois, would like to file an interpleader action against Abramson, Cross, and Deason in a Minnesota federal court. May the Minnesota federal court hear this case?

4. Same as Problem 3, except that (a) Brown did not find the CD-ROM on the ground, but instead had it handed to him by a stranger, and (b) Brown wants to bring his action in a federal district court in the Central District of Illinois, where he resides. Brown claims the person who handed him the CD was the actual owner, and that he therefore now owns the CD as a gift. May Brown bring his interpleader action in the chosen court?

E. CLASS ACTIONS

INTRODUCTORY PROBLEM

Dash Communications, Inc. is the newest mobile phone provider in the United States. In order to compete against more established companies, Dash offers rates significantly lower than the industry leaders. In addition, however, Dash decides to take advantage of the renewed sense of patriotism in the United States. Dash’s advertisements proclaim that “all of our phones are assembled right here in the United States.” That statement is only partly true. Dash’s phones are manufactured by sweatshop labor in several impoverished nations. However, when a customer buys a phone in the United States, a Dash

employee takes off the back cover, inserts a SIM, and then replaces the cover—thereby “assembling” the phone for the final time, as Dash would have it.

In time, truth wins out, and Dash’s deceptive marketing scheme is brought to light. Pat Riot is a mobile phone user who maintains an account with Dash. Pat bought from Dash primarily because he thought Dash’s phones were produced entirely in the United States. Infuriated to learn the truth, Pat wants to cancel his contract with Dash. However, Pat signed Dash’s standard three-year contract. Moreover, like all of Dash’s contracts, Pat’s contract provides he must pay a \$500 fee for early termination of the contract.

To get around these draconian terms, Pat sues Dash in state court. Although federal law provides no cause of action, state law would allow a buyer such as Pat to sue for misrepresentation. Prevailing on a claim of misrepresentation requires Pat to prove that he both knew of and relied on the “Assembled in the United States” statement. Pat asks the state court to rescind the contract. Under the remedy of rescission, Pat would not only be relieved of paying the termination fee, but would also be entitled to a refund of any payments already submitted, less the “reasonable value” of any calls Pat had made.

Pat is also an avid online chatter. After Pat files his case, he talks to a number of other Dash customers who were similarly upset to find out where Dash’s phones are made. These customers are located all across the country. When Pat suggests that they sue Dash too, some of the people respond that the amount involved is too small to justify suing. Others indicate that under the law of their state, a false statement about where a product is made would not qualify as a misrepresentation.

Pat begins to wonder whether he can join the claims of all Dash customers in the United States into his case. Is there any way Pat can arrange to litigate not only his rights, but also the rights of all other Dash customers? What about the fact that most of these customers have no connection whatsoever with Pat’s state? Thinking practically rather than logically, would this be a good case to allow one person to litigate the rights of others?

Governing (and Guiding) Rule: Federal Rule 23.

Before law school, you may never have heard of impleader, intervention, and interpleader. But you undoubtedly have heard of class actions. Over the past half century, class actions have gained a great deal of notoriety. The media devotes considerable coverage to certain class actions, either because of the incredible damages sought or the novel legal theory of recovery. Advocates of “tort reform” cite some of the more spectacular uses of the class action as evidence of a tort system run amok. These same advocates blame class actions for driving up the cost of health care, insurance, automobiles, and a host of other products and services. Some even accuse class actions of serving as a back-door way to achieve mass income redistribution in society.

On the other hand, supporters of the class action would argue that the device is an invaluable tool for achieving justice, especially in certain types of cases. Consolidating claims may be the only practical way to remedy a situation in which a large employer is engaged in widespread discrimination, or in which a company lies in connection with its issue of stock. In these situations, few individuals have the incentive, much less the financial wherewithal, to hire an attorney and pursue what may prove to be a long and arduous case. The class action not only allows the costs of litigation to be spread among all claimants, but also gives the plaintiff's side considerably more clout in negotiating a favorable settlement.

In truth, there is some merit to both sides of the debate. Class actions certainly have made it possible for people to go to court to challenge certain actions by government and large companies that might otherwise have gone unchecked. Without the class action, the nation would not have made as much progress in the areas of school desegregation and securities fraud, as well as combating various illegal practices by record companies and airlines. On the other hand, it is equally clear that the class action has at times been abused. In some cases, a plaintiff will bring a legally questionable claim as a class action in the hope the sheer weight of the claim will pressure defendant into a quick settlement. The merits of the claim often take a back seat to the fight over whether the case may proceed as a class action. If the case is allowed to proceed as a class action, defendant immediately settles, while if the judge denies class status, plaintiff usually dismisses the case.

Understanding the debate about class actions requires an understanding of the ways in which class actions are unique. In one sense, a class action is nothing more than a collection of dozens, hundreds, or perhaps thousands of individual claims. However, there is a fundamental difference between a case in which one hundred plaintiffs join under Rule 20, and a class action involving those same one hundred people. In a case of ordinary joinder, everyone looks out for her own interests. In a class action, one or a few interested parties represents the rights of everyone. That basic feature—representational litigation—is a two-edged sword. It offers tremendous opportunities for economies of scale, but at the same time presents *sui generis* problems. This chapter accordingly begins with a discussion of the issues inherent in representational litigation.

1. ISSUES IN REPRESENTATIONAL LITIGATION

HANSBERRY V. LEE

311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940)

MR. JUSTICE STONE delivered the opinion of the Court. . . .

[Hundreds of landowners in a particular area negotiated a restrictive covenant, under which each signer agreed that his lot could not be sold to

or used by a black person. However, the covenant specifically provided it was not binding unless signed by owners owning at least 95% of the street frontage of land in the area.

After the covenant had been signed, Burke, a landowner, sued Kleinman and others in an Illinois state court. Although the record is not entirely clear, the United States Supreme Court's opinion suggests this case may have been brought to obtain a judicial declaration that the covenant was legally enforceable against all who had signed. The plaintiff and defendants had all signed the covenant. Burke specified she was bringing the action not only on her own behalf, but also on behalf of all other property owners who had signed. The parties in *Burke v. Kleinman* stipulated that owners of 95 percent of the frontage had signed. The court found the covenant to be legally binding, and held for Burke.

Later, Lee, another landowner who had signed the covenant, sued the Hansberrys, a black family seeking to purchase a lot from someone else who had signed the covenant. The Hansberrys proved that only owners of 54 percent of frontage in the area had actually signed the covenant. The state courts, although agreeing that the 95 percent requirement was not in fact satisfied, held the Hansberrys could not challenge the *Burke* court's ruling that owners of 95 percent had signed, even if that finding was based on a fraudulent stipulation. On appeal, the Illinois Supreme Court justifying this result by holding that *Burke* was by nature a class action, brought by Burke on behalf of those who had signed the covenant. Because the Hansberrys' seller had signed the covenant, the court found he was a member of this class. And as the Hansberrys would be successors in interest to their seller, they too were bound by the judgment in *Burke*.]

It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. *Pennoyer v. Neff*, 95 U.S. 714. A judgment rendered in such circumstances is not entitled to the full faith and credit which the Constitution and statute of the United States prescribe, and judicial action enforcing it against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments require.

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

The class suit was an invention of equity to enable it to proceed to a decree in suits where the number of those interested in the subject of the litigation is so great that their joinder as parties in conformity to the usual rules of procedure is impracticable. Courts are not infrequently called upon

to proceed with causes in which the number of those interested in the litigation is so great as to make difficult or impossible the joinder of all because some are not within the jurisdiction or because their whereabouts is unknown or where if all were made parties to the suit its continued abatement by the death of some would prevent or unduly delay a decree. In such cases where the interests of those not joined are of the same class as the interests of those who are, and where it is considered that the latter fairly represent the former in the prosecution of the litigation of the issues in which all have a common interest, the court will proceed to a decree.

It is evident that the considerations which may induce a court thus to proceed, despite a technical defect of parties, may differ from those which must be taken into account in determining whether the absent parties are bound by the decree or, if it is adjudged that they are, in ascertaining whether such an adjudication satisfies the requirements of due process and of full faith and credit. Nevertheless, there is scope within the framework of the Constitution for holding in appropriate cases that a judgment rendered in a class suit is *res judicata* as to members of the class who are not formal parties to the suit. Here, as elsewhere, the Fourteenth Amendment does not compel state courts or legislatures to adopt any particular rule for establishing the conclusiveness of judgments in class suits, nor does it compel the adoption of the particular rules thought by this Court to be appropriate for the federal courts. With a proper regard for divergent local institutions and interests, this Court is justified in saying that there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it.

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

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

of the members of the class could stand in judgment for all, provided that the procedure were so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue. We decide only that the procedure and the course of litigation sustained here by the plea of *res judicata* do not satisfy these requirements.

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

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

It is one thing to say that some members of a class may represent other members in a litigation where the sole and common interest of the class in the litigation, is either to assert a common right or to challenge an asserted obligation. It is quite another to hold that all those who are free alternatively either to assert rights or to challenge them are of a single class, so that any group, merely because it is of the class so constituted, may be deemed adequately to represent any others of the class in litigating their interests in either alternative. Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires. . . .

The plaintiffs in the *Burke* case sought to compel performance of the agreement in behalf of themselves and all others similarly situated. They did not designate the defendants in the suit as a class or seek any injunction or other relief against others than the named defendants, and

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

Reversed.

