CIVIL PROCEDURE

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CIVIL PROCEDURE

Tenth Edition

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For Ruth, Owen, and Emmet—SCY
and
For Teddy, Kate, and Julian—JCS

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Preface

Process lies at the core of our legal system: It expresses many of our culture's basic ideas about the meaning of fairness; it determines the victor in close cases; and it further determines which cases will be close ones. Procedure is also the area of law least understood and most maligned by lay observers. We root for underdogs and insist that rules not be stacked against them. But we are equally quick to condemn a case for having been decided on a "legal technicality," a phrase commonly signifying that a procedural rule has come into operation.

A similar ambivalence pervades debate about the behavior of courts and lawyers. As a society we demonstrate a strong belief in the efficacy of lawsuits to solve social, business, and personal problems, and we extol the rule of law as a distinguishing virtue of our culture. But at the same time we worry about what many believe is an excessive willingness to seek legal solutions. The ensuing debate ranges from the role of courts in restructuring social institutions to the question of whether lawyers exacerbate disputes and waste social resources by reflexively behaving in competitive, adversarial ways.

All these issues are procedural. Lawyers thus need to understand process as a tool of their trade, as a constitutive element of the legal system, and as a focus of debate about social values. Yet civil procedure is, by most accounts, a difficult and frustrating first-year course. Students come to law school with little experience in thinking explicitly about procedure and with an impression that cases simply arrive at the point of decision. Moreover, students sense that procedure may be the area in which lawyers' skill counts most; the notion that meritorious cases can be lost because of bad lawyering outrages their sense of justice even as it creates anxiety.

This book seeks to show procedure as an essential mechanism for presenting substantive questions and as a system that itself often raises fundamental issues regarding social values. We hope that students will begin to appreciate that lawyers move the system and that, to a large extent, clients' fates depend on the wisdom, skill, and judgment of their lawyers. Moreover, although all would agree that cases should not be decided on the basis of "mere" technicalities, fierce debate quickly arises when one tries to distinguish rules that merely direct traffic from those that guard the boundaries of fairness.

In addition to considering such theoretical issues, the book has some practical goals. It seeks to give students a working knowledge of the procedural system and its sometimes arcane terminology. The course also introduces the techniques of statutory analysis. It should give students a better understanding of the procedural context of the decisions they read in other courses. To these ends we have tried to select cases that are factually interesting and do not involve substantive matters beyond the experience of first-year students. The problems following the cases are intended to be answerable by first-year students and to present real-life issues. Finally, the book incorporates a number of dissenting opinions to dispel the notion that most procedural disputes present clear-cut issues.

The organization of the book adapts it to the most common sequences in contemporary procedure courses. After a brief overview of the procedural system in Chapter 1, some courses will initially consider the materials in Part I, which covers jurisdiction and choice of law. Other courses will begin with discussion of remedies, pleading, discovery, resolution without trial, identifying the trier, trial, appeal, and former adjudication, which are addressed in Part II. Part III, on joinder and complex litigation, recapitulates much of the material in Parts I and II and can be used either as a culmination of the course or as an insertion that follows pleading.

Cases have been severely edited to eliminate citations (without indicating their omission), and they read somewhat differently from real case reports; we hope they err in the direction of smoothness. Citations are retained only when they seem significant. Footnotes have been eliminated without indication. Those that survive retain their original numbers, while the editor's footnotes employ symbols. We have used several special citation forms: F. James, G. Hazard, and J. Leubsdorf, Civil Procedure (5th ed. 2001), is cited as James, Hazard, and Leubsdorf; C. Wright, Federal Courts (5th ed. 1994), is cited as Wright, Federal Courts; J. Moore, Federal Practice and Procedure (1969), is cited as Moore; C. Wright, A. Miller, and E. Cooper, Federal Practice and Procedure (1969), is cited as Wright and Miller.

Those whose assistance was acknowledged in the prefaces of earlier editions created the foundations on which this book rests. We additionally wish to thank two UCLA colleagues, Joel Feuer and Clyde Spillenger—and a former colleague, Maureen Carroll—who have gone above and beyond to help improve the tenth edition.

Finally, both of us want to thank many teachers and students who have used previous editions for detailed, thoughtful, and constructive suggestions. As with past editions, this one has been greatly improved by the library staff at UCLA's Hugh & Hazel Darling Law Library, whose ingenuity is exceeded only by their helpfulness.

We hope you like the result.

Joanna C. Schwartz
Stephen C. Yeazell

November 2018

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CIVIL PROCEDURE

CHAPTER 1

An Overview of Procedure

A. THE IDEA AND THE PRACTICE OF PROCEDURE

1. Locating Procedure

Civil procedure is a course about truth and justice—about how we define those words, how we seek the goals they express, and how we sometimes lose sight of them. It is also, inevitably, a course about greed, venality, and oppression, and the running battle waged against these fundamental human characteristics.

Mixed with these lofty themes are the minutiae of lawyers' work. Civil procedure is about lawyers—about their relation to their clients, to their profession, and to the courts. Most of the first year of law school concerns what lawyers call substantive law, the rules governing behavior in ordinary life: property, criminal law, torts, and contract. Everyone needs to know at least a little about these topics simply to function in the everyday world. But procedure is insiders' law, of special importance to those administering the legal system.

Those insiders turn to procedure to describe the rules of the elaborate game called litigation. At one level, procedure is the etiquette of ritualized battle, defining the initiation, development, and conclusion of a lawsuit. What does one have to say to get a court to pay attention? Suppose my adversary wants to invoke a court's help—can I instead take the dispute to a different forum? From whom may a person with a grievance seek relief? What kind of relief? If I believe my adversary has information that would help me to prove my case, may I demand it of her? All these questions—involving what lawyers would call pleading, forum selection,

joinder, remedies, and discovery—are dealt with in civil procedure. The answers to such questions are important to any lawyer who needs to help a client in a lawsuit. Although one might think that the underlying merits of the case are all that matters at the end of the day, procedural rulings—about where a case can be filed, whether a case can proceed to discovery, and whether a party is entitled to the discovery he seeks—can determine who wins and who loses.

But if procedure were only a set of rules about the etiquette of lawsuits, it would be hard to justify its place in the first-year curriculum. Another facet of procedure justifies that place: Procedure mirrors our most basic notions of fairness and the meaning of justice. If coming to a quick decision were all that mattered, we could flip coins to decide lawsuits. We don't flip coins because solving an important dispute without reference to its merits strikes us as unjust. This bedrock principle of fairness and justice finds expression both in the details of procedural design and in several parts of the U.S. Constitution, most notably the Due Process Clauses of the Fifth and Fourteenth Amendments.

Commentators, litigants, and courts do not, however, agree about what procedural mechanisms best reflect these overarching values. Some argue that our system is overly obsessed with permitting the adversarial airing of grievances. Proposed solutions range from streamlining adjudication to nonadjudicative dispute resolution. The system's defenders argue both that the critics overstate the pathologies of modern civil litigation and that adjudication has proved to be a major force for social justice, economic growth, and political stability over the past two centuries. Such conflicting views lurk in the background at every turn of our path.

This chapter seeks to give you some feel for procedural issues as they arise in the life cycle of a civil lawsuit. It will raise more questions than it answers, but it will offer you a sense of the course of civil litigation and a taste of the kinds of problems lawyers describe as procedural. Seeing the whole picture all at once will make more meaningful our closer investigation of these issues in the weeks to come.

We start with a simple and plausible fact situation: Peters, a student at the University of Michigan, spent his winter vacation in Champaign, Illinois, where his parents have recently moved from Milwaukee, Wisconsin. While visiting his parents, Peters was seriously injured in an automobile accident with Dodge, a lifelong resident of Champaign and owner of a popular ice cream parlor in the town. The remainder of this chapter deals with issues that might flow from this everyday occurrence.

