Civil Procedure II
Spring 2012

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Class Schedule

Monday and Wednesday, 11-11:55, Room 2

Required Reading

1) Marcus, Redish, Sherman & Pfander, *Civil Procedure: A Modern Approach* (West Publishing, 5th ed. 2009) [hereinafter cited as "CB" – for casebook];

2) any 2011 edition of the Federal Rules of Civil Procedure that includes excerpts from title 28 of the United States Code [hereinafter referred to by rule or statute number];

3) the supplemental readings appended to this syllabus [hereinafter referred to as "Supp."]; and

4) two Supreme Court cases decided in 2011, distributed as separate pdf files [Nicastro.pdf and Goodyear.pdf].

***** Important note: In November 2011, Congress enacted several changes to the jurisdictional and venue statutes that we cover in this class. Those changes are not in your rule book. Instead, the updated sections appear in the supplemental materials that follow this syllabus. This means that when you have several statutes to read, you may have to switch back and forth from the rule book to the supplement.**

Recommended Reading

If you are interested in additional materials, the following are likely to be the most useful:

Erichson, *Inside Civil Procedure: What Matters and Why* (2009)
Freer, *Introduction to Civil Procedure* (2006)
Friedenthal, Kane & Miller, *Civil Procedure* (4th ed. 2005)
Glannon, *Civil Procedure: Examples and Explanations* (5th ed. 2006)
Shreve & Raven-Hansen, *Understanding Civil Procedure* (3rd ed. 2002)

All of these should be on reserve at Boley Library. Please let me know if you have trouble finding them.

Policy on Internet and Cell Phone Use

I expect you to turn your cell phone(s) off during class. If you have a good reason (such as child care, family illness, or the like) to keep it on, you must notify me. I also expect that, although

most of you will use laptops to take notes, you will not use them (either alone or in conjunction with a cell phone) to access the internet during class unless I instruct you to do so for a class-related purpose. That means no emailing, texting, facebooking, surfing, or similar activities. I reserve the right to sanction students who do not comply with this policy.

Grades

Your grade will be based on 3 hour limited open book final examination. Limited open book means that you may use the casebook and all other class materials, your notes, and personal outlines or group outlines to which you contributed.

Instructions

1) Each reading on the syllabus is numbered to correspond to a specific class session, which means that the syllabus assumes we will cover each set of readings in one class. That may change as the semester moves on, but unless I tell you otherwise, you should always assume that your assignment for the next class will be the next numbered set of readings on the syllabus.

2) Be sure to read the rules and statutes mentioned in the syllabus.

3) Whenever you read a case or problem, think about how you would develop the arguments if you were the attorney. What position or result would you try to establish, either as a matter of fact or of law? Then ask what the right answer should be as a normative matter. Finally, how would you go about getting a court to agree with your side of the issue (especially if your side is in tension with the most normatively attractive result)?

Syllabus

I. Personal Jurisdiction

A. The Power Theory

1. CB 680-700 (note that our class will focus on the *Pennoyer* case)
***** This is the reading for the first class *****

B. The Emergence of the Minimum Contacts Test

2. Beginnings, State Responses, and Personal Jurisdiction in Federal Court (CB 700-17, Supp. 1-3, CB 717-19)

3. Minimum Contacts and In Rem Jurisdiction (CB 781-96, Supp. 4)

C. Refining the Minimum Contacts Approach

4. *World-Wide Volkswagen* (CB 719-36)

5. *Calder* and *Burger King* (CB 736-42, Supp. 5-6, CB 743-56)

D. Uncertainty

6. *Burnham* and *Nicastro* (CB 809-21, Nicastro.pdf)

E. www= personal jurisdiction?

7. CB 766-80, Supp. 7

F. General Jurisdiction and Consent/Waiver

8. Goodyear.pdf, CB 819-25

II. Venue, Transfer, and Forum Non Conveniens

9. 28 U.S.C. §§ 1390-1392, 1404 (in Supp. at 8-10), 28 U.S.C. § 1406, CB 830-49

III. Federal Subject Matter Jurisdiction

A. Diversity Jurisdiction

10. U.S. Const., art. III, § 2; 28 U.S.C. § 1332(a)-(c) (in Supp. at 11&15); CB 850-59 (through n.10), Supp. 16, CB 859-64 (begin w/ n.11)

***** note that the case and notes in the casebook talk about the earlier version of the statute, but those discussions can help you understand some of the reasons for the statutory revisions**

B. Federal Question Jurisdiction

11. U.S. Const. art. III, § 2; 28 U.S.C. §§ 1331, 1333, 1334(a), 1350; CB 864-69 (through n.2), Supp. 17; CB 869-73 (begin w/ n.3)

12. CB 873-88

C. Supplemental Jurisdiction

13. CB 888-94 (through the beginning paragraph of n.3), 28 U.S.C. § 1367; CB 894-914 (begin w/ n.3(a))

D. Removal

14. 28 U.S.C. §§ 1441, 1446, 1453 (in Supp. at 18-22); 28 U.S.C. § 1447; CB 914-23 (omit nn. 7&9), Supp. 23

IV. Choice of Law in Federal Court

A. Introduction to Choice of Law; The Rise and Fall of General Common Law

15. CB 796-99, 924-935

B. Substance, Procedure, Rules, and Balancing

16. *Confusion*. CB 935-45, 947-53

17. *Resolution?* CB 945-47, 953-61, 964-68 (begin w/ n.2)

18. *And Then?* CB 968-93, Supp. 24-26

C. Determining State Law and the Persistence of Federal Common Law

19. CB 993-98, 1008-15

V. Trial and Appeal

A. Judicial Control of the Verdict

20. *Judgment as a Matter of Law*. FRCivP 50; CB 594-624

21. *Judgment as a Matter of Law and Motion for a New Trial*. CB 624-632, FRCivP 59, CB 632-643, Supp 27, FRCivP 60, CB 643-648