NOTES AND QUESTIONS

1. Racially restrictive covenants were fairly common in residential housing in the first half of the twentieth century. For many years, courts enforced the covenants. A few years after *Hansberry*, however, the United States Supreme Court held that enforcement of racially (and by implication religiously) restrictive covenants violated the Equal Protection clause of the Fourteenth Amendment to the United States Constitution. *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948).

2. The Hansberrys did not sign the covenant at issue in the case. Can you nevertheless reconstruct the Illinois Supreme Court's argument as to why the Hansberrys were precluded from arguing in court that the covenant was invalid?

3. Why does the United States Supreme Court reject the Illinois court's conclusions?

4. The Court in *Hansberry* is careful to limit its holding to the specific facts before it. But does the decision as a practical matter completely destroy the class action device? Can we ever be sure that the ostensible members of the class—who, after all, sit silently on the sidelines while the case is being litigated—truly share interests with the representative?

Suppose Alpha brings a class action against City on behalf of himself and everyone who resides in or near the downtown in City. The action challenges City's decision to build a new downtown stadium in the hope of luring one of Major League Baseball's increasingly peregrine teams to City. City plans to finance the stadium by raising taxes on City residents. Alpha argues that the noise, light, and increased traffic from the stadium will constitute a public nuisance, significantly reducing property values in the area. Alpha asks the court to compensate all owners for the decrease in value of their property. Although Alpha diligently prosecutes the case, he eventually loses on the merits. Are any or all of the following people bound by the decision?

- Beta: Beta is a rabid baseball fan who wants the stadium at any cost.
- Gamma: Gamma argues that had *she* been the representative, she would not have sued for a public nuisance, but instead would have claimed City's plan violated state environmental laws regulating construction projects.
- Delta: Delta agrees that the public nuisance theory was the best bet. However, Delta argues *he* would have preferred the court enjoin City from building the stadium.
- Epsilon: Epsilon, a baseball fan, feels a reduction in property values is a fair trade for the benefits of having a new stadium. Epsilon nevertheless objects to City's proposal to use tax revenues to pay for the stadium. Epsilon feels the proposal violates a provision of the state constitution that prevents municipal taxes from being used for private projects.

5. Most class actions involve a class of plaintiffs suing one or more named defendants. However, the opposite is also possible. In some cases, a plaintiff may sue one or more people as representatives of a class of *defendants*. These "defendant class actions" can present serious problems of adequate representation, especially where there is an incentive for one party to "point the finger" at others. Nevertheless, courts have allowed defendant class actions in the proper case. For an example of a defendant class action, see *In re Integra Realty Resources, Inc.*, 262 F.3d 1089 (10th Cir. 2001).

Would a *defendant* class action have helped in *Hansberry*? When answering this question, ask yourself whether the plaintiff in *Burke* gained anything by suing on behalf of a class, rather than suing as an individual.

6. The Court's opinion in *Hansberry* indicates that a person may be barred by the results of a case not only when she is a party to the case or a member of a properly-constituted class, but also when she "controls" the litigation of the case. For an example of control of a case by a non-party, see *Montana v. United States*, 440 U.S. 147, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979).

PROBLEM

Marvel Windows makes high quality wood-frame windows for residences. Water is a window frame's main enemy. From 1985 to 1988, Marvel used a chemical called SHED to waterproof its frames. SHED proved to be almost completely ineffective against water. As a result, Marvel windows would rot out after ten to twenty years.

In 1999, Scarlett O'Hara brought a class action in the District of Minnesota against Marvel Windows, on behalf of everyone who had bought a Marvel SHED-treated window between 1985 and 1988. O'Hara sought recovery for breach of contract and breach of warranty. The case was settled in 2001 for \$300,000. The court issued judgment in that amount. Pursuant to this judgment, Marvel paid \$300,000 into a fund. Members of the class could obtain

compensation from the fund by filing a claim. Notice of the settlement and the fund was both sent to the known members and published in mainstream newspapers across the nation. The fund was depleted by the summer of 2002.

Rhett Butler bought SHED-treated windows from Marvel in 1988. Butler thought his windows were fine. In October of 2002, however, Butler discovered his window frames were rotting. Butler sued Marvel in a Massachusetts federal court for replacement of his windows. Unlike O'Hara's action, Butler sought recovery for failure to warn after the sale. Marvel filed a Rule 12(b)(6) motion, asserting that the judgment in the *O'Hara* class action barred Butler because he was a member of the class. Butler argued he could not be a member because he had not yet experienced any problems while the *O'Hara* case was pending. In addition, Butler argued that because of his different legal theory, he was not adequately represented.

How should the court rule? See *Reppert v. Marvin Lumber and Cedar Co.*, 359 F.3d 53 (1st Cir. 2004).

2. THE PROTECTION AFFORDED BY RULE 23

In *Hansberry*, the Illinois courts determined that the *Burke* case was a class action after that action was complete. That hindsight-based approach presents obvious problems. Take a situation where one plaintiff sues on behalf of a class of one thousand members. Because the stakes are so high, defendant will defend the suit vigorously. Defendant may offer evidence to show why some of the class members are not entitled to recovery. That defendant would be quite frustrated if a court stepped in later and declared that the only party bound by the judgment was the representative, and the other class members could bring their own individual suits.

Federal Rule 23 deals with class actions in the federal courts. The Rule was completely revamped in 1966, in part to answer many of the concerns raised by *Hansberry*. Read Rule 23 carefully. In what ways does the Rule attempt to deal with the representation issues raised by *Hansberry*? How does it seek to avoid the practical problems with judging whether these requirements were met in hindsight, as occurred in *Hansberry*? In particular, consider the roles the following features of Rule 23 play:

- certification of the class by the trial court
- the general requirements of 23(a)
- the three different types of class action contemplated by 23(b)
- notice to the class members
- the “opt-out” provisions of Rule 23(c)(2)(B)(v)
- the provisions governing settlement of a class action

Although states are free to adopt their own methods of meeting the requirements of *Hansberry*, many have opted for an approach much along the lines of Rule 23.

SZABO V. BRIDGEPORT MACHINES, INC.

199 F.R.D. 280 (N.D. Ind. 2001)

WILLIAM C. LEE, CHIEF JUDGE.

This matter is before the court on a motion for class certification filed by the plaintiff, John D. Szabo, d/b/a Zatron (“Szabo”), on August 16, 2000. . . .

Factual Background

The pertinent introductory facts of this case are as follows. Szabo, operating as Zatron (a machine shop), provides 3-D design services, CAD/CAM and CNC (computer numerically controlled) programming, the building of precision tool, dies and mold-tooling and production machining. Szabo resides in Indiana. Bridgeport, a Delaware corporation with its principal place of business in Connecticut, is in the business of manufacturing and distributing machine tools. Szabo’s complaint arises out of his purchase in July 1997 of a Bridgeport 800/22 vertical machining center with a DX-32 Control Unit from Bridgeport. Szabo alleges that the machine did not perform up to and in accordance with certain technical specifications and performance characteristics allegedly contained in promotional material and an offer letter that Bridgeport’s alleged agent, Advance Machinery Company, Inc. (“Advance Machinery”), purportedly gave to Szabo. According to Szabo, the Bridgeport Machine was unable to meet the technical specifications and performance characteristics due to defects inherent in the Bridgeport DX-32 Control Unit. Szabo alleges that Bridgeport had knowledge of these defects and that Bridgeport’s brochure and written offer letter contained numerous fraudulent statements and omissions and that Bridgeport acted knowingly or recklessly in making these alleged false and misleading representations and omissions of fact. Szabo asserts claims of negligent misrepresentation, fraud and breach of warranties.

Motion to Certify Class

Szabo seeks certification of a class of all persons who purchased a machining center or a CNC milling machine from Bridgeport that included a Bridgeport DX-32 Control Unit between January 1, 1996 and the present (the “Class Period”) and were damaged thereby (the “Class”). . . . Szabo notes that the thrust of this action is that the DX-32 Control Unit incorporated into the machine he bought was inherently defective, which prevented the machine from operating in accordance with its specifications. Therefore, because the Class members all purchased computer numerically controlled machines with the same defective Control Unit, on the basis of

standardized performance representations, Szabo argues that this action should be certified as a class action. Certification is sought under Rule 23(a) and Rule 23(b)(3) of the Federal Rules of Civil Procedure.

Under Rule 23 of the Federal Rules of Civil Procedure, this court undertakes a two-step analysis in determining whether class certification is proper. First, the court determines whether the four threshold requirements of subsection (a) of Rule 23 have been met. These requirements are as follows:

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interest of the class.

These four factors are often referred to as: “numerosity”, “commonality”, “typicality”, and “adequate representation”.

Secondly, the court determines whether the action qualifies for class treatment under at least one of the subdivisions of Rule 23(b). Szabo is proceeding under Rule 23(b)(3), which provides in relevant part as follows:

A class action may be maintained if Rule 23(a) is satisfied and if . . .

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

- (A) the class members’ interests in individually controlling the prosecution or defense of separate actions;
- (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
- (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
- (D) the likely difficulties in managing a class action.

These two factors are commonly referred to as: “predominance” and “superiority”.

Szabo bears the initial burden of advancing reasons why this action meets the requirements of Rule 23. In ruling on a motion for class certification the focus is simply on whether the prerequisites of Rule 23 have been met. The court does not conduct a hearing on the merits when

deciding upon certification of a class. . . . Rule 23 is to be construed liberally.