2. Clients, Lawyers, Procedure, and Strategy

Consider first whether and how this accident might enter the formal legal system. Most such episodes will never get near lawyers or courts. If Peters had adequate medical insurance and no lost wages, he might have little reason to sue Dodge. Or Dodge (or his insurer) might well offer Peters a satisfactory settlement before a suit is filed. Or Peters might want to sue but be unable to find a lawyer who would take his case.

These three alternatives describe the fate of most disputes that arise in our society, with the consequence that they will never enter the official judicial system. For the rest of this book—and for the rest of law school—you will be dealing with the exceptional instances, the disputes that do find their way into court.

What would need to happen? First, Peters would probably need to find a lawyer. (In the United States individuals can prosecute their cases themselves—*in pro. per.* or *pro se*, in the jargon of the law*—but most consider lawyers worthwhile for litigation, in part because lawyers know their way around the procedural system.) We'll deal later, in Chapter 5, with how people in Peters's situation might find a lawyer; this matters a good deal, and because it does, it deserves more attention than it can get in this introduction.

But—even in this introduction—it bears emphasizing that the lawyer-client relationship involves *two* decisions at the outset. First, Peters, the prospective client, must locate a lawyer. For clients like Peters, that can be a bewildering process. Most individuals deal with lawyers quite infrequently, and therefore lack knowledge about what qualities to look for. Rules of professional ethics allow lawyers to advertise, but only in a limited way, and we have yet to develop a robust and reliable way of rating lawyers. So it's likely that someone in Peters's position would have to rely on word-of-mouth recommendations: Did a friend or relative have a lawyer she would recommend?

Suppose Peters does get such a recommendation and approaches Ursula Sands, a lawyer who practices in Champaign, where the accident occurred and where Peters's family lives. Further suppose that Sands's practice includes the kind of case Peters contemplates (as opposed, say, to a practice limited to wills or business transactions). When he visits Sands's office, the second decision must be made: Does Sands want to represent Peters? Experienced lawyers will tell you that the most important decision they make in a lawsuit is whether to take on a particular client. That initial decision derives its importance from the fact that professional rules prevent lawyers from simply abandoning clients if they become unhappy with the progress of the case. So Sands wants to be sure about at least two things before she takes on Peters as a client. First, she wants to know whether she can rely on his truthfulness and candor. It's a dreadful thing for a lawyer to discover, halfway through a case, that her client has fabricated part of the story or has omitted critical facts. We will learn a bit more in Chapter 6 about an attorney's obligation to double check her client's claims. Second, for reasons you'll better understand after reading Chapter 5, Sands will likely want to know whether the stakes of the case will warrant the investment it requires. In the United States today, almost all cases like Peters's will be handled on the plaintiff's side by a contingent fee agreement, in which the client pays nothing if the case fails but pays a percentage of any recovery to his lawyer. So Sands will care about the likely recovery in relation to the amount she will need to invest—in terms of her time and other expenses. If Peters's only injury is a broken ankle, but the case will require multiple experts, it's likely not worth his—or Sands's—while to pursue it. So, to reiterate, Peters must decide if he wants to retain Sands as his lawyer, and Sands must similarly decide whether she wants to represent Peters in this matter.

If Peters decides to hire Sands (and Sands agrees to take Peters on as a client), Peters and Sands have to divide responsibilities. Common sense and codes of

* *In pro. per.* is an abbreviation for the Latin *in propria persona*, meaning "in his or her own person" (rather than by an agent or attorney). *Pro se* means "for him- or herself."

professional ethics agree that clients make major decisions about the goals of litigation. A lawyer can get disbarred if she files suit, settles a case, or refuses a settlement without consulting her client. By contrast, questions of tactics belong to the lawyer: what court to sue in, whether to request a jury trial, how to develop the facts of the case, what evidence to present in what order, and more. A lawyer should keep her client informed about these matters and would certainly explain her thinking if a client asked, but generally would not seek a client's permission or advice concerning them. Because tactics, including procedural tactics, lie in the hands of the lawyer, the lawyer needs, besides good judgment, a good grounding in the available procedural tools. How well Sands uses these tools may, in a close case, spell the difference between victory and defeat for Peters. As you encounter cases in this course you will have two questions to answer: What principle of law determined who prevailed in this situation?; and which lawyer picked this particular fight and why—what strategic or tactical advantage was she hoping to achieve?

Having divided responsibilities between lawyer and client, the system has to decide how to handle problems that arise from this division of responsibilities. For representation to work, the legal system has to treat the lawyer's choices as if they were Peters's choices. In legal and economic terms Sands is Peters's "agent," acting for him in the lawsuit. When Peters's lawyer does a fine job, everyone (except Dodge) is happy. But what if she doesn't? Suppose Sands files a suit seeking recovery for personal injuries but not for damage to Peters's car. The legal system will treat that choice as if Peters himself had made it. But what if Sands's behavior results not from Peters's choice but from Sands's carelessness—forgetting to ask Peters whether his car was damaged? In that situation, the procedural system faces a dilemma. If the system lets Sands fix her mistake by later adding the claim for property damage, it will thereby harm Dodge, who may have been relying on the original claim to be a complete statement of Peters's grievance (and thus failed to preserve evidence showing that Peters's car was not in fact damaged). But if the procedural system insists that Peters stand by the original version of the claim—without the claim for property damage—it will thereby harm Peters, by blocking him from recovering for damage to his car.

This problem has no good solution, but the system tries to solve it in three ways. The first is to make the party who made the mistake suffer: Peters can sue Sands for malpractice if her negligence has caused him to forgo part of his recovery. The second is to tell the party suffering the harm—Dodge—that the harm really isn't so bad, and that he should suffer the expense and inconvenience of allowing Peters to fix the mistake. Finally, the system can try to wriggle out of the problem by allowing Peters to amend his claim but granting Dodge extra time to prepare a defense. Each solution has a corresponding drawback. If the system insists that Peters is bound by his lawyer's slip—and that his only remedy is a malpractice action—it will force him to start a second lawsuit (against his lawyer), with all the attendant uncertainty, expense, and delay. (Moreover, his lawyer may not have the assets or insurance to cover his losses.) If the system allows Peters's lawyer to cure her slip by amending the complaint, it will undermine the efficiency that flows from treating lawyers' actions as those of their clients and will inflict the costs of Peters's lawyer's sloppiness on Dodge. And if it crafts a solution that hurts neither Peters nor Dodge but

extends the litigation, it may inflict costs on other litigants by making them wait longer to have their cases resolved.

Because procedural choices have consequences for parties and other litigants, you will repeatedly encounter courts trying to resolve this trilemma. As you do, consider whether the choices they make are reasonable.

WHAT'S NEW HERE?

If you've absorbed the preceding few pages, you have—even before encountering your first case or Rule or statute—learned something fundamental about the practice of law: that lawyers and clients stand in a relationship. Many layers of law and professional ethics define the lawyer-client relationship and most of them lie beyond the scope of this course. But each is assigned a role, and must have confidence that the other will do their part. The client, in choosing his lawyer, must keep in mind that the lawyer will be responsible for making tactical decisions about the litigation—including where to file the case, what evidence to seek, and how to present the claims—that could spell victory or defeat in the case. The lawyer, in accepting a case, must keep in mind that the client will have authority to accept or reject settlement offers, regardless of the attorney's view of whether the case should go to trial. So—for *both* lawyer and client—it's a very good idea to do some investigating and some thinking before entering the relationship.

B. WHERE CAN THE SUIT BE BROUGHT?

Once Peters has selected Ursula Sands as his lawyer, Sands will have to begin making procedural choices, each of which may have consequences for the outcome of the suit. One of the first such choices may not have occurred to you: where to file the case. The 50 states and the federal government all operate systems of courts, and Sands must find out whether she has a choice of courts. If she has a choice, she will have to decide which would be most advantageous.