B. Appeal

22. *Final Judgments*. CB 1016-36

23. *Collateral Orders and Injunctions*. CB 1036-57, Supp. 28

VI. Preclusion

24. Res Judicata/Claim Preclusion. CB 1094-1127

25. Preclusion in Federal-State Court Adjudication. CB 1128-45

26. Collateral Estoppel/Issue Preclusion. CB 1145-68 (up to *Taylor*), 1186-1201

OREGON RULES OF CIVIL PROCEDURE

Rule 4 – Jurisdiction (Personal)

A court of this state having jurisdiction of the subject matter has jurisdiction over a party served in an action pursuant to Rule 7 under any of the following circumstances:

A. LOCAL PRESENCE OR STATUS

In any action, whether arising within or without this state, against a defendant who when the action is commenced:

(1) Is a natural person present within this state when served; or

(2) Is a natural person domiciled within this state; or

(3) Is a corporation created by or under the laws of this state; or

(4) Is engaged in substantial and not isolated activities within this state, whether such activities are wholly interstate, intrastate, or otherwise; or

(5) Has expressly consented to the exercise of personal jurisdiction over such defendant.

B. SPECIAL JURISDICTION STATUTES

In any action which may be brought under statutes or rules of this state that specifically confer grounds for personal jurisdiction over the defendant.

C. LOCAL ACT OR OMISSION

In any action claiming injury to person or property within or without this state arising out of an act or omission within this state by the defendant.

D. LOCAL INJURY; FOREIGN ACT

In any action claiming injury to person or property within this state arising out of an act or omission outside this state by the defendant, provided in addition that at the time of the injury, either:

(1) Solicitation or service activities were carried on within this state by or on behalf of the defendant; or

(2) Products, materials, or things distributed, processed, serviced, or manufactured by the defendant were used or consumed within this state in the ordinary course of trade.

E. LOCAL SERVICES, GOODS, OR CONTRACTS

In any action or proceeding which:

(1) Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to perform services within this state or to pay for services to be performed in this state by the plaintiff; or

(2) Arises out of services actually performed for the plaintiff by the defendant within this state or services actually performed for the defendant by the plaintiff within this state, if such performance within this state was authorized or ratified by the defendant; or

(3) Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to deliver or receive within this state or to

send from this state goods, documents of title, or other things of value; or

(4) Relates to goods, documents of title, or other things of value sent from this state by the defendant to the plaintiff or to a third person on the plaintiff's order or direction; or

(5) Relates to goods, documents of title, or other things of value actually received in this state by the plaintiff from the defendant or by the defendant from the plaintiff, without regard to where delivery to carrier occurred.

F. LOCAL PROPERTY

In any action which arises out of the ownership, use, or possession of real property situated in this state or the ownership, use, or possession of other tangible property, assets, or things of value which were within this state at the time of such ownership, use, or possession; including, but not limited to, actions to recover a deficiency judgment upon any mortgage, conditional sale contract, or other security agreement relating to such property, executed by the defendant or predecessor to whose obligation the defendant has succeeded.

G. DIRECTOR OR OFFICER OF A DOMESTIC CORPORATION

In any action against a defendant who is or was an officer or director of a domestic corporation where the action arises out of the defendant's conduct as such officer or director or out of the activities of such corporation while the defendant held office as a director or officer.

H. TAXES OR ASSESSMENTS

In any action for the collection of taxes or assessments levied, assessed, or otherwise imposed by a taxing authority of this state.

I. INSURANCE OR INSURERS

In any action which arises out of a promise made anywhere to the plaintiff or some third party by the defendant to insure any person, property, or risk and in addition either:

(1) The person, property, or risk insured was located in this state at the time of the promise; or

(2) The person, property, or risk insured was located within this state when the event out of which the cause of action is claimed to arise occurred; or

(3) The event out of which the cause of action is claimed to arise occurred within this state, regardless of where the person, property, or risk insured was located.

J. SECURITIES

In any action arising under the Oregon Securities Law, including an action brought by the Director of the Department of Consumer and Business Services, against

(1) An applicant for registration or registrant, and any person who offers or sells a security in this state, directly or indirectly, unless the security or the sale is exempt from ORS 59.055; or

(2) Any person, a resident or nonresident of this state, who has engaged in conduct prohibited or made actionable under the Oregon Securities Law.

K. CERTAIN MARITAL AND DOMESTIC RELATIONS ACTIONS

(1) In any action to determine a question of status instituted under ORS chapter 106

or 107 when the plaintiff is a resident of or domiciled in this state.

(2) In any action to enforce personal obligations arising under ORS chapter 106 or 107, if the parties to a marriage have concurrently maintained the same or separate residences or domiciles within this state for a period of six months, notwithstanding departure from this state and acquisition of a residence or domicile in another state or country before filing of such action; but if an action to enforce personal obligations arising under ORS chapter 106 or 107 is not commenced within one year following the date upon which the party who left the state acquired a residence or domicile in another state or country, no jurisdiction is conferred by this subsection in any such action.

(3) In any proceeding to establish paternity under ORS chapter 109 or 110, or any action for declaration of paternity where the primary purpose of the action is to establish responsibility for child support, when the act of sexual intercourse which resulted in the birth of the child is alleged to have taken place in this state.

L. OTHER ACTIONS

Notwithstanding a failure to satisfy the requirement of sections B. through K. of this rule, in any action where prosecution of the action against a defendant in this state is not inconsistent with the Constitution of this state or the Constitution of the United States.

M. PERSONAL REPRESENTATIVE

In any action against a personal representative to enforce a claim against the deceased person represented where one or more of the grounds stated in sections A. through L. would have furnished a basis for jurisdiction over the deceased had the deceased been living. It is immaterial whether the action is commenced during the lifetime of the deceased.

N. JOINDER OF CLAIMS IN THE SAME ACTION

In any action brought in reliance upon jurisdictional grounds stated in sections B. through L., there cannot be joined in the same action any other claim or cause against the defendant unless grounds exist under this rule, or other rule or statute, for personal jurisdiction over the defendant as to the claim or cause to be joined.