Numerosity

The first requirement of Rule 23 is that “the class is so numerous that joinder of all members is impracticable.” This rule does not require that joinder be impossible, but impracticable. Courts may make “common sense assumptions” in order to support the finding of numerosity.

Szabo estimates that hundreds of individuals fall within the parameters of the class definition. Szabo claims that members of the Class can be identified by reference to objective criteria such as Bridgeport’s sales records which will reveal who purchased CNC milling machines or vertical machining centers that incorporated the DX-32 Control Unit. Szabo indicates that the proposed class consists of all persons, nationwide, who purchased these machines and that, although the exact number of jurisdictions in which the class members reside is not yet known, it would be impracticable to join hundreds of class members from different states. Therefore, Szabo concludes that the numerosity requirement is satisfied.

Bridgeport, however, argues that Szabo has not met the numerosity requirement because he has not sufficiently put forth evidence of the number of the class members. Nevertheless, Bridgeport, which presumably knows the exact number of purchasers who would fit within the proposed class, has not attempted to make any showing that there are not hundreds of potential class members. Additionally, as Szabo points out in detail in his reply brief, Bridgeport’s annual report clearly supports an estimate of domestic sales of machining centers in 1998 of over 600 machining centers. In any event, the law is clear that precise enumeration of the members of a class is not necessary for an action to proceed as a class action, and it is permissible to estimate class size. Consequently, the court finds that Szabo has met the numerosity requirement.

Commonality, Predominance, Typicality

The next issue is whether there are “questions of law or fact common to the class” and whether the common questions predominate. This is not a demanding requirement. The rule does not require that all questions be common. In fact, a single common question is sufficient to satisfy the requirements of Rule 23(a)(2), at least in some circumstances.

A common question is one which “arises from ‘a common nucleus of operative facts’” regardless of whether the underlying facts change over the class period and vary as to individual claimants.

Szabo claims that he has alleged a variety of common questions concerning the defects in the DX-32 Control Unit, Bridgeport’s dealings with the members of the Class, and the Class members’ potential remedies. . . .

Bridgeport, in response, argues that where, as here, the plaintiff moves for certification under Rule 23(b)(3), “Rule 23(a)(2)’s ‘commonality’ requirement is subsumed under, or superseded by, the more stringent Rule 23(b)(3) requirement that questions common to the class ‘predominate over’ other questions.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 609, 117 S. Ct. 2231 (1997). Bridgeport claims that Szabo cannot meet the requirement that the common questions predominate because, according to Bridgeport multiple individualized issues permeate both Szabo’s particular claim and the class claims he alleges. The issue raised by Bridgeport will be discussed below, in connection with typicality. (“The commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff’s claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately represented in their absence.” *General Tel. Co. v. Falcon*, 457 U.S. 147, 157 n. 13, 102 S. Ct. 2364 (1982)).

A plaintiff’s claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of the other class members and his or her claims are based on the same legal theory. The typicality requirement is satisfied when all plaintiffs have the same theory of recovery against the defendant based on the same set of facts. For class certification purposes, “a named plaintiff need not have suffered precisely the same injury as every member of the class, so long as he has been adversely affected by the same practice or policy, therefore the court must focus on the nature of the class claims and whether they are ‘fairly encompassed by the named plaintiff’s claims.’” *Koski v. Gainer [sic]*, 1993 WL 153828 (N.D. Ill.).

Szabo argues that he is a typical victim of the defendant’s practices and that his claims arise out of the same course of conduct and are based on the same legal theories as those of the putative Class members. Szabo notes that the gravamen of his claims is that the DX-32 Control Unit was defective. . . . Szabo alleges in his complaint that the defects in the DX-32 were inherent, and therefore present in every CNC milling machine and vertical machining center that incorporated that unit. . . . The complaint describes numerous complaints by other purchasers of the DX-32 who experienced the same problems as Szabo with their machines. In light of all the above allegations, Szabo concludes that the common issues in this case are central to his claim and that by litigating the liability issues he can reasonably be expected to advance the interests of all putative Class members in a favorable determination on each common issue.

Bridgeport, in response, contends that Szabo’s claim is inherently dependent upon his unique factual circumstances and, therefore, common factual issues do not predominate. Bridgeport relies on Szabo’s deposition,

wherein he indicated that numerous oral representations were made to him by Bridgeport's alleged agent (Advanced Machinery), as well as a demonstration of the product. Bridgeport then concludes that Szabo's claim is one based on oral misrepresentations, which oral misrepresentations would be different for each potential Class member, and, therefore, class certification is not permissible.

Clearly, Bridgeport is forgetting that this court must accept the substantive allegations of Szabo's complaint as true. While Bridgeport is free to argue during the merits phase of the case that Szabo cannot base his claim on written materials he received, such an argument has no place in response to a motion to certify class. In any event, the law is clear that the presence of some oral misrepresentations does not preclude class treatment.

Bridgeport also presents the argument that where class members have differing degrees of reliance on promotional materials, class issues do not predominate. Szabo, however, strongly contends that the existence of reliance issues does not preclude class certification. Szabo points out that he has alleged that the representations and performance specification in the contracts for sale were uniformly given to all class members.

As Szabo points out there is an ample body of federal decisional law holding that reliance may be presumed where common representations are directed at class members. "When the fraud was perpetrated in a uniform manner against every member of the class, such as when all plaintiffs received virtually identical written materials from the defendants, courts typically hold that individual reliance questions do not predominate." *Rohlfing v. Manor Care, Inc.*, 172 F.R.D. 330, 338 (N.D. Ill. 1997). . . .

Szabo reiterates the fact that the four causes of action asserted here are based on the uniform written representations. The available brochures discuss the DX-32 Control Unit in similar terms and Bridgeport used standardized form quotations for the sale of its machines. . . . Szabo further maintains that it is "logical" to presume that because the Class members contracted for, paid for and received the machines, they relied on the uniform written representations made in connection with the sale. Szabo concludes that Bridgeport's use of uniform and standardized written documents obviates the need to demonstrate reliance on an individual basis and, therefore, reliance can be established on a class-wide basis and common issues predominate. . . .

[I]t is clear that (contrary to Bridgeport's arguments) the fact that Szabo seeks to represent class members who purchased different models of Bridgeport's machines that incorporated the DX-32 Control Unit does not render him atypical. Typicality is satisfied even where there are factual differences between the claims of the named plaintiff and the claims of class members. . . .

In conclusion, the court finds that Szabo has met Rule 23's requirements with respect to commonality, predominance, and typicality.

Adequate Representation

The adequacy of representation requirement of Rule 23(a)(4) consists of two parts: (1) the adequacy of the named plaintiff's counsel and (2) the adequacy of representation provided in protecting the different, separate and distinct interest of the class members. The requirement is met if it appears that the plaintiff's interests are not antagonistic to those of other members of the class he or she seeks to represent, that the representative has a sufficient interest in the outcome to ensure vigorous advocacy, and the plaintiff's attorneys are qualified, experienced and generally able to conduct the litigation.

Bridgeport does not take issue with the qualifications of Szabo's counsel to adequately represent the class. However, Bridgeport claims that Szabo's interests (doing 3D mold work) are incompatible with other Bridgeport machine owners who were not using their machines for the same type of work as the plaintiff. Clearly, however, as the underlying claim is that the allegedly defective DX-32 Control Unit caused the machines at issue to not meet their specifications, whether Szabo intended to perform the exact type of work with his machine as other potential plaintiffs is totally immaterial. . . .

For a court to deny class certification based on a conflict with the potential class members, there must be real and substantial conflict, not merely a speculative or conjectural one, and it must go to the subject matter of the controversy. It is abundantly clear that none of Bridgeport's arguments meet this standard. . . .

Therefore, as Szabo's counsel is qualified to adequately represent the class and Szabo's interests are not antagonistic to those of other class members, the court finds Rule 23's "adequate representation" requirement to have been met.

Superiority

Rule 23(b)(3) requires the consideration of the following factors in determining whether a class action is "superior to other available methods for the fair and efficient adjudication of the controversy": (1) the interest of the members of the class in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (3) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (4) the difficulties likely to be encountered in the management of a class action. As Szabo notes, it has been widely recognized that a class action is superior to other available methods for the fair and efficient adjudication of a suit that affects a large number of persons injured by violations of a common law. See *Paper Sys.*,

Inc. v. Mitsubishi, 193 F.R.D. 601, 616 (class action superior where repeatedly litigating the same issues in individual suits would consume more judicial resources than addressing them in a single blow in consolidated actions).

Szabo argues that Bridgeport has inflicted economic injury on a large number of geographically dispersed persons to such an extent that the cost of pursuing individual litigation to seek recovery against a well-financed adversary is not feasible and, thus, the alternatives to a class action are either no recourse for hundreds of small businesses, or a multiplicity of scattered suits resulting in the inefficient administration of litigation. Szabo further argues that, given the complex nature of the technology at issue and the need for extensive experts, the cost of pursuing individual claims by Class members could effectively preclude their ability to recover.

Bridgeport, however, argues that there is no need for class certification because the potential class members are business people who have spent over \$70,000 for a machine. Bridgeport hypothesizes that any such class member would likely be capable of protecting his own rights. . . .

