Civil Procedure I
Fall 2011

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Class Schedule

Monday and Wednesday, 9:25-10:50 a.m., Room 1

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) the statutes and litigation documents from *Carpenter v. Dee* appended to this syllabus after the supplemental materials and designated in the syllabus as "Carpenter".

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 a 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

Background Reading (read this *before* the first class)

Procedure and the Adversary System (CB 1-3, 13-16)

I. Due Process and Remedies

A. Due Process, Prejudgment Remedies, and Opportunity to be Heard

1. *Sniadach*, *Goldberg*, and *Fuentes* (Supp. 1-8; CB 27-41 through n.4)
***** This is the reading for the first class *****

2. *Mitchell* and *North Georgia* (CB 42-48 through n.5)

3. *Mathews v. Eldridge*, Mashaw, and *Doehr* (Supp. 9-18; CB 49-64; Supp. 19)

B. Post Judgment Remedies

4. Damages and Equity (CB 64-75 though n.4, 76-92 beginning with n.7)

C. Expense and Alternatives

5. CB 93-98 through n.3, 100-113

II. Pleading

A. The Complaint (and its sufficiency)

6. CB 114-118, 121-122 (note 1), 123-124 (note 6); FRCivP 1-4, 7, 8, 10, 11; CB 125-151; Carpenter 1-8

7. FRCivP 12(b)(6); CB 151-158; FRCivP 9; CB 158-159, 174-192 (through the first 2 paragraphs of n.1), 193-198 (notes 2-4, 6-10)

8. Supp. 20-39

B. Defendant's Responses to the Complaint; Amendments to the Complaint

9. FRCivP 12, 55; CB 198-205 (through n.3), 207-215; Supp. 40; Carpenter 9-13; FRCivP 13; CB 215-220; FRCivP 41(a)(1); CB 220-222; FRCivP 15; CB 222-227; Supp. 41-50; Carpenter 14-24

III. Joinder of Parties and Claims

10. Simple Joinder **(**CB 1094-1096; FRCivP 17, 18, 20-22; CB 238-252)

11. Compulsory Joinder (FRCivP 19; CB 252-268)

12. Impleader, Counter and Cross Claims, and Intervention (FRCivP 13, 14, and 24; CB 268-275, 285-297; Carpenter 25-30)

13. Interpleader and Introduction to Class Actions (FRCivP 22; 28 U.S.C. § 1335; CB 275-285; FRCivP 23; CB 297-318)

14. More on Class Actions (CB 318-342)

IV. Discovery

15. FRCivP 26-37, 45; CB 343-368; Carpenter 31-36

16. CB 368-399

17. CB 399-429

V. Summary Judgment

18. FRCivP 56; CB 430-454

19. CB 455-470

VI. Pre-Trial, Trial, and Post-Trial

A. Pre-Trial, Settlement, and Trial

20. FRCivP 16; CB 471-476, 491-506, 523-524 (through n.1), 592-594, 524-531; FRCivP 47-51, 52, 54

B. The Right to a Jury in Federal Civil Cases

21. CB 531-546

22. CB 548-580

C. Judicial Control of the Verdict

23. Judgment as a Matter of Law (FRCivP 50; CB 594-624)

24. Judgment as a Matter of Law and Motion for a New Trial (CB 624-632; FRCivP 59; CB 632-643; FRCivP 60; CB 643-648)

25. Verdicts (CB 648-661; FRCivP 49; CB 661-679)

SUPPLEMENTAL READINGS

Sniadach v. Family Finance Corp. of Bay View

395 U.S. 337 (1969)

Mr. Justice Douglas delivered the opinion of the Court.

Respondents instituted a garnishment action against petitioner as defendant and Miller Harris Instrument Co., her employer, as garnishee. The complaint alleged a claim of $420 on a promissory note. The garnishee filed its answer stating it had wages of $63.18 under its control earned by petitioner and unpaid, and that it would pay one-half to petitioner as a subsistence allowance[1] and hold the other half subject to the order of the court.

Petitioner moved that the garnishment proceedings be dismissed for failure to satisfy the due process requirements of the Fourteenth Amendment. The Wisconsin Supreme Court sustained the lower state court in approving the procedure. The case is here on a petition for a writ of certiorari.

The Wisconsin statute gives a plaintiff 10 days in which to serve the summons and complaint on the defendant after service on the garnishee. In this case petitioner was served the same day as the garnishee. She nonetheless claims that the Wisconsin garnishment procedure violates that due process required by the Fourteenth Amendment, in that notice and an opportunity to be heard are not given before the in rem seizure of the wages. What happens in Wisconsin is that the clerk of the court issues the summons at the request of the creditor's lawyer; and it is the latter who by serving the garnishee sets in motion the machinery whereby the wages are frozen. They may, it is true, be unfrozen if the trial of the main suit is ever had and the wage earner wins on the merits. But in the interim the wage earner is deprived of his enjoyment of earned wages without any opportunity to be heard and to tender any defense he may have, whether it be fraud or otherwise.

Such summary procedure may well meet the requirements of due process in extraordinary situations. *Cf. Fahey v. Mallonee*, 332 U.S. 245, 253-254; *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 598-600; *Ownbey v. Morgan*, 256 U.S. 94, 110-112; *Coffin Bros. v. Bennett*, 277 U.S. 29, 31. But in the present case no situation requiring special protection to a state or creditor interest is presented by the facts; nor is the Wisconsin statute narrowly drawn to meet any such unusual condition. Petitioner was a resident of this Wisconsin community and in personam jurisdiction was readily obtainable.