O. DEFENDANT DEFINED

For purposes of this rule and Rules 5 and 6, "defendant" includes any party subject to the jurisdiction of the court.

Presence of Property: Cybersquatting

In *Office Depot Inc. v. Zuccarini*, 596 F.3d 696 (9th Cir. 2010), the court relied on the Anticybersquatting Consumer Protection Act (p. 796 n.8) to conclude that domain names are located in the place where the domain name registry is located for purposes of a levy to enforce a judgment. The judgment in question was against Zuccarini, who had registered the domain name "office-depot.com." Zuccarini owned some 248 domain names, of which 190 ended in ".com" and were registered with VeriSign, a Mountain View, Calif., company that is the official registry for all ".com" domain names.

Speaking through Judge William Fletcher (a former civ. pro. prof.), the court held that this was an instance of "type two quasi in rem jurisdiction" because these domain names were not involved in the underlying litigation. But quasi in rem jurisdiction can be asserted over intangible property and, in an action to execute on a judgment, due process is satisfied so long as the court that rendered the judgment had in personam jurisdiction over the owner-defendant. Looking to California law for purposes of execution, it was reasonable to find that the Anticybersquatting Act would be a suitable guide and therefore that "we conclude under California law that domain names are located where the registry is located for the purpose of asserting quasi in rem jurisdiction." Id. at 703.

More Calder Cases

Regarding Calder v. Jones (p. 736), consider Clemens v. McNamee, 615 F.3d 374 (5th Cir. 2010), a defamation suit by former professional baseball pitcher Roger Clemens against Brian McNamee, a trainer for several of the Major League Baseball teams for which Clemens played. Under threat of prosecution, McNamee told various federal authorities that he had injected Clemens with performance-enhancing drugs in New York and Toronto when Clemens was playing baseball in those places. McNamee later repeated the statements to an internet writer, who included them in an online story. Clemens sued McNamee for defamation in Texas, claiming the statements were false.

McNamee challenged jurisdiction, and Clemens relied on Calder v. Jones, emphasizing that he had been a Texas resident since he was 15 years old, that he returned to Texas after the end of the season each year when he was playing baseball (and did some of that playing on a Texas team), and that his family (including his four children) lived in Texas. The district court dismissed for lack of jurisdiction, and the court of appeals affirmed by a 2-1 vote. The majority emphasized *Calder*'s requirement that the forum "be the focal point of the story." But "the statements in this case concerned non-Texas activities -- the delivery of performance-enhancing drugs to Clemens in New York and Canada. The statements were not made in Texas or directed to residents of Texas." Id. at 380. The dissenting judge had a different view (id. at 385):

> It is undisputed that Clemens is a resident of Texas with many civic and business activities in that state. In addition to his residency in Texas, Clemens played baseball for the Houston Astros for three years shortly before the events in question. Taking Clemens's allegations in the complaint as true, McNamee intended to cause particular harm to Clemens in Texas because he was aware that Clemens resided in Texas. * * * [U]nder *Calder*, personal jurisdiction is appropriate over McNamee because McNamee knew that Clemens resided and worked in Texas and that Clemens would feel the brunt of the impact of his allegedly defamatory statements in Texas.

For another comparison, consider Love v. Associated Newspapers, Ltd., 611 F.3d 601 (9th Cir. 2010), a suit resulting from a dispute between two former members of the Beach Boys. Brian Wilson had long since left that band, and Mike Love, the plaintiff and another member of the original band, had a right to use the name The Beach Boys in live performances. Wilson undertook a performance tour in the UK, and a British newspaper distributed 2.6 million CDs of his performances in the UK in anticipation of this tour. Approximately 425 copies of that edition of the paper -- without the CD but with a print advertisement including an image of the CD's cover – were distributed in the U.S. 18 of them were delivered to California. Love sued Wilson and various others in California, claiming that this activity in the UK gave him a right to sue under California's common law right of privacy even though the UK recognizes no such claim. (That issue led the court to observe regarding plaintiff Love that "Love wishes they all could be California torts." Sometimes it's fun to be a judge.) The court ruled that the UK newspaper was not subject to suit in California under *Calder* because Love was a Nevada resident, even though Love argued that harm directed at him was necessarily aimed at California, where his musical career was based. See id. at 699 & n.4.

In Brayton Purcell LLP v. Reardon & Reardon, 575 F.3d 981 (9th Cir. 2009), a divided panel upheld jurisdiction in a copyright infringement suit brought by law firm in the San Francisco Bay Area against a San Diego law firm. Because venue in copyright infringement suits depends on where the defendant "resides or may be found," the Ninth Circuit regards it as permissi-

ble only in instances in which the defendant would be subject to jurisdiction in the district in which suit is filed if that were a separate state -- here the Northern District of California. Plaintiff claimed defendant's web site copied copyrighted elder law material from plaintiff's web site. Defendant -- which only served clients in San Diego, in the Southern District of California -- hired a web-design company in San Diego to add an elder law section to its website. Plaintiff used a tool called "Copyscape," which scours the Internet for unauthorized use of copyrighted materials, and found material on defendant's new elder law section that had been copied verbatim from plaintiff's web site material on elder law. Plaintiff markets itself as a leader in providing elder law representation throughout the state, including San Diego.

Applying Calder v. Jones, the majority found that defendant "purposefully directed" its website toward the Northern District. Although defendant claimed its website was passive, the court concluded that defendant was accused of "expressly aiming" its conduct at plaintiff by engaging in willful copyright infringement targeted at plaintiff, which defendant knew to be a resident of the Northern District. In support of that assertion, plaintiff submitted an affidavit asserting that elder law is a growing area of practice in which there are presently few entrants, so that potential clients reading both web sites would be confused about which firm was the true author of the material.