Szabo asserts that this is a complex case, and that developing the evidence of defect and presenting it in a way that a jury can comprehend will require significant time and effort. Szabo also informs the court that the possibility of pursuing the case on an individual basis was initially considered by counsel and rejected because of the complex subject matter. Szabo further points out that to the extent that a member of the proposed class has a claim that it wishes to pursue individually, it will remain free to do so by opting out. Fed.R.Civ.P. 23(c)(2). Similarly, class members will be given the option of entering an appearance through counsel should they wish to do so. The court finds that Szabo has the better argument on this point and holds that the mere fact that the machines at issue cost approximately \$70,000 does not preclude class certification.

Bridgeport has also claimed that differing state laws militate against a finding of superiority. The court will discuss the issue of choice of law below.

Choice of Law

. . . The parties agree that Indiana's choice of law rules are to be used to determine what law applies to the proposed class' claims. The application of choice of law principles will vary slightly for the different claims raised in the amended complaint. The warranty claims are contractual, while the remaining claims (negligent misrepresentation and fraud) are based upon tort theories. . . . [Indiana's choice of law rules require] an assessment of which jurisdiction has the most significant relationship with the particular tort. . . . [T]he place where the harm occurred will frequently have the most significant relationship with the

dispute, but other factors are to be considered when the place where the harm occurred is an insignificant contact.

Szabo argues that the law of Connecticut is the most appropriate source of substantive law whereas, of course, Indiana law would still govern matters of procedure. With respect to the tort claim of negligent misrepresentation, there are significant differences between Indiana and Connecticut law. The Connecticut Supreme Court has “long recognized liability for negligent misrepresentation. . . .” *Citino v. Redevelopment Agency*, 51 Conn.App. 262, 721 A.2d 1197, 1206 (App. Ct. 1998). Indiana, however, does not recognize negligent misrepresentation, except in limited circumstances focused on the area of employment. . . .

While it is true that Szabo is an Indiana resident and the machine he purchased is located in Indiana, the court finds these to be insignificant contacts with respect to the current action. Szabo’s allegations against Bridgeport concentrate on Bridgeport’s action and representations made in Connecticut. Therefore, Indiana’s contacts are of inconsequential significance. . . .

As Szabo has shown that Indiana does not have significant contacts with the cause of action, and Connecticut does have significant contacts, the law of Connecticut will be applied to Szabo’s negligent misrepresentation and fraud claims.

With respect to the warranty claims, this court agrees with Szabo that under Indiana choice of law principles for contract actions, Connecticut law should apply to both the express and implied warranty claims. Indiana’s choice of law rule for contract actions directs that the court should apply the substantive law of the state with “the most intimate contact to the facts.” *Travelers Indem. Co. v. Summit Corporation of America*, 715 N.E.2d 926, 931 (Ind. App. 1999). Clearly, Connecticut is the state with the “most intimate contacts” to the warranty claims.

Szabo claims that he was injured because the DX-32 Control Unit incorporated into his machining center is defective. The shipment of the defective machining center is the conduct that caused Bridgeport to breach its express and implied warranties. The brochures and sales contract containing the specifications that form the basis of the express warranty claim came from Connecticut. Bridgeport is based in Connecticut, which is where the machine was shipped from and where the decision to sell under the faulty specifications was made. Finally, the contract that Szabo signed was F.O.B. Bridgeport Connecticut, which means that title to the machine and risk of loss passed to him at that location, not in Indiana.

In sum, the court finds that Connecticut law applies to the claims in this cause of action. As the substantive law of a single state is applicable to all of the claims with respect to Szabo and all putative class members, Bridgeport’s argument that the case is unmanageable as a class action

fails. The court finds that Szabo has shown that all of Rule 23's requirements have been met. Accordingly, the court will grant Szabo's motion to certify a class. . . .

WAL-MART STORES, INC. v. DUKES

564 U.S. 338, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011)

JUSTICE SCALIA delivered the opinion of the Court.

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

I

A

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

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

Promotions work in a similar fashion. . . . [R]egional and district managers have discretion to use their own judgment when selecting candidates for management training. Promotion to higher office—e.g., assistant manager, co-manager, or store manager—is similarly at the discretion of the employee's superiors after prescribed objective factors are satisfied.

B

The named plaintiffs in this lawsuit, representing the 1.5 million members of the certified class, are three current or former Wal-Mart

employees who allege that the company discriminated against them on the basis of their sex by denying them equal pay or promotions, in violation of Title VII of the Civil Rights Act of 1964.¹

Betty Dukes began working at a Pittsburgh, California, Wal-Mart in 1994. She started as a cashier, but later sought and received a promotion to customer service manager. After a series of disciplinary violations, however, Dukes was demoted back to cashier and then to greeter. Dukes concedes she violated company policy, but contends that the disciplinary actions were in fact retaliation for invoking internal complaint procedures and that male employees have not been disciplined for similar infractions. Dukes also claims two male greeters in the Pittsburgh store are paid more than she is.

Christine Kwapnoski has worked at Sam's Club stores in Missouri and California for most of her adult life. She has held a number of positions, including a supervisory position. She claims that a male manager yelled at her frequently and screamed at female employees, but not at men. The manager in question "told her to 'doll up,' to wear some makeup, and to dress a little better."

The final named plaintiff, Edith Arana, worked at a Wal-Mart store in Duarte, California, from 1995 to 2001. In 2000, she approached the store manager on more than one occasion about management training, but was brushed off. Arana concluded she was being denied opportunity for advancement because of her sex. She initiated internal complaint procedures, whereupon she was told to apply directly to the district manager if she thought her store manager was being unfair. Arana, however, decided against that and never applied for management training again. In 2001, she was fired for failure to comply with Wal-Mart's timekeeping policy.

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

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

to litigate the Title VII claims of all female employees at Wal-Mart's stores in a nationwide class action.

C

. . . Respondents rely on Rule 23(b)(2), which applies when “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.”

Invoking these provisions, respondents moved the District Court to certify a plaintiff class consisting of “[a]ll women employed at any Wal-Mart domestic retail store at any time since December 26, 1998, who have been or may be subjected to Wal-Mart’s challenged pay and management track promotions policies and practices.” As evidence that there were indeed “questions of law or fact common to” all the women of Wal-Mart, as Rule 23(a)(2) requires, respondents relied chiefly on three forms of proof: statistical evidence about pay and promotion disparities between men and women at the company, anecdotal reports of discrimination from about 120 of Wal-Mart’s female employees, and the testimony of a sociologist, Dr. William Bielby, who conducted a “social framework analysis” of Wal-Mart’s “culture” and personnel practices, and concluded that the company was “vulnerable” to gender discrimination.

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

D

A divided en banc Court of Appeals substantially affirmed the District Court’s certification order. The majority concluded that respondents’ evidence of commonality was sufficient to “raise the common question whether Wal-Mart’s female employees nationwide were subjected to a single set of corporate policies (not merely a number of independent discriminatory acts) that may have worked to unlawfully discriminate against them in violation of Title VII.” It also agreed with the District Court that the named plaintiffs’ claims were sufficiently typical of the class as a whole to satisfy Rule 23(a)(3), and that they could serve as adequate class representatives. With respect to the Rule 23(b)(2) question, the Ninth Circuit held that respondents’ backpay claims could be certified as part of a (b)(2) class because they did not “predominat[e]” over the requests for

declaratory and injunctive relief, meaning they were not “superior in strength, influence, or authority” to the nonmonetary claims. . . .

II

. . .

A

The crux of this case is commonality—the rule requiring a plaintiff to show that “there are questions of law or fact common to the class.” Rule 23(a)(2).⁵ That language is easy to misread, since “[a]ny competently crafted class complaint literally raises common ‘questions.’” Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U.L.Rev. 97, 131–132 (2009). For example: Do all of us plaintiffs indeed work for Wal-Mart? Do our managers have discretion over pay? Is that an unlawful employment practice? What remedies should we get? Reciting these questions is not sufficient to obtain class certification. Commonality requires the plaintiff to demonstrate that the class members “have suffered the same injury,” *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982). This does not mean merely that they have all suffered a violation of the same provision of law. Title VII, for example, can be violated in many ways—by intentional discrimination, or by hiring and promotion criteria that result in disparate impact, and by the use of these practices on the part of many different superiors in a single company. Quite obviously, the mere claim by employees of the same company that they have suffered a Title VII injury, or even a disparate-impact Title VII injury, gives no cause to believe that all their claims can productively be litigated at once. Their claims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.

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

⁵ We have previously stated in this context that “[t]he commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff’s claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. Those requirements therefore also tend to merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about the competency of class counsel and conflicts of interest.” *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157–158, n. 13, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982). In light of our disposition of the commonality question, however, it is unnecessary to resolve whether respondents have satisfied the typicality and adequate-representation requirements of Rule 23(a).

potential to impede the generation of common answers.” Nagareda, *supra*, at 132.

Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc. . . . Frequently that “rigorous analysis” will entail some overlap with the merits of the plaintiff’s underlying claim. That cannot be helped. . . .

In this case, proof of commonality necessarily overlaps with respondents’ merits contention that Wal-Mart engages in a pattern or practice of discrimination. That is so because, in resolving an individual’s Title VII claim, the crux of the inquiry is “the reason for a particular employment decision,” *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 876, 104 S.Ct. 2794, 81 L.Ed.2d 718 (1984). Here respondents wish to sue about literally millions of employment decisions at once. Without some glue holding the alleged reasons for all those decisions together, it will be impossible to say that examination of all the class members’ claims for relief will produce a common answer to the crucial question why was I disfavored.