Why should Sands care in which state Peters's case is heard? Convenience provides one possible answer: Recall that Peters is likely to return to Ann Arbor for classes, but Sands, his lawyer, operates out of Champaign. For Peters it would likely be more convenient to have the case heard in Ann Arbor, Michigan. For Sands, this may involve some headaches: If she is not licensed to practice in Michigan, she must refer the case to a lawyer who is. On the other hand, recall that Dodge is a long-established business owner in Champaign and Peters and his family are relative newcomers. A Champaign jury might be less sympathetic to Peters than to Dodge—in which case it may be worth Sands's time to find that Ann Arbor lawyer. Moreover, convenience for Peters is likely to mean inconvenience for Dodge (or his insurer), a possibility that may not make Sands unhappy. Will an Ann Arbor jury—with perhaps a University of Michigan student or

two on it—be more sympathetic to Peters? Do courts in one state or the other have large case backlogs that would delay Peters's claim? Or maybe Sands is trying to avoid a particular judge, whom she believes to be unsympathetic or ill-tempered.

With a sense in mind of where she might prefer to bring suit, Sands now needs to know what the possibilities are. The rules governing where a suit can be brought come under the headings of personal jurisdiction, subject matter jurisdiction, and venue.

1. Personal Jurisdiction

A court in the United States cannot exercise power over a defendant—here Dodge—if doing so would "deprive any person of life, liberty, or property, without due process of law." Out of this phrase in the U.S. Constitution* the United States Supreme Court has woven an elaborate doctrinal fabric that limits the power of courts over defendants. As you will see in Chapter 2, this doctrine defines the *personal jurisdiction* of courts. To condense a great deal of law into a few words, a court cannot exercise power over Dodge unless the state in which that court sits has some connection with him or with the accident that gave rise to Peters's claim. Because Dodge lives in Illinois and the accident occurred there, courts in Illinois would have the power to hear the case, but not a court in Texas or California—unless Dodge lived there when the suit was later filed or had some other significant connection with those states.

What about Michigan, where Peters goes to school? Probably not, unless Dodge consented. The doctrine of personal jurisdiction focuses on the defendant, who is being taken to court against his will. That does not mean that defendants can only be sued in their home states—but it does mean that a state cannot enter a judgment against a defendant like Dodge who has no connection with the state. So our case is almost certain to be brought in a court in Illinois.

2. Subject Matter Jurisdiction

Assuming for now that Peters will have to bring suit in Illinois, does he have any other choices among courts available to him? Specifically, does he have his choice between a state court and a federal court? As already noted, Sands will want to choose the court that offers her client the greatest advantages—and fewest disadvantages.

All states have at least one court of general jurisdiction that could hear Peters's state law tort claim. In Illinois that court is the circuit court, but in other states it may be called a district court, superior court, court of common pleas, or, in New York, the Supreme Court. Thus one alternative open to Peters is the Circuit Court of Illinois.

Sands may also be able to file Peters's case in federal court. If she can, some additional elements enter the calculation. All federal judges are appointed for life

* There are, in fact *two* Due Process Clauses, one found in the Fifth Amendment, which applies only to the federal government, the other in the Fourteenth Amendment, which applies to the states.

(Article III of the U.S. Constitution permits their removal only by impeachment). Most state judges are subject to some electoral approval. That difference can be important in a case in which judicial insulation from political pressure may play a role (hardly likely in the Peters-Dodge case). Second, most federal districts are larger than their state equivalents (usually counties), so jurors will be drawn from a broader pool—not just Ann Arbor or Champaign but several surrounding counties. Consider how this fact might have affected the strategy of the plaintiffs' lawyer in the next case, *Hawkins v. Masters Farms.*

Though at this point in your study the idea may seem strange, federal courts have limited jurisdiction. Article III, §2 of the federal Constitution set the outer bounds of that jurisdiction. Within those bounds it is up to Congress to decide the precise subject matter jurisdiction of the federal courts. Congress has enacted a number of statutes authorizing federal district courts (the trial courts of the federal system) to hear certain kinds of cases. The most important statutes at this point in our exploration are 28 U.S.C. §§1331 and 1332(a).* Read those two statutes and decide which might apply to *Peters v. Dodge*. Then read the following case. Does it tell Peters's lawyer whether she can file his claim in federal court?

Hawkins v. Masters Farms, Inc.

2003 WL 21555767 (D. Kan. 2003)

Van Bebber, S.J.

Plaintiffs, Mary Ann Hawkins, as Personal Representative to the Estate of James Patrick Creal, and Rachel Baldwin, as heir of Mr. Creal, bring this action . . . against Defendants, Masters Farms, Inc., Harhge Farms, Inc., and Jack E. Masters. Plaintiffs' claims arise from a December 8, 2000 traffic accident in which a tractor driven by Defendant Masters collided with Mr. Creal's automobile, resulting in the death of Mr. Creal. Plaintiffs filed this action in federal court alleging the existence of diversity jurisdiction under 28 U.S.C. §1332. Defendants dispute that there is complete diversity among the parties, and the matter is before the court on Defendants' motion to dismiss for lack of subject matter jurisdiction. For the reasons set forth below, Defendants' motion is granted.

I. Rule 12(b)(1) Motion to Dismiss Standard

Fed. R. Civ. P. 12(b)(1) motions for lack of subject matter jurisdiction generally take one of two forms: (1) a facial attack on the sufficiency of the complaint's allegations as to subject matter jurisdiction; or (2) a challenge to the actual facts upon which subject matter jurisdiction is based. . . . Here, Defendants mount a factual attack on

* This citation form means that the text of this statute is found in section 1332 of title 28 of the United States Code, a compilation of the statutes that make up part of federal law. The "titles" are divisions of the code according to topic; title 28 is also known as the Judicial Code, and governs matters of procedure in federal courts.

Plaintiffs' allegations of diversity subject matter jurisdiction. In addition to Plaintiffs' complaint itself, deposition testimony and other documents have been submitted for the court's review. As the party seeking to invoke federal jurisdiction, Plaintiffs bear the burden of proving that jurisdiction is proper. Because federal courts are courts of limited jurisdiction, the presumption is against federal jurisdiction.

II. Factual Background

On December 8, 2000, Mr. Creal was killed in an automobile accident on Mineral Point Road, just south of Troy, Kansas, when his 1988 Chevrolet van collided with a New Holland tractor driven by Defendant Masters [a citizen of Kansas]. At the time of his death, Mr. Creal was living in Troy with his wife, Elizabeth Creal, and her children. He was approximately forty-four years old when he died.

James and Elizabeth Creal first met in St. Joseph, Missouri in November 1999. Mr. Creal had lived in St. Joseph for most of his life, while Mrs. Creal resided in Troy for the majority of her life. When the couple first met, Mr. Creal was living at his mother's home in St. Joseph, where he had been residing since obtaining a divorce from his previous wife.

Beginning in January 2000, Mr. Creal began spending the night at the apartment Mrs. Creal shared with her children on South Park Street in Troy. Initially, Mr. Creal would return to his mother's house every evening after work, shower, gather some clothes, and proceed to the apartment to retire for the evening. Mrs. Creal paid the rent for the apartment on South Park Street, while Mr. Creal contributed by buying the groceries for himself, Mrs. Creal, and her two children. Mr. and Mrs. Creal split the cost of utilities for the apartment.

When Mrs. Creal and her children moved into an apartment on 1st Street in Troy in March 2000, Mr. Creal brought his clothes, some furniture, pictures, photo albums, and other memorabilia to the new apartment. Mr. and Mrs. Creal also purchased a bedroom set for the apartment. When they moved into the apartment, Mr. Creal stopped going to his mother's house in St. Joseph to shower and change after work, and instead came directly back to Troy to spend the night. Also at that time, Mr. and Mrs. Creal opened a joint checking account into which Mr. Creal began depositing his paychecks to help pay the household bills. Mr. and Mrs. Creal were married in July 2000.