Judge Reinhardt dissented, arguing that defendant did not target the Northern District because it sought clients only in the San Diego area. Accordingly, if there were confusion among prospective clients, that could only be in the Southern District. He cautioned (id. at 991-92):

> [T]he majority opinion would permit a defendant who resides in Ohio, Florida, or Maine, thousands of miles from the Ninth Circuit, to be sued in the Northern District of California based on nothing more than his knowledge that the plaintiff whose intellectual property rights he allegedly infringed resides in San Francisco. Under the majority's opinion, every website operator faces the potential that he will be hailed into far-away courts based upon allegations of intellectual property infringement, if he happens to know where the alleged owner of the property rights resides.

More Internet Cases

Regarding Pavlovich v. Superior Court (p. 766), note that a copyright infringement suit against RealNetworks in the N.D. Cal. resulted in entry of a consent judgment under which defendant was enjoined from using RealDVD software (which enabled copying of DVDs) for a year. It thus seems that unauthorized copying of DVDs remains a hot issue. On the other hand, Floppy Discs, The Economist, July 11, 2009, at 64, reports that sales of DVDs had begun falling dramatically, so this concern may abate for commercial reasons.

In uBID, Inc. v. GoDaddy.com, 623 F.3d 421 (7th Cir. 2010), the court held that defendant's efforts to restrict its physical activities to Arizona did not defeat jurisdiction in Illinois in a suit by an Illinois online business that charged defendant with aiding and profiting from cybersquatting by its customers. Defendant registers and maintains domain names from its Arizona location, and advertises widely. Its advertizing activities include the "GoDaddy Girls," who invite TV viewers to use defendant's services, and broadcast advertizing during the Super Bowl. It also has ads at Major League Baseball parks in Illinois. The district court held that jurisdiction was not proper because the defendant's Illinois customers initiate their relationships with defendant by contacting it online. The court of appeals held that defendant's activities were analogous to those of defendant in Keeton v. Hustler Magazine, Inc. (p. 738 n.1) (id. at 427):

> This is a company that, like the national magazine in *Keeton*, has conducted extensive national advertising and made significant national sales. GoDaddy has aired many television advertisements on national networks, including six straight years of Super Bowl ads. It has engaged in extensive venue advertising and celebrity and sports sponsorships. All of this marketing has successfully reached Illinois consumers, who have flocked to GoDaddy by the hundreds of thousands and have sent many millions of dollars to the company each year.

The court also found that these contacts sufficiently related to the claim that some customers of GoDaddy (mostly outside Illinois) engaged in cybersquatting to plaintiff's harm. See id. at 429-32.

Revised Venue Statutes

§ 1390. Scope

(a) **Venue Defined.** — As used in this chapter, the term ‘‘venue’’ refers to the geographic specification of the proper court or courts for the litigation of a civil action that is within the subject-matter jurisdiction of the district courts in general, and does not refer to any grant or restriction of subject-matter jurisdiction providing for a civil action to be adjudicated only by the district court for a particular district or districts.

(b) **Exclusion of Certain Cases.** — Except as otherwise provided by law, this chapter shall not govern the venue of a civil action in which the district court exercises the jurisdiction conferred by section 1333, except that such civil actions may be transferred between district courts as provided in this chapter.

(c) **Clarification Regarding Cases Removed from State Courts.** — This chapter shall not determine the district court to which a civil action pending in a State court may be removed, but shall govern the transfer of an action so removed as between districts and divisions of the United States district courts.

§ 1391. Venue Generally

(a) **Applicability of Section.** — Except as otherwise provided by law —

> (1) this section shall govern the venue of all civil actions brought in district courts of the United States; and
>
> (2) the proper venue for a civil action shall be determined without regard to whether the action is local or transitory in nature.

(b) **Venue in General.** — A civil action may be brought in —

> (1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located;
>
> (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or
>
> (3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court’s personal jurisdiction with respect to such action.

(c) **Residency.** — For all venue purposes —

> (1) a natural person, including an alien lawfully admitted for permanent residence in the United States, shall be deemed to reside in the judicial district in which that person is domiciled;
>
> (2) an entity with the capacity to sue and be sued in its common name under applicable law, whether or not incorporated, shall be deemed to reside, if a defendant, in any judicial district in which such defendant is subject to the court’s personal jurisdiction with respect to the civil action in question and, if a plaintiff, only in the judicial district in which it maintains its prin-

cipal place of business; and

(3) a defendant not resident in the United States may be sued in any judicial district, and the joinder of such a defendant shall be disregarded in determining where the action may be brought with respect to other defendants.

(d) **Residency of Corporations in States with Multiple Districts.** — For purposes of venue under this chapter, in a State which has more than one judicial district and in which a defendant that is a corporation is subject to personal jurisdiction at the time an action is commenced, such corporation shall be deemed to reside in any district in that State within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State, and, if there is no such district, the corporation shall be deemed to reside in the district within which it has the most significant contacts.

(e) **Actions Where Defendant is Officer or Employee of the United States.** —

(1) **In General.** — A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (A) a defendant in the action resides, (B) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (C) the plaintiff resides if no real property is involved in the action. Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party.

(2) **Service.** — The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought. . . .

(f) Civil Actions Against a Foreign State.—A civil action against a foreign state as defined in section 1603(a) of this title may be brought—

(1) in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated;

(2) in any judicial district in which the vessel or cargo of a foreign state is situated, if the claim is asserted under section 1605(b) of this title;

(3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title; or

(4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

(g) **Multiparty, Multiforum Litigation.** — A civil action in which jurisdiction of the district court is based upon section 1369 of this title may be brought in any district in which any defendant resides or in which a substantial part of the accident giving rise to the action took place.

§ 1392. Defendants or property in different districts in same State

[Deleted.]

§ 1404. Change of venue

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

(b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer.

(c) A district court may order any civil action to be tried at any place within the division in which it is pending.

(d) Transfers from a district court of the United States to the District Court of Guam, the District Court for the Northern Mariana Islands, or the District Court of the Virgin Islands shall not be permitted under this section. As otherwise used in this section, the term "district court" includes the District Court of Guam, the District Court for the Northern Mariana Islands, and the District Court of the Virgin Islands, and the term "district" includes the territorial jurisdiction of each such court.