B

This Court’s opinion in *Falcon* describes how the commonality issue must be approached. There an employee who claimed that he was deliberately denied a promotion on account of race obtained certification of a class comprising all employees wrongfully denied promotions and all applicants wrongfully denied jobs. We rejected that composite class for lack of commonality and typicality, explaining:

Conceptually, there is a wide gap between (a) an individual’s claim that he has been denied a promotion [or higher pay] on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual’s claim and the class claim will share common questions of law or fact and that the individual’s claim will be typical of the class claims. *Id.*, at 157–158, 102 S.Ct. 2364.

Falcon suggested two ways in which that conceptual gap might be bridged. First, if the employer “used a biased testing procedure to evaluate both applicants for employment and incumbent employees, a class action on behalf of every applicant or employee who might have been prejudiced by the test clearly would satisfy the commonality and typicality requirements of Rule 23(a).” *Id.*, at 159, n. 15, 102 S.Ct. 2364. Second, “[s]ignificant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the

discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes.” *Ibid.* We think that statement precisely describes respondents’ burden in this case. The first manner of bridging the gap obviously has no application here; Wal-Mart has no testing procedure or other companywide evaluation method that can be charged with bias. The whole point of permitting discretionary decisionmaking is to avoid evaluating employees under a common standard.

The second manner of bridging the gap requires “significant proof” that Wal-Mart “operated under a general policy of discrimination.” That is entirely absent here. Wal-Mart’s announced policy forbids sex discrimination, and as the District Court recognized the company imposes penalties for denials of equal employment opportunity. The only evidence of a “general policy of discrimination” respondents produced was the testimony of Dr. William Bielby, their sociological expert. Relying on “social framework” analysis, Bielby testified that Wal-Mart has a “strong corporate culture,” that makes it “vulnerable” to “gender bias.” He could not, however, “determine with any specificity how regularly stereotypes play a meaningful role in employment decisions at Wal-Mart. At his deposition . . . Dr. Bielby conceded that he could not calculate whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking.” . . . Bielby’s testimony does nothing to advance respondents’ case. “[W]hether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking” is the essential question on which respondents’ theory of commonality depends. If Bielby admittedly has no answer to that question, we can safely disregard what he has to say. It is worlds away from “significant proof” that Wal-Mart “operated under a general policy of discrimination.”

C

The only corporate policy that the plaintiffs’ evidence convincingly establishes is Wal-Mart’s “policy” of allowing discretion by local supervisors over employment matters. On its face, of course, that is just the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy against having uniform employment practices. It is also a very common and presumptively reasonable way of doing business—one that we have said “should itself raise no inference of discriminatory conduct,” *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988).

To be sure, we have recognized that, “in appropriate cases,” giving discretion to lower-level supervisors can be the basis of Title VII liability under a disparate-impact theory—since “an employer’s undisciplined system of subjective decisionmaking [can have] precisely the same effects as a system pervaded by impermissible intentional discrimination.” *Id.*, at

990–991, 108 S.Ct. 2777. But the recognition that this type of Title VII claim “can” exist does not lead to the conclusion that every employee in a company using a system of discretion has such a claim in common. To the contrary, left to their own devices most managers in any corporation—and surely most managers in a corporation that forbids sex discrimination—would select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all. Others may choose to reward various attributes that produce disparate impact—such as scores on general aptitude tests or educational achievements. And still other managers may be guilty of intentional discrimination that produces a sex-based disparity. In such a company, demonstrating the invalidity of one manager’s use of discretion will do nothing to demonstrate the invalidity of another’s. A party seeking to certify a nationwide class will be unable to show that all the employees’ Title VII claims will in fact depend on the answers to common questions.

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

[Discussion of statistical evidence omitted.] Merely showing that Wal-Mart’s policy of discretion has produced an overall sex-based disparity does not suffice.

Respondents’ anecdotal evidence suffers from the same defects, and in addition is too weak to raise any inference that all the individual, discretionary personnel decisions are discriminatory. . . . [R]espondents filed some 120 affidavits reporting experiences of discrimination—about 1 for every 12,500 class members—relating to only some 235 out of Wal-Mart’s 3,400 stores. More than half of these reports are concentrated in only six States (Alabama, California, Florida, Missouri, Texas, and Wisconsin); half of all States have only one or two anecdotes; and 14 States have no anecdotes about Wal-Mart’s operations at all. Even if every single one of these accounts is true, that would not demonstrate that the entire company “operate[s] under a general policy of discrimination,” *Falcon, supra*, at 159, n. 15, 102 S.Ct. 2364, which is what respondents must show to certify a companywide class.

The dissent misunderstands the nature of the foregoing analysis. It criticizes our focus on the dissimilarities between the putative class members on the ground that we have “blend[ed]” Rule 23(a)(2)’s commonality requirement with Rule 23(b)(3)’s inquiry into whether common questions “predominate” over individual ones. That is not so. We

quite agree that for purposes of Rule 23(a)(2) “[e]ven a single [common] question” will do. We consider dissimilarities not in order to determine (as Rule 23(b)(3) requires) whether common questions predominate, but in order to determine (as Rule 23(a)(2) requires) whether there is “[e]ven a single [common] question.” And there is not here. Because respondents provide no convincing proof of a companywide discriminatory pay and promotion policy, we have concluded that they have not established the existence of any common question.

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

held a multitude of different jobs, at different levels of Wal-Mart’s hierarchy, for variable lengths of time, in 3,400 stores, sprinkled across 50 states, with a kaleidoscope of supervisors (male and female), subject to a variety of regional policies that all differed. . . . Some thrived while others did poorly. They have little in common but their sex and this lawsuit. 603 F.3d, at 652 (dissenting opinion).

III

We also conclude that respondents’ claims for backpay were improperly certified under Federal Rule of Civil Procedure 23(b)(2). Our opinion in *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121, 114 S.Ct. 1359, 128 L.Ed.2d 33 (1994) (per curiam) expressed serious doubt about whether claims for monetary relief may be certified under that provision. We now hold that they may not, at least where (as here) the monetary relief is not incidental to the injunctive or declaratory relief.

A

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

authorize class certification when each class member would be entitled to an individualized award of monetary damages. . . .

Permitting the combination of individualized and classwide relief in a (b)(2) class is also inconsistent with the structure of Rule 23(b). Classes certified under (b)(1) and (b)(2) share the most traditional justifications for class treatment—that individual adjudications would be impossible or unworkable, as in a (b)(1) class, or that the relief sought must perforce affect the entire class at once, as in a (b)(2) class. For that reason these are also mandatory classes: The Rule provides no opportunity for (b)(1) or (b)(2) class members to opt out, and does not even oblige the District Court to afford them notice of the action. Rule 23(b)(3), by contrast, is an “adventuresome innovation” of the 1966 amendments, framed for situations “in which ‘class-action treatment is not as clearly called for.’” . . .

Given that structure, we think it clear that individualized monetary claims belong in Rule 23(b)(3). The procedural protections attending the (b)(3) class—predominance, superiority, mandatory notice, and the right to opt out—are missing from (b)(2) not because the Rule considers them unnecessary, but because it considers them unnecessary to a (b)(2) class. . . .

B

Against that conclusion, respondents argue that their claims for backpay were appropriately certified as part of a class under Rule 23(b)(2) because those claims do not “predominate” over their requests for injunctive and declaratory relief. They rely upon the Advisory Committee’s statement that Rule 23(b)(2) “does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages.” 39 F.R.D., at 102 (emphasis added). The negative implication, they argue, is that it does extend to cases in which the appropriate final relief relates only partially and nonpredominantly to money damages. Of course it is the Rule itself, not the Advisory Committee’s description of it, that governs. And a mere negative inference does not in our view suffice to establish a disposition that has no basis in the Rule’s text, and that does obvious violence to the Rule’s structural features. The mere “predominance” of a proper (b)(2) injunctive claim does nothing to justify elimination of Rule 23(b)(3)’s procedural protections: It neither establishes the superiority of class adjudication over individual adjudication nor cures the notice and opt-out problems. We fail to see why the Rule should be read to nullify these protections whenever a plaintiff class, at its option, combines its monetary claims with a request—even a “predominating request”—for an injunction. . . .

The judgment of the Court of Appeals is Reversed.

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

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

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

I

. . . Wal-Mart’s supervisors do not make their discretionary decisions in a vacuum. The District Court reviewed means Wal-Mart used to maintain a “carefully constructed . . . corporate culture,” such as frequent meetings to reinforce the common way of thinking, regular transfers of managers between stores to ensure uniformity throughout the company, monitoring of stores “on a close and constant basis,” and “Wal-Mart TV,” “broadcas[t] . . . into all stores.”

The plaintiffs’ evidence, including class members’ tales of their own experiences, suggests that gender bias suffused Wal-Mart’s company culture. Among illustrations, senior management often refer to female associates as “little Janie Qs.” One manager told an employee that “[m]en are here to make a career and women aren’t.” A committee of female Wal-Mart executives concluded that “[s]tereotypes limit the opportunities offered to women.” . . .

The District Court’s identification of a common question, whether Wal-Mart’s pay and promotions policies gave rise to unlawful discrimination, was hardly infirm. The practice of delegating to supervisors large discretion to make personnel decisions, uncontrolled by formal standards, has long been known to have the potential to produce disparate effects. Managers, like all humankind, may be prey to biases of which they are unaware. The risk of discrimination is heightened when those managers are predominantly of one sex, and are steeped in a corporate culture that perpetuates gender stereotypes.