In November 2000, Mr. and Mrs. Creal moved into a house on Streeter Creek Road in Troy. Mr. Creal died approximately two weeks later. His death certificate lists Kansas as his residence.

From the time Mr. and Mrs. Creal first met until Mr. Creal's death in December 2000, Mr. Creal retained certain connections with the State of Missouri. In November 1999, he applied for a Missouri title and license for his Chevrolet van using his mother's St. Joseph address. In December 1999, he applied for automobile insurance on the van using the same address. In March 2000, he listed the address when he took out a loan and applied for a new Missouri title on the van to name a new lien holder. In April 2000, he renewed his Missouri driver's license for three more years under the address. In May 2000, he filled out a form for life insurance listing the address. Mr. Creal also received mail and his paycheck stubs at his mother's house, where he

stopped by every week to visit. After his death, an estate was opened for Mr. Creal in Buchanan County, Missouri alleging that he resided at his mother's address at the time of his death.

Finally, although Mr. and Mrs. Creal left open the possibility of leaving Troy to move to a location closer to Kansas City, Missouri, such as Platte City or Faucett, Missouri, they never looked for houses elsewhere and never made any specific plans to leave. Mrs. Creal testified in deposition that she was, for the most part, satisfied living in Troy.

III. Discussion

. . . The parties do not dispute that all Defendants are citizens of the State of Kansas and that Plaintiff Baldwin is a citizen of the State of Missouri. Although Plaintiff Hawkins, as an individual, is also a citizen of the State of Missouri, her role in this case as Personal Representative of the Estate of Mr. Creal mandates that the court focus on the citizenship of Mr. Creal at the time of his death, not the citizenship of Plaintiff Hawkins herself. 28 U.S.C. §1332(c)(2) ("[T]he legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent . . ."). Whether Mr. Creal was a citizen of the State of Kansas or the State of Missouri at the time of his death is the central dispute currently before the court.

For purposes of determining whether diversity jurisdiction exists, a person is a "citizen" of the state in which he or she is "domiciled." "For adults, domicile is established by physical presence in a place in connection with a certain state of mind concerning one's intent to remain there." Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 48 (1989).

Here, the court concludes that at the time of his death, Mr. Creal had not only established a physical presence in the State of Kansas, but also displayed an intent to remain there. Although Mr. Creal lived the majority of his life in St. Joseph, Missouri, he had been living in Troy, Kansas with his wife of five months for nearly one year at the time he died. Among other things, he had moved his clothes, some furniture, pictures, photo albums, and other memorabilia into the home he shared with Mrs. Creal and her children; he contributed to household costs; and he purchased a new bedroom set with his wife. Although Mr. Creal retained some connections with the State of Missouri, the court does not find these connections sufficient to overcome the evidence that his actions from January 2000 until the time of his death demonstrated an intent to remain with his wife in the State of Kansas. In fact, the only evidence presented by Plaintiffs that directly calls Mr. Creal's intent into question is the deposition testimony of Mrs. Creal that the couple left open the possibility of leaving Troy to move to a location like Platte City or Faucett, Missouri, but that they never looked for houses there or made any specific plans to leave. At most, Mrs. Creal's testimony evidences a "floating intention" of Mr. Creal to return to his former domicile, which is insufficient to overcome the evidence that he was domiciled in the State of Kansas at the time of his death.

In conclusion, the court has considered all of the evidence and arguments presented by the parties and holds that Mr. Creal was a citizen of the State of Kansas at the time of his death. Because Plaintiffs have failed to carry their burden of showing

that complete diversity exists among the parties, the court grants Defendants' motion to dismiss for lack of subject matter jurisdiction.

IT IS, THEREFORE, BY THE COURT ORDERED that Defendants' motion to dismiss is granted.

The case is closed.

WHAT'S NEW HERE?

- *Hawkins* is a quintessential case about procedure. What does that mean? For starters, the case talks not at all about whether the driver of the tractor was careless—a question that will surely matter if the case goes to trial. Instead, it focuses on an apparently strange question: of what state Mr. Creal was a "citizen"? That matters because a federal statute, 28 U.S.C. §1332, confers subject matter jurisdiction on federal district courts in controversies between "citizens of different states." For over two centuries courts have interpreted that phrase in ways this short opinion elaborates.
- But—and this is what makes this a quintessential procedural case—after we know the answer to this question, we will still not have resolved the question of negligence (what lawyers would call the "substantive" issue in the case). Instead we will know *where* (in what court system) the rest of the case will proceed.

Notes and Problems

1. Focus on what the parties did that led to this decision.
   - **a.** The plaintiffs filed a "complaint" (stay tuned) stating a claim for damages for wrongful death.
   - **b.** The defendant then filed a "motion" (a request that the court do something).
     - **i.** In this case it was a motion authorized by Rule 12(b)(1) of the Federal Rules of Civil Procedure. Read that Rule.
     - **ii.** The motion asked the court to dismiss the case because the federal court lacked jurisdiction. The opinion doesn't tell us exactly what the motion papers said, but we can infer a good deal from the opinion. What do you suppose the defendants' lawyer said in the effort to get the case dismissed?
     - **iii.** Once the defendants made this motion, the plaintiffs' lawyer resisted it, by filing more papers arguing against dismissal. Again, what can you infer the plaintiffs said to try to persuade the court not to dismiss the case?

2. Why do the plaintiffs lose?
   a. Troy, Kansas, where the Creals lived during their short marriage, is about 16 miles from St. Joseph, Missouri, which lies on the eastern bank of the Missouri River. Mr. Creal still conducted most of his business affairs in Missouri—his mother's address was on his car registration and insurance, life insurance, and paycheck. Why wasn't this enough to make him a "citizen" of Missouri?
   b. What's the smallest factual change that would, you think, lead to a different outcome? If the Creals had signed a lease in St. Joseph, but had not yet moved there? If Mr. Creal had not moved his "memorabilia" into their Kansas apartment? If the Creals had not married?

3. What does it mean that plaintiffs have lost this motion?
   a. Can plaintiffs file the claim again in federal court?
   b. Can plaintiffs file the claim again in a state court?
   c. The answer to 3a is almost certainly no, for reasons that we will discuss in Chapter 11. Although, as a technical matter, the plaintiffs could file the case again in federal court, it would quickly be dismissed because the issue of federal court jurisdiction has already been conclusively answered.
   d. The answer to 3b is "probably." The court held there was no subject matter jurisdiction in federal court, but a Kansas state court of general jurisdiction would be able to hear the case. One might think that during the federal litigation the statute of limitations would expire, but Kansas, like many states, has a "savings" statute, which provides:

      > If any action be commenced within due time, and the plaintiff fail in such action otherwise than upon the merits, and the time limited for the same shall have expired, the plaintiff, or, if the plaintiff die, and the cause of action survive, his or her representatives may commence a new action within six (6) months after such failure.
>
> K.S.A. §60-518.

      The action in federal court apparently "was commenced within due time," that is, within the statute of limitations, and it failed for a reason "otherwise than upon the merits," namely a jurisdictional dismissal.