Revised 28 U.S.C. § 1332

§ 1332. Diversity of citizenship; amount in controversy; costs

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

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State;

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

(4) a foreign state, defined in section 1603(a) of this title [part of the Foreign Sovereign Immunities Act, not included in your reading], as plaintiff and citizens of a State or of different States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title —

(1) a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of —

(A) every State and foreign state of which the insured is a citizen;

(B) every State and foreign state by which the insurer has been incorporated; and

(C) the State or foreign state where the insurer has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d) (1) In this subsection —

(A) the term “class” means all of the class members in a class action;

(B) the term “class action” means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action;

(C) the term “class certification order” means an order issued by a court approving the treatment of some or all aspects of a civil action as a class action; and

(D) the term “class members” means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which —

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

(3) A district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction under paragraph (2) over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed based on consideration of —

(A) whether the claims asserted involve matters of national or interstate interest;

(B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;

(C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;

(D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;

(E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and

(F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

(4) A district court shall decline to exercise jurisdiction under paragraph (2) —

(A) (i) over a class action in which —

(I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;

(II) at least 1 defendant is a defendant —

(aa) from whom significant relief is sought by members of the plaintiff class;

(bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and

(cc) who is a citizen of the State in which the action was originally filed; and

(III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and

(ii) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons; or

(B) two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.

(5) Paragraphs (2) through (4) shall not apply to any class action in which —

(A) the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief; or

(B) the number of members of all proposed plaintiff classes in the aggregate is less than 100.

(6) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs.

(7) Citizenship of the members of the proposed plaintiff classes shall be determined for purposes of paragraphs (2) through (6) as of the date of filing of the complaint or amended complaint, or, if the case stated by the initial pleading is not subject to Federal jurisdiction, as of the date of service by plaintiffs of an amended pleading, motion, or other paper, indicating the existence of Federal jurisdiction.

(8) This subsection shall apply to any class action before or after the entry of a class certifica-

tion order by the court with respect to that action.

(9) Paragraph (2) shall not apply to any class action that solely involves a claim —

(A) concerning a covered security as defined under 16(f)(3) of the Securities Act of 1933 (15 U.S.C. § 78p(f)(3)) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. § 78bb(f)(5)(E));

(B) that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

(C) that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. § 77b(a)(1)) and the regulations issued thereunder).

(10) For purposes of this subsection and section 1453, an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized.

(11) (A) For purposes of this subsection and section 1453, a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.

(B) (i) As used in subparagraph (A), the term "mass action" means any civil action (except a civil action within the scope of section 1711(2)) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

(ii) As used in subparagraph (A), the term "mass action" shall not include any civil action in which —

(I) all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State;

(II) the claims are joined upon motion of a defendant;

(III) all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action; or

(IV) the claims have been consolidated or coordinated solely for pretrial proceedings.

(C) (i) Any action(s) removed to Federal court pursuant to this subsection shall not

thereafter be transferred to any other court pursuant to section 1407, or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer pursuant to section 1407.

(ii) This subparagraph will not apply —

(I) to cases certified pursuant to rule 23 of the Federal Rules of Civil Procedure; or

(II) if plaintiffs propose that the action proceed as a class action pursuant to rule 23 of the Federal Rules of Civil Procedure.

(D) The limitations periods on any claims asserted in a mass action that is removed to Federal court pursuant to this subsection shall be deemed tolled during the period that the action is pending in Federal court.

(e) The word “States”, as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

Corporations and Diversity Jurisdiction

In Hertz Corp. v. Friend, 559 U.S. ___, 130 S.Ct. 1181 (2010), the Court addressed the question where a corporate party's "principal place of business" is located and rejected the "total activity" test that had led to holding some nationwide companies to be California citizens, as in Ghaderi v. United Airlines, cited on p. 859. In this case, the Ninth Circuit had held that removal was not proper in a wage and hour action brought against Hertz in a California state court because Hertz was a California citizen under 28 U.S.C. § 1332(c)(1). Hertz pointed to the fact that its corporate headquarters are located in New Jersey, and that its "core executive and administrative functions" are carried out there. The lower courts, however, regarded these circumstances as unimportant because the amount of Hertz's activity in California was substantially larger than in any other state.

The Supreme Court adopted a "nerve center" test. It reviewed the evolution of the handling of corporate citizenship, and the great variety of factors that had become important in determining the "center of gravity," finding these approaches difficult to apply and the results unpredictable. Better to use something easier:

> We conclude that "principal place of business" is best read as referring to the place where a corporation's officers direct, control, and coordinate the corporation's activities. It is the place that Courts of Appeals have called the corporation's "nerve center." And in practice it should normally be the place where the corporation maintains its headquarters -- provided that the headquarters is the actual center of direction, control, and coordination, i.e., the "nerve center," and not simply an office where the corporation holds its board meetings (for example, attended by directors and officers who have travelled there for the occasion).

The court found this approach desirable for simplicity purposes, and because under the center of gravity test nearly every nationwide retailer might be deemed a California citizen even though its "nerve centers" were clearly elsewhere. Although there is likely no perfect test, and in the era of telecommuting there may be hard cases, the Court felt that this test was better because it was clearer.

Federal Question Jurisdiction and Counterclaims

In Vaden v. Discovery Bank, 129 S.Ct. 1262 (2009), the Court pursued further the treatment of a counterclaim based on federal law (p. 869 n.2(c)). The bank sued Vaden in Maryland state court on "a garden-variety, state-law-based contract claim" for over $10,000 allegedly due on a credit card. Vaden responded with a class action counterclaim, claiming that the bank's finance charges, interest, and late fees violated Maryland's usury laws. The credit card agreement had an arbitration clause, but neither the bank nor Vaden invoked it while the case was pending in state court.