The plaintiffs' allegations resemble those in one of the prototypical cases in this area, *Leisner v. New York Tel. Co.*, 358 F.Supp. 359, 364–365 (S.D.N.Y.1973). In deciding on promotions, supervisors in that case were to start with objective measures; but ultimately, they were to “look at the individual as a total individual.” *Id.*, at 365 (internal quotation marks omitted). The final question they were to ask and answer: “Is this person going to be successful in our business?” *Ibid.* (internal quotation marks omitted). It is hardly surprising that for many managers, the ideal candidate was someone with characteristics similar to their own.

We have held that “discretionary employment practices” can give rise to Title VII claims, not only when such practices are motivated by discriminatory intent but also when they produce discriminatory results. . . .

II

A

The Court gives no credence to the key dispute common to the class: whether Wal-Mart's discretionary pay and promotion policies are discriminatory. “What matters,” the Court asserts, “is not the raising of common ‘questions,’” but whether there are “[d]issimilarities within the proposed class” that “have the potential to impede the generation of common answers.”

The Court blends Rule 23(a)(2)'s threshold criterion with the more demanding criteria of Rule 23(b)(3), and thereby elevates the (a)(2) inquiry so that it is no longer “easily satisfied.” Rule 23(b)(3) certification requires, in addition to the four 23(a) findings, determinations that “questions of law or fact common to class members predominate over any questions affecting only individual members” and that “a class action is superior to other available methods for . . . adjudicating the controversy.”

The Court's emphasis on differences between class members mimics the Rule 23(b)(3) inquiry into whether common questions “predominate” over individual issues. And by asking whether the individual differences “impede” common adjudication, the Court duplicates 23(b)(3)'s question whether “a class action is superior” to other modes of adjudication. Indeed, Professor Nagareda, whose “dissimilarities” inquiry the Court endorses, developed his position in the context of Rule 23(b)(3). If courts must conduct a “dissimilarities” analysis at the Rule 23(a)(2) stage, no mission remains for Rule 23(b)(3). . . .

B

. . . Wal-Mart's delegation of discretion over pay and promotions is a policy uniform throughout all stores. The very nature of discretion is that people will exercise it in various ways. A system of delegated discretion, *Watson* held, is a practice actionable under Title VII when it produces

discriminatory outcomes. A finding that Wal-Mart's pay and promotions practices in fact violate the law would be the first step in the usual order of proof for plaintiffs seeking individual remedies for company-wide discrimination. That each individual employee's unique circumstances will ultimately determine whether she is entitled to backpay or damages, § 2000e-5(g)(2)(A) (barring backpay if a plaintiff "was refused . . . advancement . . . for any reason other than discrimination"), should not factor into the Rule 23(a)(2) determination.

The Court errs in importing a "dissimilarities" notion suited to Rule 23(b)(3) into the Rule 23(a) commonality inquiry. I therefore cannot join Part II of the Court's opinion.

NOTES AND QUESTIONS

1. As *Szabo* demonstrates, Rule 23 requires a party to move to certify the case as a class action. Although that motion is usually made by the party or parties seeking to be class representative, it may also be made by the opposing side. Why might a defendant being sued by one plaintiff want to turn the case into a class action involving hundreds or thousands of claims?

2. *Timing and appeal.* A motion to certify the case is usually filed at a very early stage in the case. Rule 23(c)(1)(A) also requires the court to rule on that motion "at an early practicable time." In many cases, the court's ruling on certification effectively ends the case. If the court certifies the class, defendant has a great incentive to settle. If the court denies certification, plaintiff will often dismiss the case rather than go it alone.

Because of the importance of the certification decision, a losing party will often want to file an immediate appeal. Unlike most other orders issued while a case is still pending, a decision concerning class certification may qualify for immediate appeal under Rule 23(f). However, the court of appeals has discretion whether to hear the appeal.

3. Suppose defendant fails to respond to plaintiff's motion to certify the case. In other situations, a party who fails to respond waives any objections to the request made by motion. May a court certify a case "by default" where defendant fails to respond to the certification motion? See *Davis v. Hutchins*, 321 F.3d 641 (7th Cir. 2003).

Szabo and *Wal-Mart* are useful because they separate the complex requirements of Rule 23, and deal with each in turn. At the risk of overgeneralization, the certification process involves three basic steps. First, the court considers the factors set out in Rule 23(a). Second, it determines whether the case fits any of the three allowable categories of class actions described in Rule 23(b). Third, if both Rule 23(a) and (b) are satisfied, the court considers whether the class members receive notice and the right to "opt out." The following text discusses each of these in turn.

a. Rule 23(a): Requirements Applicable to All Class Actions

Rule 23(a) sets out four basic requirements that all class actions must satisfy to be certified. These four requirements are often referred to as numerosity, commonality, typicality, and adequate representation.

i. Numerosity

Numerosity was not really an issue in either *Szabo* or *Wal-Mart*. *Szabo* involved hundreds of potential claimants, making it impracticable to join all of them as individual plaintiffs. *Wal-Mart* involved well over a million. Imagine the chaos if each of these parties was represented by separate counsel in the same case. How could they coordinate discovery? Where would everyone sit in the courtroom once the case went to trial?

The Rule does not provide a specific number necessary to satisfy numerosity. Case law indicates that although the number varies somewhat based on the type of case, 40 seems to be a threshold. *Basco v. Wal-Mart Stores, Inc.*, 216 F.Supp.2d 592 (E.D. La. 2002). If there are 40 or more members, courts presume joinder would be impracticable. But in certain cases, a class of fewer than 40 may be proper. One decision held that a class size of 16 was sufficient. *Jackson v. Danberg*, 240 F.R.D. 145 (D. Del. 2007) (class comprised prisoners on death row; class could change due to executions and additional sentences).

As *Szabo* indicates, the party seeking class certification does not have to be able to identify the potential class members by name. It need only have an approximate number. In many cases, additional discovery—often from the opposing party’s files—will be needed to ascertain who the class members are. In some cases, it will never be possible to identify the members. Nevertheless, a class action can proceed even if the identify of many members cannot be determined. Ironically, inability to determine who the members are makes certification more likely, because it makes ordinary joinder impossible.

ii. Commonality

Commonality asks whether the claims to be joined in the class share common issues of law or fact. Even a single common issue may suffice, provided the issue is significant. How can the majority in *Wal-Mart* conclude this requirement is not met? Is the dissent correct that the majority is conflating the commonality requirement of 23(a) with the predominance requirement of 23(b)(3)?

iii. Adequate Representation

Turning to the fourth requirement for a moment, the requirement of *adequate representation* acknowledges the concerns raised in *Hansberry*. Although Rule 23(a) requires the court to make a threshold determination

of adequate representation, that issue can be revisited at any point in the case. Therefore, if a conflict arises between the representative and one or more class members, the court can remove people from the class or even de-certify the class.

Other provisions in Rule 23 are likewise designed to ensure adequate representation. Rule 23(d)(1)(B)(iii) allows a judge to issue orders that, for example, give class members the opportunity “to signify whether they consider the representation fair and adequate.” Similarly, Rule 23(e), governing settlement, contains extensive protections for the class members.

iv. Typicality

The typicality requirement, although listed separately, is designed to deal with the same sorts of concerns as adequate representation. If a representative’s claim is significantly different than those of the class, there is a greater chance the interests of the representative may diverge from the interests of those being represented. However, given that Rule 23(a) already requires adequate representation, it is not entirely clear what additional function typicality serves. In fact, the requirement may operate to prevent someone from serving as representative even though she might be a completely adequate representative.

b. Rule 23(b): Acceptable Types of Class Actions

Rule 23(b) describes three types of class actions. Unless the case at bar fits into one of these three classes, it cannot be certified as a class action. Rule 23(a) and 23(b) must both be satisfied for certification to occur.

i. 23(b)(1): Numerous Necessary Parties

You may find the language of Rule 23(b)(1) vaguely familiar. If so, congratulate yourself. The language of Rule 23(b)(1) closely tracks the language of Rules 19 (necessary parties) and 24(a) (intervention of right). In essence, Rule 23(b)(1) provides that a class action is appropriate when the dispute involves a large number of people who should be in the case because their interests will likely be affected, or because their claims expose one of the existing parties to a risk of inconsistent judgments.

Suppose a defendant faces lawsuits by thousands of different plaintiffs who were all injured by defendant’s allegedly defective product. If the suits are prosecuted individually, defendant may win some and lose some. Such a defendant does not face a risk of “incompatible standards of conduct” within the meaning of Rule 23(b)(1)(A). Do you see why not? *See Zinser v. Accufix Research Institute, Inc.*, 253 F.3d 1180, 1193–94 (9th Cir. 2001).

Rule 23(b)(1)(B) class actions can raise serious problems of adequacy and typicality under Rule 23(a), as the parties are raising adverse claims.

Because certification may occur only if both Rule 23(a) and (b) are satisfied, do not assume that a class comprising hundreds of necessary parties with competing claims will automatically be certified.

ii. 23(b)(2): Injunctive or Declaratory Relief

The Rule 23(b)(2) category is in some ways the most intuitively obvious type of class action. Suppose a part-time law student sues his law school to prevent the school from carrying out its decision to quit offering courses during the weekend. If the student wins, all other students who want to continue taking weekend courses will automatically benefit. Rule 23(b)(2), then, merely allows the plaintiff to spread the costs of obtaining the injunction among all parties who will benefit. The party opposing the class (the law school in our example) also benefits from knowing that a single case can finally resolve this issue, as the judgment in *favor* of the law school in the class action would bind all members of the class.