4. How did the court come to know all the facts about the Creals that the court relied upon in making its ruling?
   a. For the most part, issues that arise before trial are decided based on motions written by a lawyer. Often motions include presentations of evidence, usually affidavits (sworn statements) from witnesses. The affidavits may incorporate documentary evidence: bills, correspondence, photographs, and the like. If you were representing the plaintiffs, whom would you have contacted to obtain an affidavit?
   b. In this case, because there was a dispute over the facts relating to the question of jurisdiction, the court says that it considered deposition testimony as well. At a deposition, a witness is questioned under oath before a court

reporter by a lawyer for each party, usually at one attorney's office. The witness can also be requested to bring to the deposition documents in her possession, which then can be reviewed and possibly marked as exhibits. Lawyers can then use portions of the transcript and exhibits from the deposition to support motions they submit to the court. If you were representing the defendant, whom would you have liked to depose to obtain evidence to support your argument that the court lacked jurisdiction? What documents would you have asked the witnesses to bring to the deposition? What questions would you have asked?

c. As you read cases in this book and in your other law school courses, consider in each instance how the court came to know the facts that the court relies upon in its opinion. Much of lawyering consists of marshalling the facts and trying to persuade the court that your client's version of the facts is more credible than your opponent's version.

Procedure as Strategy

If it was clear that plaintiffs (the executor and heir of the estate) could have filed—and probably still can file—their claim in state court, why did the defendants' lawyer (most likely hired by their insurance carrier) spend time and money trying to get it dismissed from federal court? Conversely, if there was any doubt about the existence of federal diversity jurisdiction, why did plaintiffs (or, likely, their lawyer, who is probably working on a contingent fee basis) waste time and effort on a losing gamble when they could have been proceeding with state court litigation?

Your authors don't know for sure the answers to these questions. But reading the depositions taken in this case offers some clues that permit speculation. The plaintiffs requested a jury trial, as is common in automobile tort cases. Troy, Kansas is the seat of Doniphan County, located in northeast Kansas; a state court jury would have been drawn from the citizens of Doniphan County. If, however, the case were brought in federal court, the jury would be drawn from a much larger population pool, one that would include a number of city-dwellers.

Masters, a defendant, was a long-time resident of Troy, active in civic affairs, and known to many of its residents, including Elizabeth Creal. We know that Mr. Creal was a relative newcomer. The depositions reveal some more information about Mr. Creal: His marriage to Elizabeth Creal was his fourth marriage, and he appears not to have had close relationships with his adult children from his previous marriages. Nor was he connected with the religious or civic organizations in Troy. The fatal accident occurred when Creal was returning—alone—from a solitary day spent deer hunting.

Which jury pool would plaintiffs' lawyer want? Which jury pool would defendants' lawyer want? If this speculation is correct, notice something else: the decision's absolute silence about this factor. Judge Van Bebber, who grew up in Troy and may well have had a pretty good inkling about why this case was on the fed-

eral docket, applies the law to the facts and renders a decision. You will repeatedly encounter cases where your guess about trial strategy is not reflected in the court's application of the law.

5. On the basis of cases like *Hawkins*, Sands decides to bring Peters's case in a federal court. Dodge is indisputably a resident of Champaign, Illinois and thus a citizen of that state within the meaning of the statute. Where might Sands argue that Peters is domiciled to establish federal subject matter jurisdiction? Given what you know about students' lives, what sort of evidence would Sands want to gather to support her contention that diversity jurisdiction is appropriate here?

3. Service of Process

Once Sands has decided where to bring the suit, she must begin the action and notify the defendant that it has begun. The first thing to do is to draft a *complaint*. A copy of the complaint must be filed with the court. Rule 3.

Then the plaintiff's lawyer must formally notify the defendant of the suit. (It's quite likely that informal conversations with the defendant's insurance carrier will have suggested that a lawsuit is coming, but formal notice is necessary.) Rule 4 sets forth two basic means of notice, one inexpensive and informal, the other more expensive and formal. The inexpensive method, called waiver of service, involves mailing the defendant the complaint; if the defendant agrees to waive service the suit can proceed. The more expensive method, used if the defendant refuses to cooperate, requires the lawyer to draft a summons (an order to appear), and take it to the clerk of the court, who will sign and seal it. See Rule 4(a) and (b). The summons and complaint must then be "served"—that is, delivered to the defendant in one of the ways authorized by Rule 4—by private process servers or, in exceptional cases, a federal marshal. The expense comes because process servers require a fee for their work. See Rule 4(c). These topics are covered in more depth in Chapter 2.

C. STATING THE CASE

1. The Lawyer's Responsibility

The preceding paragraphs referred in passing to the lawyer's drafting of a complaint. Do not be misled by that casual reference: A complaint asks the legal system to use governmental power to grant plaintiff relief; it sets out the plaintiff's claims against the defendant; leads to the exchange of discovery; and, if the facts warrant it, the entry of judgment against the defendant. Those filing a complaint bear the responsibility not to invoke the formal legal system for claims that lack factual or legal basis, and not to bring claims for improper purposes. Lawyers bear special burdens in this respect. Read Rule 11(b) and consider it in connection with the next case.

Bridges v. Diesel Service, Inc.

1994 U.S. Dist. LEXIS 9429 (E.D. Pa. 1994)

Huyett, J.

I. Background

James Bridges ("Plaintiff") commenced this action against Diesel Service, Inc. ("Defendant") under the Americans with Disabilities Act ("ADA"), 42 U.S.C. §12101 et seq. [Bridges alleged that Diesel Service dismissed him from his job as a result of a disability and thus violated the ADA.] By Order dated June 29, 1994, the Court dismissed Plaintiff's Complaint without prejudice for failure to exhaust administrative remedies. In particular, Plaintiff did not file a charge with the Equal Employment Opportunity Commission ("EEOC") until after commencement of this action. Defendant now moves for sanctions pursuant to Fed. R. Civ. P. 11. . . .

II. Discussion

. . . [A]s explained in this Court's June 29 Order, the filing of a charge with the EEOC is . . . a condition precedent to maintenance of a discrimination suit under the ADA. The parties do not dispute that administrative remedies must be exhausted before commencement of an action under the ADA. . . .

Rule 11 "imposes an obligation on counsel and client analogous to the railroad crossing sign, 'Stop, Look and Listen.' It may be rephrased, 'Stop, Think, Investigate and Research' before filing papers either to initiate the suit or to conduct the litigation." Gaiardo v. Ethyl Corp., 835 F.2d 479, 482 (3d Cir. 1987). Rule 11 is violated only if, at the time of signing, the signing of the document filed was objectively unreasonable under the circumstances. "The Rule does not permit the use of the 'pure heart and an empty head' defense." *Gaiardo*. Rather, counsel's signature certifies the pleading is supported by a reasonable factual investigation and "a normally competent level of legal research." Lieb v. Topstone Industries, Inc., 788 F.2d 151, 157 (3d Cir. 1986).

The Court is not convinced that Plaintiff's counsel displayed a competent level of legal research. A brief review of case law would have revealed the EEOC filing requirement. Further, an award of sanctions for failure to exhaust administrative remedies is not unprecedented.

Notwithstanding, the Court will not grant sanctions. Rule 11 is not intended as a general fee-shifting device. The prime goal of Rule 11 sanctions is deterrence of improper conduct. In this case, monetary sanctions are not necessary to deter future misconduct. Plaintiff's counsel immediately acknowledged its error and attempted to rectify the situation by filing a charge with the EEOC and moving to place this action in civil suspense. In fact, the Complaint has been dismissed without prejudice. The Court expects that Plaintiff's counsel has learned its lesson and will demonstrate greater diligence in future.

Further, Rule 11 sanctions should be reserved for those exceptional circumstances where the claim asserted is patently unmeritorious or frivolous. The mistake in the present case was procedural rather than substantive. It is also possible that Plaintiff's

counsel was confused by the different interpretations of the Supreme Court's holding in [a case interpreting the EEOC filing requirement]. Finally, the Court is aware of the need to avoid "chilling" Title VII litigation.