Contending that the Federal Deposit Insurance Act completely preempted the state-law usury claims, the bank filed a new action in federal court, seeking arbitration under the Federal Arbitration Act. The FAA itself did not create federal jurisdiction, and the Court therefore looked to the underlying dispute in deciding whether jurisdiction existed. Applying the well-pleaded complaint rule, the majority held that the federal court lacked jurisdiction (id. at 1272):

> Nor can federal jurisdiction rest upon an actual or anticipated counterclaim. We so ruled, emphatically, in *Holmes Group[,Inc. v. Vornado Air Circulation Systems, Inc.*]. Without dissent, the Court held in *Holmes Group* that a federal counterclaim, even when compulsory, does not establish "arising under" jurisdiction. Adhering assiduously to the well-pleaded complaint rule, the Court observed that it would undermine the clarity and simplicity of that rule if federal courts were required to consider the contents not only of the complaint but also of responsive pleadings in determining whether a case "arises under" federal law.

Revised Removal Statutes

§ 1441. Removal of Civil Actions

(a) **Generally.** — Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) **Removal Based on Diversity of Citizenship.** —

> (1) In determining whether a civil action is removable on the basis of the jurisdiction under section 1332(a) of this title, the citizenship of defendants sued under fictitious names shall be disregarded.
>
> (2) A civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) **Joinder of Federal Law Claims and State Law Claims.** —

> (1) If a civil action includes —
>
> > (A) a claim arising under the Constitution, laws, or treaties of the United States (within the meaning of section 1331 of this title), and
> >
> > (B) a claim not within the original or supplemental jurisdiction of the district court or a claim that has been made nonremovable by statute,
>
> the entire action may be removed if the action would be removable without the inclusion of the claim described in subparagraph (B).
>
> (2) Upon removal of an action described in paragraph (1), the district court shall sever from the action all claims described in paragraph (1)(B) and shall remand the severed claims to the State court from which the action was removed. Only defendants against whom a claim described in paragraph (1)(A) has been asserted are required to join in or consent to the removal under paragraph (1).

(d) Actions Against Foreign States.—Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e) **Multiparty, Multiforum Jurisdiction.** —

> (1) Notwithstanding the provisions of subsection (b) of this section, a defendant in a civil action in a State court may remove the action to the district court of the United States for the district and division embracing the place where the action is pending if —

(A) the action could have been brought in a United States district court under section 1369 of this title; or

(B) the defendant is a party to an action which is or could have been brought, in whole or in part, under section 1369 in a United States district court and arises from the same accident as the action in State court, even if the action to be removed could not have been brought in a district court as an original matter.

The removal of an action under this subsection shall be made in accordance with section 1446 of this title, except that a notice of removal may also be filed before trial of the action in State court within 30 days after the date on which the defendant first becomes a party to an action under section 1369 in a United States district court that arises from the same accident as the action in State court, or at a later time with leave of the district court.

(2) Whenever an action is removed under this subsection and the district court to which it is removed or transferred under section 1407(j) has made a liability determination requiring further proceedings as to damages, the district court shall remand the action to the State court from which it had been removed for the determination of damages, unless the court finds that, for the convenience of parties and witnesses and in the interest of justice, the action should be retained for the determination of damages.

(3) Any remand under paragraph (2) shall not be effective until 60 days after the district court has issued an order determining liability and has certified its intention to remand the removed action for the determination of damages. An appeal with respect to the liability determination of the district court may be taken during that 60-day period to the court of appeals with appellate jurisdiction over the district court. In the event a party files such an appeal, the remand shall not be effective until the appeal has been finally disposed of. Once the remand has become effective, the liability determination shall not be subject to further review by appeal or otherwise.

(4) Any decision under this subsection concerning remand for the determination of damages shall not be reviewable by appeal or otherwise.

(5) An action removed under this subsection shall be deemed to be an action under section 1369 and an action in which jurisdiction is based on section 1369 of this title for purposes of this section and sections 1407, 1697, and 1785 of this title.

(6) Nothing in this subsection shall restrict the authority of the district court to transfer or dismiss an action on the ground of inconvenient forum.

(f) **Derivative Removal Jurisdiction. —** The court to which a civil action is removed under this section is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

§ 1446. Procedure for removal of civil actions

(a) **Generally.** — A defendant or defendants desiring to remove any civil action from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and

containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) **Requirements; Generally.** —

(1) The notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within 30 days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

(2) (A) When a civil action is removed solely under section 1441(a), all defendants who have been properly joined and served must join in or consent to the removal of the action.

(B) Each defendant shall have 30 days after receipt by or service on that defendant of the initial pleading or summons described in paragraph (1) to file the notice of removal.

(C) If defendants are served at different times, and a later-served defendant files a notice of removal, any earlier-served defendant may consent to the removal even though that earlier-served defendant did not previously initiate or consent to removal.

(3) Except as provided in subsection (c), if the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

(c) **Requirements; Removal Based on Diversity of Citizenship.** —

(1) A case may not be removed under subsection (b)(3) on the basis of jurisdiction conferred by section 1332 more than 1 year after commencement of the action, unless the district court finds that the plaintiff has acted in bad faith in order to prevent a defendant from removing the action.

(2) If removal of a civil action is sought on the basis of the jurisdiction conferred by section 1332(a), the sum demanded in good faith in the initial pleading shall be deemed to be the amount in controversy, except that —

(A) the notice of removal may assert the amount in controversy if the initial pleading seeks —

(i) nonmonetary relief; or

(ii) a money judgment, but the State practice either does not permit demand for a specific sum or permits recovery of damages in excess of the amount demanded; and

(B) removal of the action is proper on the basis of an amount in controversy asserted under subparagraph (A) if the district court finds, by the preponderance of the evi-

dence, that the amount in controversy exceeds the amount specified in section 1332(a).

(3) (A) If the case stated by the initial pleading is not removable solely because the amount

in controversy does not exceed the amount specified in section 1332(a), information relating to the amount in controversy in the record of the State proceeding, or in responses to discovery, shall be treated as an ''other paper'' under subsection (b)(3).

(B) If the notice of removal is filed more than 1 year after commencement of the action and the district court finds that the plaintiff deliberately failed to disclose the actual amount in controversy to prevent removal, that finding shall be deemed bad faith under paragraph (1).