Rule 23(b)(2) does not state that a class action must contain *only* claims for injunctions or declaratory relief to be certified under that Rule. Given this language, why does the majority in *Wal-Mart* conclude that the claims for backpay were improperly certified under Rule 23(b)(2)? Does the Court's reasoning extend to *all* individualized monetary awards?

iii. 23(b)(3): Common Issues Predominate

The Rule 23(b)(3) class action—the type at issue in both of the main cases—is the most complex and controversial form of class action. In this category, the claims are neither logically intertwined as they are under Rule 23(b)(1), nor practically intertwined as under Rule 23(b)(2). Instead, Rule 23(b)(3) class actions exist mainly because of the potential savings due to economies of scale. It can be much more efficient to allow a single court to decide a particular issue once and for all, rather than having separate courts decide that same issue time and time again in separate cases. In addition, allowing a single court to decide the issue prevents inconsistent judgments.

However, because the class action introduces a new set of complexities (both legal and practical), those savings can be realized only if there is a high degree of overlap between the claims. This concern is reflected in Rule 23(b)(3)'s requirement that the common issues of law or fact *predominate* over the individual issues. Predominance is measured not simply by counting the number of shared and individual issues, but instead by evaluating how much time the court will have to spend on each.

Apply the Rule 23(b)(3) predominance standard to a typical case. Several thousand people are injured by the air bags installed in a particular make of car. These injuries range from broken noses to death. One of the injured brings a claim, alleging the airbags were defectively designed to deploy prematurely. The manufacturer denies the product is

defective. Assuming Rule 23(a) is met, is the court likely to certify this case as a class action? What are the common issues of law and fact? The individual issues?

Szabo raises another issue that often arises in nationwide class actions: differences in the governing law. In that case, the court found that all claims would be governed by the same state's law. However, if different states' laws govern the various claims, a court is extremely unlikely to certify all the claims as part of a single 23(b)(3) class action. *In the Matter of Bridgestone/Firestone, Inc., Tires Products Liability Litigation*, 288 F.3d 1012, 1014 (7th Cir. 2002) ("No class action is proper unless all litigants are governed by the same legal rules.")

Of course, if the claims are governed by *federal* law, this problem does not arise. Similarly, the problem does not arise if the substantive rules of all governing state laws are the same. *See, e.g., In the Matter of Mexico Money Transfer Litigation*, 267 F.3d 743 (7th Cir. 2001) (certification of nationwide class granted because plaintiffs alleged only federal law claims and state claims where the law of all involved states was the same.)

Limited certification. Even if individual issues predominate when the case is viewed as a whole, a court may be able to make limited use of the class action by certifying a class only on the common issue. For example, in the airbag situation described above, the court could certify a class solely on the issue of whether the airbags were defectively designed. If the court determines there was no defect, the claims would be dismissed. If the court determines there was a defect, each of the individual plaintiffs could then file an individual claim for damages. The manufacturer in these later cases would be precluded by the doctrine of issue preclusion from arguing that the airbag was not defective. For two examples of partial certification, *see Mejdrech v. Met-Coil Systems Corp.*, 319 F.3d 910 (7th Cir. 2003) and *Rink v. Cheminova, Inc.*, 203 F.R.D. 648 (M.D. Fla. 2001).

Superiority. Predominance is not the only requirement for a proper Rule 23(b)(3) class action. The court must also find that a class action is superior to other methods of resolving the controversy. This "superiority" factor compares the class action to both individual lawsuits and joinder of the claims under Rule 20. A major consideration in determining whether a class action is superior is whether each claimant has a sufficient *incentive* to litigate her own rights. Other things equal, a court is more likely to certify a class made up a number of small claims than one in which the claimants all suffered serious injuries. If each claimant only suffered a few dollars in damages, it is quite likely that many would not bother with the time and expense of an individual lawsuit, or even with joining as a co-plaintiff in an existing case.

Apply that reasoning to *Szabo*. Plaintiff in *Szabo* was seeking damages in excess of \$70,000. Why does he want the case to be a class action? After all, the class action certification process is complicated and expensive. Does

Szabo gain any advantage by representing not only his own rights, but also the rights of other purchasers of the part?

At the opposite end of the spectrum are securities fraud cases. Victims in these cases often have fairly small claims. Moreover, because they can sue under federal law, the choice of law problem is not a factor. However, fraud class actions have problems of their own. The issue on which a fraud class action is most likely to fail is *reliance*. Even if the victims all saw the same information (for example, a written prospectus), the representative must demonstrate that everyone relied on the statement, and that such reliance was reasonable. *Szabo* also involves a claim requiring proof of reliance. How does the court deal with the issue?

c. Certification Order, Notice and Opt-Out

If the court decides to grant the motion to certify, Rule 23(c)(1) requires it to issue an order defining the composition of the class, and setting out the claims, issues, and defenses that will be considered in the class action. The court must also appoint an attorney for the class. Furthermore, depending on the type of class, the representative may be required to notify all members of the class and afford a right to “opt out.”

i. Certification Order

The certification order does not have to describe the class members by name. In many cases, it is impossible to determine who is in a class, either because of lack of records or because the particular trait that applies to the members has not yet manifested itself. In these situations, a court could define the class as “Every person who purchased a sound recording under the XYZ label between 2001 and 2008,” or “Every person who took the medication commonly called ‘Placebo,’ and who subsequently developed, or will develop, restless leg syndrome.” Note that in the latter example, it may be many years before the class can be identified with certainty. In fact, a person’s rights may be adjudicated by a class action even though she does not realize she is in the class. The court in such a case will typically order the creation of a fund against which future claimants can file claims.

The class attorney is typically someone with experience with class actions, ideally someone who also has experience with the type of claim involved in this case.

ii. Notice and Opt-Out

Rule 23(c)(2) covers notice and opt-out. Read that rule carefully, noting how it distinguishes between the three types of class actions listed in Rule 23(b).

Although Rule 23(c)(2)(A) makes notice merely optional in Rule 23(b)(1) and (b)(2) class actions, many courts require notice in these cases.

Part of the motivation for requiring notice is a concern that notice may be constitutionally required. See *Richards v. Jefferson County*, 517 U.S. 793, 116 S.Ct. 1761, 135 L.Ed.2d 76 (1996); *Phillips Petroleum v. Shutts*, 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985).

Rule 23(c)(2) requires individual notice to all class members whose name and location can be identified. This requirement cannot be waived through the use of other means such as notice by publication. *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974). As you might imagine, the cost of providing this individual notice can be quite high in a large class action. Although the costs of notice can be deducted from the recovery if the class should ultimately prevail, the Supreme Court has held that the class representative must initially bear the costs of notice. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 98 S.Ct. 2380, 57 L.Ed.2d 253 (1978).

The rules allowing a member to opt out are a direct response to the representation concerns raised in *Hansberry*. A party himself is the ultimate judge of whether his rights will be adequately represented. If the party feels, for whatever reason, that he would rather try his own luck, he may withdraw his claim from the class action.

As the majority opinion in *Wal-Mart* points out, opt-out is not required in Rule 23(b)(1) and (b)(2) class actions. Does that make sense? Aren't the concerns for adequate representation and party autonomy at least as great in those cases? Think again about the nature of those two types of class actions, as discussed by the Court in *Wal-Mart*. In Rule 23(b)(1), the members would all be necessary parties under Rule 19. If they are necessary, does it make sense to allow them to opt out?

Under Rule 23(b)(2), by contrast, allowing opt-out would create a more practical problem. Consider a situation where *X* is a member of a class in a case seeking to enjoin pollution from a nearby factory. A rational person in *X*'s shoes would almost always choose to opt out. Can you see why? Consider what happens if *X* opts out and the class wins the case. Compare that to what happens if *X* opts out and the class loses.

What happens if the notice and opt-out form cannot be served on one or more members? Rule 23 allows the court to keep these members in the class. However, out of a concern for fairness many courts will exclude from the class any member who did not receive the notice.

3. OTHER ISSUES IN CLASS ACTIONS

a. Personal Jurisdiction

Rule 23(c)(3) provides that a judgment in a class action binds all members of the class who do not opt out, regardless of whether it is favorable. Recall that a court must have personal jurisdiction over someone

before it may issue an order that binds that person in any way. As in the *Szabo* case, however, many class actions include members scattered all across the nation, and possibly in other nations. How can a court in one state bind people who have no minimum contacts with that state? Is jurisdiction somehow based on “consent,” as with ordinary plaintiffs?