III. Conclusion

For the above stated reasons, Defendant's motion pursuant to Fed. R. Civ. P. 11 is DENIED. However, this Opinion should not be read as condoning the conduct of Plaintiff's counsel. As stated above, the standard of pre-filing research was below that required of competent counsel. Plaintiff's case has been dismissed without prejudice. If the action is refiled, the Court fully expects to see a high standard of legal product from Plaintiff's counsel—in particular attorney London, who signed the Complaint.

WHAT'S NEW HERE?

- Most Rules tell lawyers how to run the procedural system: where to file the complaint, how to notify the defendant, and so on.
- Rule 11 does something different: It tells lawyers and parties to be careful, diligent, and honest. And it sets forth some consequences if they are not.

Notes and Problems

1. The court concludes that the plaintiff's counsel did not "display[] a competent level of legal research." What did they do wrong? What provision of Rule 11(b) was violated?

2. The court concludes that the plaintiff's counsel violated Rule 11 by signing and filing a complaint that was "objectively unreasonable under the circumstances." But the court nevertheless declines to impose a sanction. What aspect of Rule 11(c) gives the court this discretion?

Procedure as Strategy

The judge, the defendant, and the plaintiff agreed that the complaint was defective and that it would be easy to cure the defect by filing the right piece of paper with the Commission. If the defect is so minor and so easy to cure, why did the defendant

bother to file a motion for sanctions? One possibility is that the defendant hoped to collect fees for the relatively small amount of time necessary to bring the motion to dismiss. Possible, but not likely: Most judges would view such a sanctions motion as a waste of time—and think ill of the defendant's lawyer for imposing on the court.

Consider another possibility. Many employment discrimination lawyers would say that the EEOC filing requirement as a precondition of suit was quite elementary, and that a lawyer unfamiliar with it was likely not familiar with this area of the law. Supposing such an assessment to be correct, consider what signals the defendant's lawyer would be sending to the judge with this Rule 11 motion. Locate the signs in the opinion that the judge has heard those implicit signals.

Despite the plaintiff's attorneys' error, the court declines to impose sanctions. Why might that be? Note that, when Bridges's attorneys learned of the failure to exhaust, they agreed to dismiss the complaint without prejudice on the condition that defendant did not file a motion for sanctions.

The current Rule 11(c)(2)—not in effect at the time of the *Bridges* decision—requires that a party first serve his opponent with a motion for sanctions, then give her 21 days to fix the error. Only if the error remains uncorrected is the party allowed to provide the court with a copy of the motion. Were this rule followed in *Bridges*, the court would never have known of the plaintiff's attorneys' failure to exhaust—assuming that the plaintiff's lawyers withdrew the complaint within the 21 days.

Note: Reading the Rules—Process and Politics

In *Masters Farms* and in *Bridges* you have encountered references to various Federal Rules of Civil Procedure. What are these Rules? Where do they come from? How are they related to other sources of law that shape civil procedure: the Constitution, statutes, and cases?

Briefly put, the Rules are like statutes and the Constitution in that they state general principles rather than dealing with their application in specific instances, which is the task of courts. But the Rules differ from statutes in two important ways.

- Unlike statutes, they are not directly enacted by a legislature. Instead, Congress in 1935 empowered judges to write the Rules. A statute, 28 U.S.C. §2072 (called the Rules Enabling Act), empowers the U.S. Supreme Court to promulgate "rules of practice and procedure . . . for cases in the United States district courts."
- Also, unlike federal statutes, which can deal with any topic concerning which the Constitution allows Congress to legislate, the Rules may *only* deal with "practice and procedure." Emphasizing this point, 28 U.S.C. §2072(b) provides, "Such rules shall not abridge, enlarge, or modify any substantive right." To give a crude example, a Rule could not establish principles governing damages for breach of contract; that would be "substantive." A Rule could, however, tell the parties how they have to go about claiming whatever damages they have suffered; Rules 8(a)(3)

> and 26(a)(1)(A)(iii) do just that. As you will learn in your studies this year, defining the boundary between substance (which the Rules may not regulate) and procedure (which they may) can be difficult, but Congress has made it clear that it wants the Rules to confine themselves to the latter. You will also notice that, in theory, a Rule could violate the Rules Enabling Act if it crossed the line and regulated a "substantive right"—if, for example, a Rule tried to establish the principles of contractual damages. The Supreme Court has never found such a violation, though on several occasions parties have argued that some Rule crossed this line.

The original set of Federal Rules became effective in 1938. The Supreme Court Justices did not write the original Rules themselves nor do they now serve as the primary body considering amendments to the Rules. Instead, as provided in 28 U.S.C. §§2073-2077, a series of committees, appointed by the Chief Justice of the United States Supreme Court, do this work. A Committee on Civil Rules, consisting of judges, lawyers, and a professor or two, considers proposed amendments to the Rules. This group circulates proposed changes, holds public hearings, revises the changes in light of the hearings, and submits the results to the Standing Committee on Rules of Practice, Procedure, and Evidence, again with members from the bench and bar. The Standing Committee further considers and refines the proposed amendments, passing them in turn to the Judicial Conference of the United States. The Conference, consisting entirely of federal judges and presided over by the chief justice, is the senior administrative body of the federal courts. Its tasks include everything from judicial discipline to assigning visiting judges, approving requests for new courthouse buildings, and passing on proposed amendments to the Rules.

If the Conference approves a change, it passes the proposed Rule to the Supreme Court. With all these layers in place, it may not be surprising to learn, first, that amending a Rule takes a long time, and, second, that the Court has rarely rejected outright a Rules amendment, although on occasion individual justices have dissented from the promulgation of a proposed Rule.

Even after all these steps the proposed Rule still is not law. Under 28 U.S.C. §2074 the Court, if it too approves the proposed change, must "transmit [it] to Congress not later than May 1 of the year in which such a rule . . . is to become effective." Congress has until December 1 to act: If it disagrees with a proposed change it can pass a statute blocking or altering the proposed Rule. Congress has only on a very few occasions blocked or amended a Rule.

Since their promulgation in 1938 the Rules have undergone a number of revisions, some minor (adding a new holiday to the list of days that do not "count" for time limits) and some major (creating the modern class action, a change that some thought came close enough to being "substantive" that it violated the Rules Enabling Act).

After a number of decades during which the Rules and the process that produced them were seen as essentially technical, recent years have seen both individual Rules and the process surrounding them become the source of controversy. Briefly put, that controversy has taken two forms. Some have criticized specific Rules as favoring one group over another. For example, some say that the recent

changes in discovery rules came at the behest of repeat defendants (generally large public and private institutions) and will handicap those who more often find themselves as plaintiffs—those challenging the actions of such defendants. (We'll explore this branch of the controversy more thoroughly in Chapter 7, on discovery.) The other form of criticism focuses on the courts, which, some charge, have interpreted Rules in ways unintended by the drafters and which, again, favor institutional defendants over plaintiffs. As examples, critics cite the U.S. Supreme Court's recent reinterpretation (as the critics would have it) of Rule 8, governing pleading; and the same Court's interpretation of Rule 23, governing class actions. As you will see in later chapters, these decisions raised barriers for plaintiffs that, critics say, betray the original principles behind the Rules and distort access to justice. In the pages that follow, we shall try to highlight such examples of controversy—we aim not to resolve these disputes, but to lay out their bases and sometimes point to data that would enable one to decide who has the stronger argument.

Finally, one should note that the Rules have had an influence far beyond the courts for which they were written. Federal courts hear only 2 percent of the civil cases in the United States. But the model represented by the Rules—merger of law and equity, relaxed pleading, flexible joinder of claims and parties, and broad discovery—has deeply influenced the procedure of state courts. Though it was not the case in 1938, *every* state now uses a procedural model that embraces most of these principles. At one time, 30-plus states went so far as to adopt the "federal" Rules as their own procedural code. This trend has declined; as of 2003, one scholar found "no true replicas" of the Federal Rules adopted by any state, but concluded that "the federal model of civil procedure remains substantially influential at the state level." John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 Nev. L.J. 354 (2003). So when you are studying the Rules, you are studying the most influential procedural reform of the last 200 years. Note also that the states' adoption of a Rules-model procedure makes state courts a forum for the political controversies just noted. To use just one example, when the U.S. Supreme Court interpreted Rule 8 (the pleading rule) in a way said to handicap plaintiffs, that interpretation bound all federal courts, but left state courts free to interpret their analogous rule in a different way. So when, in the coming pages, you read a federal court's interpretation of a federal Rule, you might ponder whether you think a state should follow the same path or diverge from it.