(d) **Notice to Adverse Parties and State Court.** — Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

(e) **Counterclaim in 337 Proceedings**. With respect to any counterclaim removed to a district court pursuant to section 337(c) of the Tariff Act of 1930, the district court shall resolve such counterclaim in the same manner as an original complaint under the Federal Rules of Civil Procedure, except that the payment of a filing fee shall not be required in such cases and the counterclaim shall relate back to the date of the original complaint in the proceeding before the International Trade Commission under section 337 of that Act.

§ 1453. Removal of Class Actions.

(a) **Definitions.—** In this section, the terms "class", "class action", "class certification order", and "class member" shall have the meanings given such terms under section 1332 (d)(1).

(b) **In General.—** A class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(c)(1) shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.

(c) **Review of Remand Orders.—**

(1) **In general.—** Section 1447 shall apply to any removal of a case under this section, except that notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not more than 10 days after entry of the order.

(2) **Time period for judgment.—** If the court of appeals accepts an appeal under paragraph (1), the court shall complete all action on such appeal, including rendering judgment, not later than 60 days after the date on which such appeal was filed, unless an extension is granted under paragraph (3).

(3) **Extension of time period.—** The court of appeals may grant an extension of the 60-day period described in paragraph (2) if—

(A) all parties to the proceeding agree to such extension, for any period of time; or

(B) such extension is for good cause shown and in the interests of justice, for a period not to exceed 10 days.

(4) **Denial of appeal.—** If a final judgment on the appeal under paragraph (1) is not issued before the end of the period described in paragraph (2), including any extension under paragraph (3), the appeal shall be denied.

(d) **Exception.—** This section shall not apply to any class action that solely involves—

(1) a claim concerning a covered security as defined under section 16(f)(3) of the Securities Act of 1933 (15 U.S.C. § 78p(f)(3)) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. § 78bb(f)(5)(E));

(2) a claim that relates to the internal affairs or governance of a corporation or other form of business enterprise and arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

(3) a claim that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. § 77b(a)(1)) and the regulations issued thereunder).

Appealability of Remand Orders

In Carlsbad Technology, Inc. v. HIF Bio, Inc.,, 129 S.Ct. 1862 (2009), the Court addressed appealability of a remand for lack of subject matter jurisdiction. (See p. 922 n.10.)

Plaintiffs sued in a state court in California due to a patent dispute. There was one RICO claim, but the rest of the claims were based on state law. Defendant removed and successfully moved to dismiss the RICO claim. The district court then remanded the state-law claims under §1367(c)(3), and defendant sought appellate review. The Court held that § 1447(d) does not preclude that review because, "[w]ith respect to supplemental jurisdiction . . ., a federal court has subject-matter jurisdiction over specified state-law claims, which it may (or may not) choose to exercise. A district court's decision whether to exercise that jurisdiction after dismissing every claim over which it had original jurisdiction is purely discretionary." Id. at 1866. Such a discretionary decision is not a jurisdictional matter and therefore not subject to §1447(d).

One More *Erie* Case . . .

Shady Grove Orthopedic Assoc. v. Allstate Ins. Co., ___ U.S. ___, 130 S.Ct. 1431 (2010), produced a fractious outcome but probably not a fundamental revision of the prevailing analysis outlined in Gasperini (p. 977). From one perspective, it offered a lesson in being careful what you wish for, for to the extent Corporate America wished for the Class Action Fairness Act, CAFA produced here a result that is probably unattractive to those proponents of CAFA.

The suit was in federal court due to CAFA. Plaintiff Shady Grove asserted a claim for about $500 in statutory interest at 2% per month, based on Allstate's alleged violation of the New York Insurance Law requiring that claims be paid promptly or subject to the statutory interest. Shady Grove sued for the statutory interest in federal court, asserting that it represented a class including others denied interest by Allstate, and that the aggregate claims of the class members totalled over $5 million. Were it not for CAFA, this case surely could not be in federal court; the likelihood that any one claimant had interest claims exceeding $75,000 seems to be zero. In state court, Shady Grove could not have filed a class action because New York Civil Practice Law § 901(b) says:

> Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action.

This limitation, in turn, probably resulted from the New York Legislature's concern about crippling class-action recoveries resulting from relatively innocuous, but repeated failings. Indeed, Congress imposed a limit on Truth in Lending Act class action recoveries for much this sort of reason. See 15 U.S.C. § 1640(a(2)(B).

All seemed to concede that the interest payment required by the New York insurance law was a "penalty" or "minimum measure of recovery" for purposes of § 901(b). Because the case was in federal court, however, Shady Grove argued that § 901(b) did not matter and the propriety of a class action was entirely determined by Rule 23. The battle lines from *Gasperini* were drawn again, but this time Justice Scalia had more votes on which side should win on the bottom-line issue.

Justice Ginsburg, dissenting with three others, argued that the Legislature's limitation on the remedy available under the substantive law should be respected in federal court. In her view, the Court had "avoided immoderate interpretations of the Federal Rules that would trench on state prerogatives without serving any countervailing federal interest." Id. at 1461. In her view, the state statute did not conflict with Rule 23 because it regulated remedies, a matter not addressed by Rule 23. "Any doubt whether Rule 23 leaves § 901(b) in control of the remedial issue at the core of this case should be dispelled by our *Erie* jurisprudence, including *Hanna*, which counsels us to read Federal Rules moderately and counsels against stretching a rule to cover every situation it could conceivably reach." Id. at 1468. Accordingly, Justice Ginsburg would have resolved the case on the ground that under "unguided *Erie*" the state law should be applied in federal court. See id. at 1469-72.

Justice Scalia, who dissented in *Gasperini*, announced the judgment of the Court and wrote an opinion joined by the Chief Justice and Justice Thomas, and joined in part by Justice Sotomayor and in small part by Justice Stevens. This disarray reflects the variance in analysis that created a fractured Court.