In *Phillips Petroleum v. Shutts*, 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985), the Supreme Court held that a state court could adjudicate the rights of all members of a plaintiff class action even though there were not minimum contacts between many of those members and the state. The Court indicated the protections of Rule 23 were enough to satisfy due process. However, the Court was careful to point out that its ruling only applied to *plaintiff* class actions certified under *Rule 23(b)(3)*. Should the analysis be different for defendant class actions, or for actions under Rule 23(b)(1) or (2)? What about the fact that notice is not required in Rule 23(b)(1) and (2) actions?

b. Federal Subject Matter Jurisdiction

As in interpleader, a special statute expands federal subject-matter jurisdiction in certain class action cases. In 2005, Congress amended the general diversity statute, 28 U.S.C. § 1332, to add a new subsection (d). This subsection applies to any plaintiff class action where the total amount in controversy exceeds \$5,000,000. Thus, unlike previous law, the statute allows plaintiffs to aggregate their claims to meet the amount in controversy requirement. Moreover, § 1332(d) requires only “minimal diversity,” that is, only one member of the plaintiff class needs to be diverse from any one defendant. However, if more than one-third of the class members are from the same state as the “primary defendants,” and the action is filed in the state where those parties reside, the court may decline to exercise jurisdiction based on factors listed in § 1332(d)(3). If more than two-thirds of the plaintiff class resides in the same state as any significant defendant, the action is filed in that state, and the claims arose in that state, the federal court *must* refuse to exercise jurisdiction. § 1332(d)(4).

In plaintiff class actions involving less than \$5,000,000, and in defendant class actions, a class representative who sues in federal court must demonstrate that the case meets the requirements of the federal question or diversity statutes. As long as every member of the class has a claim arising under federal law, subject matter jurisdiction presents no special issues in class action cases. Courts determine whether the claims arise under federal law in class actions in exactly the same way they analyze claims in ordinary cases. Many federal class actions involve claims arising under federal law, such as civil rights and securities fraud claims.

When some of the class members’ claims arise under *state* law, however, the plaintiff may need to make use of diversity and/or

supplemental jurisdiction. In these situations, additional unique rules apply to class actions.

i. Diversity

Under the complete diversity rule that applies under § 1332, diversity is proper only if no plaintiff is from the same state as any defendant. However, in class actions, the court considers *only the citizenship of the named representative(s)*. *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 41 S.Ct. 338, 65 L.Ed. 673 (1921). Therefore, diversity jurisdiction can still exist even if a number of the class members are from the same state as one or more of the defendants. Should this rule still apply when 90 percent of the class members are from the same state as the opposing party, but the attorney purposefully picked a representative who was diverse? Does such a representative present problems of typicality under Rule 23(a)(3)?

Conversely, when applying the amount in controversy requirement, courts historically considered the claims of *all* members. According to the Supreme Court's decision in *Zahn v. International Paper Co.*, 414 U.S. 291, 94 S.Ct. 505, 38 L.Ed.2d 511 (1973), every member's claim must satisfy the amount in controversy. Aggregation of the members' claims will rarely be an option. Note that this requirement does not necessarily force a particular class action into state court. As long as the class is defined to include only those members whose claims exceed the amount in controversy, the class action can proceed under diversity jurisdiction.

ii. Supplemental Jurisdiction

EXXON MOBIL CORP. V. ALLAPATTAH SERVICES, INC.

545 U.S. 546, 125 S.Ct. 2611, 162 L.Ed.2d 502 (2005)

[This case is set out in Chap. 4 pt. D.]

NOTES AND QUESTIONS

1. For all practical purposes, *Exxon Mobil* overturns the holding in *Zahn* in situations where the class members' claims all stem from a common nucleus of operative fact. In these cases, members of a plaintiff class may be able to sue in federal court based on diversity even though some of their claims do not meet the amount in controversy requirement.

2. Note, however, that supplemental jurisdiction is available only if at least one of the members of the plaintiff class has a claim exceeding \$75,000.

3. Would the rule of *Exxon Mobil* apply to a *defendant* class action? Why or why not?

4. What effect, if any, does *Exxon Mobil* have on the citizenship requirements for diversity jurisdiction? What if some members of the plaintiff

class are not diverse from the defendant? What if one of the named representatives is not diverse?

5. *Exxon Mobil* has no effect on the expanded federal jurisdiction granted by 28 U.S.C. § 1332(d). That statute, discussed above, applies in cases where the total amount in controversy exceeds \$5,000,000.

c. Resolving the Class Action

Many class actions are settled—often soon after the court’s decision whether to certify the case as a class action. If the court denies class certification, settlement presents no special concerns. If the court does certify the class, however, settlement becomes a trickier issue. As you have seen throughout this discussion, Rule 23 is designed to protect the interests of the class members. One of these protections is set out in Rule 23(e). Under this rule, the court must approve any settlement of the class action. (Courts in non-class action cases do not usually concern themselves with the terms of a settlement.) Rule 23 allows the court to scrutinize the settlement carefully to ensure it is not a “sweetheart deal” benefitting the representative at the expense of the members. Moreover, the parties must provide notice of the proposed settlement to the class members. The class members may then challenge the settlement if they feel it is not in their best interests. The Supreme Court has also held that a court may not approve a class action settlement if none of the named representatives has standing to bring the action. *Frank v. Gaos*, 139 S.Ct. 1041 (2019).

Plaintiffs sometimes delay seeking class action certification until *after* the general terms of a settlement have been reached. In these cases, the parties ask the court to certify a “settlement class action.” Class certification is as beneficial to the defendant in these cases as it is to the plaintiff, as it allows defendant to deal in one fell swoop with all claims arising out of a particular transaction or occurrence. Plaintiff also stands to benefit, as if the case is settled he need not conduct any more litigation. Nevertheless, these settlement class actions create a real possibility of abuse. In *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997), the Supreme Court set out significant limits on the use of settlement class actions. These limits seek to ensure that the interests of the class members—who played no role whatsoever in the negotiation of the settlement—are fully and fairly represented.

If a class action proceeds to trial, courts continue to be solicitous of the interests of the absent members. Class members do not have the right to hire their own counsel to litigate their individual claims. However, the class members may challenge the adequacy of the representation at any time during the course of the proceedings. Even in the middle of trial, the court may de-certify the class, or exclude a certain subset of the members, if representation is not adequate.

PROBLEMS

1. A union declares a labor strike against a certain employer. According to the union agreement, all union members agree, as a condition of membership, to co-operate in a strike. Nevertheless, X, a union member, declares she will cross the picket line. R, a union official, sues X for an injunction. R has the case certified as a class action, in which R represents all union members. X defends by claiming that the provision in the union agreement preventing her from working is illegal under federal law. R prevails, and the court renders judgment.

Later, Y declares he will cross the picket line. When R sues Y, Y also raises the defense that the term in the union agreement is illegal. R argues that Y is barred by the judgment in *R v. X* from arguing the agreement is illegal. Is Y barred?

2. Same facts as Problem 1, except that that the court gave all class members notice and the chance to opt out. Y received notice, but did not opt out. Is Y barred?

3. Same as Problem 1, except that R *lost* his case against X. When Y declares his intention, Z, another member of the union, sues Y. Y claims Z is barred from arguing that the agreement *is* enforceable. Is Z barred?

4. Same as Problem 3, except that the reason R lost the first case was because he refused to allow the attorney to call a crucial witness who would have testified in favor of enforceability.

5. In Problem 1, if the court were to certify the case as a class action, into which Rule 23(b) category(ies) would it fit?

6. Professor X teaches an upper-level law school class in which 15 students are enrolled. When Professor X unilaterally changes the date of the final, student R sues Professor X. Student R wants to have the case certified as a class action. Is the case likely to satisfy Rule 23(a)?

7. Same as Problem 6, except that the Rule 23(a) requirements of numerosity and adequacy are satisfied. Student R's reason for wanting to prevent a change in the date of the exam is that he is to be married on the date Professor X has selected. Is the case likely to satisfy Rule 23(a)?

8. Skinflint Corp. insists that all its employees eat together when they are on a business trip. While Skinflint pays for meals, company policy strictly forbids employees from leaving a tip. Skinflint has learned that many restaurants have adopted a policy of automatically adding a 15 to 20 percent gratuity for groups of six or more diners. Company auditors calculate that as a result of this policy, the company has been forced to pay gratuities to hundreds of restaurants all over the nation. Skinflint therefore sues WEHOP, one of the offending restaurants, for reimbursement of the amount it paid as a gratuity to WEHOP. Skinflint claims that under state law, an automatic fee added to a bill is not a "gratuity." Skinflint seeks to have WEHOP named as representative of a defendant class of all restaurants that have charged such a fee to Skinflint employees. Is the case likely to satisfy Rule 23(a)?

9. Same as Problem 8. Assuming the case satisfies Rule 23(a), into which Rule 23(b) category does it fit best? Would the class action satisfy the requirements of that subpart of Rule 23(b)?

10. Same as Problem 8. Skinflint brings its action in federal court. Skinflint is diverse from WEHOP. Moreover, because its employees love WEHOP's fried pickles, Skinflint seeks well over \$100,000 in damages from WEHOP. However, Skinflint is not diverse from some of the other restaurants. Moreover, in many cases the forced gratuity was \$500 or less. Will a federal court have subject-matter jurisdiction over the class action?

11. R sues D for damages. The court certifies R as the representative of a Rule 23(b)(1) class action. Must R pay for notice to be sent to all members of the class?

12. Same as Problem 11. X, a member of the class, asks the court to be excluded from the class. The court refuses to exclude X, reasoning that he is not entitled to "opt out" in this sort of case. Is the court correct?

13. Same as Problem 11, except that the court certifies R as the representative of a Rule 23(b)(3) class. R sends notice to all of the class members. R and D eventually settle the case. The court approves the settlement. Later, X, a member of the class who received notice of class certification and did not opt out, sues D for the same claim as that litigated in the class action. D argues the settlement agreement bars X from suing. X disagrees, arguing that he should have received a second, separate notice of the proposed settlement. Assuming no second notice was sent, who will win?