2. The Complaint

Bridges illustrates one facet of a lawyer's responsibility in drafting a complaint. But even if Peters's lawyer is entirely comfortable that the claim is well grounded in fact and in law, she must still confront the task of setting forth that claim in a formal document. What should be in a complaint? Should it contain a simple statement that Peters is suing Dodge for injuries suffered in an accident, or a detailed recitation of what each party did on the day of the accident, and a blow-by-blow account of plaintiff's injuries and recovery? As we will explore in Chapter 6, we are now in the midst of a revived debate over that question. The next case captures what was, until recently, the answer in federal courts and continues to be the rule in most state courts.

Bell v. Novick Transfer Co.

17 F.R.D. 279 (D. Md. 1955)

Thompsen, J.

In this tort action, originally filed in the Court of Common Pleas of Baltimore City, and removed to this court pursuant to 28 U.S.C. §§1441 and 1446, defendants have moved to "dismiss the Declaration" because (1) it "fails to state a claim against the defendants and each of them upon which relief can be granted"; (2) it "alleges only that an accident occurred due to the negligence of the defendants as a result of which the plaintiffs were injured"; and (3) it "fails to allege the specific acts of negligence by the defendants of which the plaintiffs complain."

The [complaint, known in Maryland as a] declaration[,] alleges that [1] "on or about August 14, 1954, while the Infant Plaintiff, Ronald Bell, was riding in an automobile headed in a northerly direction on Race Road at its intersection with Pulaski Highway, both said road and highway being public highways of Baltimore County, State of Maryland, the automobile in which the infant plaintiff was riding was run into and struck by an automobile tractor-trailer outfit owned by the Defendants, Novick Transfer Company, Inc., and Katie Marie Parsons, and operated at the time by their agent, servant or employee, the Defendant, Morris Jarrett Coburn, III, in a careless, reckless and negligent manner, in a westerly direction on Pulaski Highway at the intersection aforesaid, [2] so that" the infant plaintiff was injured. The declaration also alleges the injuries and damage, and that they were "the direct result of the negligence on the part of the defendants" without any negligence on the part of the plaintiffs contributing thereto.

Although this declaration may not be sufficient under Maryland practice, it meets the requirements of Rule 8, Fed. Rules Civ. Proc., which requires only "a short and plain statement of the claim showing that the pleader is entitled to relief."

Nor is defendant entitled in this case to "a more definite statement" by motion under Rule 12(e). Although some courts have held that such a motion is the correct procedure to follow if a party needs further information to prepare his defense, the better rule of law is that such information should be obtained by interrogatories under Rule 33, or other discovery procedure, unless it is really necessary to enable the party to frame his responsive pleading.

Defendant may obtain by interrogatories or other discovery procedure the facts upon which plaintiff based its allegations that the truck was being operated in a careless, reckless and negligent manner, and that such negligence was the direct cause of the injury to the infant plaintiff.

The motion is hereby overruled.

Notes and Problems

1. To understand what this fight is about, reread the second paragraph of the opinion, which quotes the significant parts of the complaint, which are

preceded by numbers in square brackets (e.g., [1]). Imagine yourself in the position of the defendant. What other information would the defendant want the complaint to contain?

a. Why might the plaintiff not include all the detail desired by the defendant?
b. Why doesn't the court require the plaintiff to include additional detail in the complaint?
c. If the plaintiff did not know this information, would filing the complaint violate Rule 11? (The case arose before the current version of Rule 11.) Presumably not, so long as there was a factual basis for the claims made in the complaint.

2. The court, in passing, notes that the complaint was not sufficiently detailed to pass muster under the then-prevailing Maryland state court pleading rules. That statement references a debate that has recently taken on new salience.

a. One school of thought says that a detailed complaint will enable courts to screen out weak claims early in the process. That desirable result will, however, come at the cost of eliminating a certain number of claims that *would be strong* if they gained access to the discovery mechanism that is one hallmark of modern procedure.
b. The other school of thought says that "notice pleading"—a regime like that endorsed in *Bell*, that gives the defendant only a general idea of the nature of the claim—will lead to more claims being resolved justly, on their factual merits. That desirable result will, however, come at the cost of allowing some weak claims to survive to a later stage of litigation—thus increasing the defendant's litigation expense.

3. The case accurately describes the approach long understood to be prescribed by the Federal Rules—allowing sketchy pleadings and leaving until a later stage the elimination of unsubstantiated claims. As you will see in Chapter 6, over the last several years the U.S. Supreme Court has revisited this debate, interpreting Rule 8 with more stringency than does the opinion in *Bell v. Novick Transfer*. Stay tuned.

Procedure as Strategy

We have thus far focused on procedural maneuvers in which the adversaries have sought to use procedural rules to gain tactical or procedural advantage. Consider the possibility that Novick Transfer's lawyer may have outsmarted himself. Unlike *Hawkins v. Masters Farms*, Bell's lawyer originally filed suit in a state court. The opinion tells us in passing that the very general complaint it quotes would at the time not have passed muster in Maryland state courts. But defendant, presumably seeking some tactical advantage, "removed" the case to federal court alleging that the parties were of diverse citizenship. (As you will see in Chapter 3, under some

circumstances it is possible for a defendant to reject plaintiff's original choice of a court.) Explain how this opinion suggests that the decision to remove was a tactical error.

On the basis of *Novick Transfer Co.*, Peters's attorney has drafted the following complaint:

United States District Court for the Central District of Illinois

Paul Peters,
Plaintiff

COMPLAINT FOR NEGLIGENCE
File No. _____

v.
Dan Dodge,
Defendant

Plaintiff, Paul Peters, for his complaint, alleges as follows:

1. Plaintiff, Paul Peters, is a citizen of the state of Michigan, and defendant, Dan Dodge, is a citizen of the state of Illinois. The matter in controversy exceeds $75,000, exclusive of interest and costs.

2. On January 1, 2019, Paul Peters was operating his car on Main Street in Champaign, Illinois.

3. At 4:00 P.M. on that date, a car owned and operated by defendant Dan Dodge negligently collided with plaintiff's car, causing damage to plaintiff's car and injury to plaintiff's person.

4. Plaintiff suffered a sprained neck, broken arm, and numerous bruises and lacerations, and incurred medical expenses in the amount of $25,000.

WHEREFORE, plaintiff demands judgment for $100,000, together with the costs of this action.

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3. The Response—Motions and Answer

Once defendant receives proper notice of the complaint, attention shifts to his response—the defense of the action. In the United States in the twenty-first century, most defendants in cases like *Peters v. Dodge* will be represented by a lawyer hired by their automobile insurer.