Justice Scalia renounced Justice Ginsburg's invitation to construe the Federal Rules with sensitivity to important state interests (id. at 1441 n.7) because "[t]he search for state interests and policies that are 'important' is just as standardless as the 'important or substantial' criterion we rejected in Sibbach v. Wilson & Co." Instead, looking only at Rule 23 "[w]e must first determine whether Rule 23 answers the question in dispute." Id. at 1437. That answered itself: "Rule 23 unambiguously authorizes *any* plaintiff, in *any* federal civil proceeding, to maintain a class action if the Rule's prerequisites are met." Id. at 1442. § 2072(b) placed no restraint on that, in Justice Scalia's view; all that is necessary to survive scrutiny under that limitation is that "the Rule really must 'really regulate procedure -- the judicial process for enforcing rights and duties recognized by substantive law.' * * * The test is not whether the rule affects a litigant's substantive rights; most procedural rules do." Id. Indeed, Justice Scalia seemed to think there could be no work for § 2072(b) to do (id. at 1446):

> *Sibbach*'s exclusive focus on the challenged Federal Rule -- driven by the very real concern that Federal Rules which vary from State to State would be chaos -- is hard to square with §2072(b)'s terms.

But Justice Scalia did leave an opening for state legislatures moved by the concerns advanced in support of the New York provision (id. at 1439):

> We need not decide whether a state law that limits the remedies available in an existing class action would conflict with Rule 23; that is not what § 901(b) does. By its terms, the provision precludes the plaintiff from "maintain[ing]" a class action seeking statutory penalties. Unlike a law that sets a ceiling on damages (or puts other remedies out of reach) in properly filed class actions, § 901(b) says nothing about what remedies a court may award; it prevents the class actions it covers from coming into existence at all.

Justice Stevens cast the deciding vote. He disagreed with Justice Scalia's approach to the Enabling Act, in particular the effect of § 2072(b), rejecting the notion that the only question under sub-section (b) is whether the rule "really regulates procedure." Id. at 1451-55. This disagreement drew a reply from Justice Scalia that was joined only by the Chief Justice and Justice Thomas but not Justice Sotomayor. See id. at 1444-47. Justice Stevens' general approach seemed to echo Justice Ginsburg's approach (and the approach of the Court in G*asperini*), but he found could not join Justice Ginsburg's vote in this case because he saw no way around the conclusion that Rule 23 and § 901(b) overlap and conflict, so that Rule 23 would have to apply to the case before the Court. He therefore concurred in part and in the judgment.

For a spirited critique of *Shady Grove*, see Burbank & Wolff, Redeeming the Missed Opportunities of *Shady Grove*, 159 U. Pa. L. Rev. 17 (2010). It urges that, in such cases, the impact of class treatment should make its availability depend on the goal of the underlying substantive law (id. at 21):

> The solution to the seeming dilemma caused by Rule 23's dramatic impact upon substantive liability and regulatory regimes is that Rule 23 is not the source of the aggregate-liability policies that generate that impact, and it never has been. Rather, courts must look to the substantive liability and regulatory regimes of state and federal law in determining whether aggregate relief is appropriate and consistent with the goals of that underlying law. Rule 23 is merely the mechanism

> for carrying an aggregate proceeding into effect when the underlying law supports that result.

Along the way, the authors denounce "*Sibbach*'s misdirected and wooden approach to the Enabling Act," and say that decision is "hopeless." Id. at 26.

More from the Supreme Court on the Intersection Between Judgment as a Matter of Law and Motion for New Trial

In Ortiz v. Jordan, 562 U.S. ___, 131 S.Ct. 884 (2011), the Court held that defendants' failure to make a Rule 50(b) motion on qualified-immunity grounds precluded the court of appeals from holding that plaintiff had insufficient evidence to overcome this defense even though defendants had earlier moved for summary judgment on qualified-immunity grounds. For one thing, "[o]nce the case proceeds to trial, the full record developed in court supersedes the record existing at the time of the summary judgment motion." Defendants did move for judgment as a matter of law under Rule 50(a), but did not move for judgment under Rule 50(b). Absent such a motion, an appellate court is "powerless" to review the sufficiency of the evidence after trial. One lesson to draw from this decision -- mistakes do matter. It is not at all clear why defendants did not make post-trial motions.

Discovery Orders and the Collateral Order Doctrine

In Mohawk Indus., Inc. v. Carpenter, 558 U.S. ___, 130 S.Ct. 599 (2009), the Court refused to apply the collateral order doctrine to authorize immediate review of an order compelling production of allegedly privileged materials. In the underlying wrongful termination litigation, the district court ordered defendant Mohawk to turn over materials protected by the attorney-client privilege on the ground that Mohawk had waived the protection of the privilege. After the district court refused to certify the question for immediate review under 28 U.S.C. § 1292(b), Mohawk noticed an appeal and filed a petition for a writ of mandamus. The court of appeals held the order was not appealable, and the Supreme Court agreed.

The Court emphasized that a collateral-order determination depends on a judgment about whether the public interest would be disserved by delaying appellate review, and that in making such a determination it focused on the entire category of orders involved, not just the one before it. It examined only the third collateral-order consideration -- whether the challenged order is effectively unreviewable after entry of final judgment. Although privilege issues have higher importance than the ordinary run of discovery orders, the issue was whether deferring review until final judgment so imperils the interest as to justify the cost of allowing immediate appeal of the entire class of orders.

Even defining the category as orders to produce allegedly privileged materials, the Court reasoned that allowing immediate appeals in all such cases would be wasteful because "[m]ost district court rulings on these matters involve the routine application of settled legal principles. They are unlikely to be reversed on appeal, particularly when they rest on factual determinations for which an appellate deference is the norm." Id. at 607. If erroneous rulings are made, courts of appeals can remedy them by vacating the resulting judgment and remanding for a new trial. In extraordinary cases, district-court certification and petitions for writs of mandate suffice, combined with the objecting party's option to refuse to produce and appeal a contempt ruling.