Liability policies typically contain two promises—that the insurer will pay damages (up to the amount of the policy limits) *and* that the insurer will provide a

legal defense. Dodge will have notified his insurer immediately after the accident (liability policies require prompt notification of accidents so the insurer's staff can gather information with which to defend against possible claims). When Dodge is served with the complaint, he may be upset that he's being sued, but he'll again contact his insurer, who will inform him that the insurer will provide a lawyer. The insurer will then contact a local lawyer, with whom the insurer likely has a standing arrangement, giving the lawyer any information already in the file. The lawyer will contact Dodge directly and proceed from there with Dodge as her client. The relationship between Dodge and his attorney will mirror that between Peters and his attorney, with one important exception. Almost all liability policies give the insurer—not the insured—authority to settle the case. So an insurer could decide that Peters's claim was strong and pay him the damages he demanded (or whatever smaller sum was agreed on), even if Dodge vehemently denied any liability. Conversely, even if Dodge wanted his insurer to enter into a quick settlement so he could focus all his attention on his ice cream shop, the insurer could decide to contest liability and litigate.*

Assume that Dodge and his insurer do not want to settle, at least at this stage. How does Dodge's lawyer proceed? Her first procedural task is to respond to the complaint. Although it would be possible to have a system in which a defendant was not required to do anything until trial, both the Federal Rules and state codes of procedure require some response by the defendant. Generally, that response takes one of two forms: a *motion* attacking the complaint in some way or a pleading responding to the allegations in the complaint (usually called an *answer*).

a. Pre-Answer Motions

Motions is lawyer-talk for requests that a court do something; lawyers speak of "moving" or of "making a motion" to have the court take some step—dismiss the case, require an adversary to disclose certain information, enter judgment on a verdict, and so on. At the early stages of litigation, there are several motions that a defendant may make to end the case or to alter its shape, set out in Rule 12(b).

There may be reasons, having nothing to do with the merits of the claim, why a case should be dismissed. These reasons typically relate to the court in which the action is brought or the method by which the defendant was brought into that court. For example, the defendant may contend that the case should be dismissed because it does not belong in federal court (subject matter jurisdiction); such a motion prompted the decision in *Hawkins v. Masters Farms*, the first case in this chapter. See Rule 12(b)(1).

* As you may learn in another course, there may be penalties if an insurer *unreasonably* refuses to settle a case, but we ignore these refinements for now.

The defendant may also say that, even if everything in the complaint is true, under the substantive law plaintiff has no right to relief. An obvious if unrealistic example is a complaint that alleges that the defendant made a face at the plaintiff or that the defendant drove a car of an offensive color. At common law, the defendant would *demur* to such claims; now we say that the defendant moves to dismiss on the ground that the complaint fails to state a claim upon which relief can be granted. See Rule 12(b)(6). The opinion you read in *Bell v. Novick Transfer* was written in response to the defendant's Rule 12(b)(6) motion.

Notice an important characteristic of these pre-answer motions: *They take no position on the truth or falsity of plaintiff's factual allegations* (for example, that Dodge was driving negligently). That, as you will see in a moment, is the job of the answer.

Notes and Problems

1. If Dodge wants to make a pre-answer motion to dismiss for lack of subject matter jurisdiction, he will prepare and file a series of papers with the court and serve them on Peters:
   - **a.** A notice of the motion—which simply tells the other side that the defendant plans to make a motion, what that motion is (here, a motion to dismiss for want of subject matter jurisdiction), and the time and place at which the motion will be heard by the judge;
   - **b.** A memorandum of points and authorities (a short brief discussing his case and the reasons the court should grant his motion);
   - **c.** Any evidence pertinent to the motion—perhaps an affidavit (a sworn declaration) and copies of documents concerning Dodge's and Peters's residence and local affiliations.

2. What next? It has become common for motions to be decided without any oral hearing—"on the papers." In that event the judge will simply issue a ruling. If there is a hearing, the judge will typically have read the motion papers beforehand. The judge will either hear oral argument from the lawyers or ask them questions about any aspects of the case not clear from the papers. She may decide the motion on the spot or she may reserve her ruling, making it after additional thought or research. Sometimes a judge will issue a tentative ruling based on the papers, which is given to the lawyers when they arrive for the hearing. The judge then allows the losing party to argue against the tentative ruling.

If the defendant does not make a pre-answer motion or if the court denies a pre-answer motion, the defendant must then answer. See Rules 7(a), 12(a).

b. The Answer

In contrast to a pre-answer motion, an *answer*, as the name suggests, does respond to the allegations of the complaint, paragraph by paragraph. There are only two essential variations on the answer:

1. In the most common response to a complaint, the defendant denies the truth of one or more of the allegations of the complaint, or, if after reasonable investigation the defendant does not know whether an allegation is true, he may deny the allegation. See Rule 8(b). (At common law, this move was called a *traverse**; today it's a *denial*.) The defendant will also likely admit some of the facts in the complaint, for example, the day the accident occurred, or the citizenship of the parties.

2. The defendant may want to assert defenses that will wholly or partially defeat plaintiff's claim. For example, the defendant may contend that the applicable statute of limitations has run or that the plaintiff has released her claim. At common law, such matters were called *confession and avoidance*; today we call them *affirmative defenses*. See Rule 8(c).

3. The defendant may also wish to assert a claim against the plaintiff that would entitle him to relief. These are called *counterclaims*. See Rule 13.

Turning to Peters's case, let us suppose that Dodge's attorney decides there is no question relating to personal jurisdiction and that there are no problems with notice or service of process. On the other hand, Dodge may very well believe that the federal court does not have subject matter jurisdiction over the claim because the parties are not diverse (as in *Hawkins*). Dodge probably will want to deny certain allegations of the complaint, such as the allegation that he was negligent. He also may want to allege various affirmative defenses to Peters's claims. For example, in such a case it is quite common for a defendant to claim that the plaintiff's contributory negligence was, at least in part, the cause of the accident. Such contributory negligence will act as a complete or partial defense to recovery. And, if Dodge was injured or his vehicle damaged in the accident, he will want to assert a counterclaim, alleging Peters's negligence caused injuries to Dodge, which could enable Dodge to get compensation for his injuries and property damage. Indeed, as you will discover in Chapter 12, if Dodge has a counterclaim arising from the accident, he *must* assert it in his answer, or lose it.

After considering the possible responses and possible counterclaims, Dodge's attorney drafts the following answer to Peters's complaint.

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* From an obsolete sense of the word: "something that crosses, thwarts, or obstructs."

United States District Court for the Central District of Illinois

Paul Peters,
Plaintiff

ANSWER AND COUNTERCLAIM
File No. _____

v.
Dan Dodge,
Defendant

Defendant, Dan Dodge, answers the complaint of plaintiff herein as follows:

1. Admits that defendant is a citizen of the state of Illinois, and, except as admitted, denies the allegations of paragraph 1 of the complaint.

2. Admits that, at approximately 4:00 P.M. on January 1, 2019, plaintiff was operating a car on Main Street in Champaign, Illinois, and, except as admitted, states that defendant is without information sufficient to form a belief as to the truth of the allegations in paragraph 2 of the complaint and, on that basis, denies the allegations of paragraph 2 of the complaint.

3. Admits that, at approximately 4:00 P.M. on January 1, 2019, there was a collision between a car owned and operated by defendant and a car owned and operated by plaintiff and that plaintiff's vehicle was damaged and plaintiff suffered some injury as a result of said collision and, except as admitted, defendant denies the allegations of paragraph 3 of the complaint.

4. Defendant states that he is without information sufficient to form a belief as to the truth of the allegations in paragraph 4 of the complaint and, on that basis, denies the allegations of paragraph 4 of the complaint.

First Defense

5. The court lacks jurisdiction over the subject matter of this action because plaintiff and defendant are not citizens of different states.

Second Defense

6. Defendant alleges that plaintiff drove his car carelessly and recklessly, and that such careless and reckless operation was a cause of the accident.

Counterclaim

7. On January 1, 2019, at approximately 4:00 P.M. at Main Street in Champaign, Illinois, Paul Peters drove a car in a careless, reckless, and negligent manner and thereby caused said car to collide with a car owned and operated by Dan Dodge.

8. As a result of said collision, Dodge's car was damaged, and Dodge also suffered a whiplash injury, as well as numerous cuts and bruises, and incurred expenses for medical treatment of $1,800.