The question is not whether the Wisconsin law is a wise law or unwise law. Our concern is not what philosophy Wisconsin should or should not embrace. *See Green v. Frazier*, 253 U.S. 233. We do not sit as a super-legislative body. In this case the sole question is whether there has been a taking of property without that procedural due process that is required by the Fourteenth Amendment. We have dealt over and over again with the question of what constitutes "the right to be heard" (*Schroeder v. New York*, 371 U.S. 208, 212) within the meaning of procedural due process. *See Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314. In the latter case we said that the right to be heard "has little reality or worth unless one is informed the matter is pending

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[1] Wis. Stat. § 267.18(2)(a) provides:

> When wages or salary are the subject of garnishment action, the garnishee shall pay over to the principal defendant on the date when such wages or salary would normally be payable a subsistence allowance, out of the wages or salary then owing, in the sum of $25 in the case of an individual without dependents or $40 in the case of an individual with dependents; but in no event in excess of 50 per cent of the wages or salary owing. Said subsistence allowance shall be applied to the first wages or salary earned in the period subject to said garnishment action.

and can choose for himself whether appear or default, acquiesce or contest." In the context of this case the question is whether the interim freezing of the wages without a chance to be heard violates procedural due process.

A procedural rule that may satisfy due process for attachments in general, see *McKay v. McInnes*, 279 U.S. 820, does not necessarily satisfy procedural due process in every case. The fact that a procedure would pass muster under a feudal regime does not mean it gives necessary protection to all property in its modern forms. We deal here with wages – a specialized type of property presenting distinct problems in our economic system. We turn then to the nature of that property and problems of procedural due process.

A prejudgment garnishment of the Wisconsin type is a taking which may impose tremendous hardship on wage earners with families to support. Until a recent Act of Congress * * * which forbids discharge of employees on the ground that their wages have been garnished, garnishment often meant the loss of a job. Over and beyond that was the great drain on family income. * * * Recent investigations of the problem have disclosed the grave injustices made possible by prejudgment garnishment whereby the sole opportunity to be heard comes after the taking. * * *

The leverage of the creditor on the wage earner is enormous. The creditor tenders not only the original debt but the "collection fees" incurred by his attorneys in the garnishment proceedings:

The debtor whose wages are tied up by a writ of garnishment, and who is usually in need of money, is in no position to resist demands for collection fees. If the debt is small, the debtor will be under considerable pressure to pay the debt and collection charges in order to get his wages back. If the debt is large, he will often sign a new contract of 'payment schedule' which incorporates these additional charges.

Apart from those collateral consequences, it appears that in Wisconsin the statutory exemption granted the wage earner is "generally insufficient to support the debtor for any one week."

The result is that a prejudgment garnishment of the Wisconsin type may as a practical matter drive a wage-earning family to the wall. Where the taking of one's property is so obvious, it needs no extended argument to conclude that absent notice a prior hearing (*cf. Coe v. Armour Fertilizer Works*, 237 U.S. 413, 423) this prejudgment garnishment procedure violates the fundamental principles of due process.

Reversed.

[Justice Harlan's concurring opinion is omitted.]

Mr. Justice Black, dissenting.

The Court here holds unconstitutional a Wisconsin statute permitting garnishment before a judgment has been obtained against the principal debtor. The law, however, requires that notice be given to the principal debtor and authorizes him to present all of his legal defenses at the regular hearing and trial of the case. The Wisconsin law is said to violate the "fundamental principles of due process." Of course the Due Process Clause of the Fourteenth Amendment contains no words that indicate that this Court has power to play so fast and loose with state laws. The arguments the Court makes to reach what I consider to be its unconstitutional conclusion, however, show why it strikes down this state law. It is because it considers a garnishment law of this kind to be bad state policy, a judgment I think the state legislature, not this Court, has power to make.

* * * There is not one word in our Federal Constitution or in any of its Amendments and not a word in the reports of that document's passage from which one can draw the slightest inference that we have authority thus to try to supplement or strike down the State's selection of its own policies. The Wisconsin law is simply nullified by this Court as though the Court had been granted a super-legislative power to step in and frustrate policies of States adopted by their own elected legislatures. The Court thus steps back into the due process philosophy which brought on President Roosevelt's Court fight. Arguments can be made for outlawing loan sharks and install-

ment sales companies but such decisions, I think, should be made by state and federal legislators, and not by this Court. * * *

Goldberg, Commissioner of Social Services of the City of New York v. Kelly et al.

397 U.S. 254 (1970)

Mr. Justice Brennan delivered the opinion of the Court.

The question for decision is whether a State that terminates public assistance payments to a particular recipient without affording him the opportunity for an evidentiary hearing prior to termination denies the recipient procedural due process in violation of the Due Process Clause of the Fourteenth Amendment.

This action was brought in the District Court for the Southern District of New York by residents of New York City receiving financial aid under the federally assisted program of Aid to Families with Dependent Children (AFDC) or under New York State's general Home Relief program. Their complaint alleged that the New York State and New York City officials administering these programs terminated, or were about to terminate, such aid without [constitutionally adequate] prior notice and hearing, thereby denying them due process of law. * * *

Pursuant to [the city's procedures, a] caseworker who has doubts about the recipient's continued eligibility must first discuss them with the recipient. If the caseworker concludes that the recipient is no longer eligible, he recommends termination of aid to a unit supervisor. If the latter concurs, he sends the recipient a letter stating the reasons for proposing to terminate aid and notifying him that within seven days he may request that a higher official review the record, and may support the request with a written statement prepared personally or with the aid of an attorney or other person. If the reviewing official affirms the determination of ineligibility, aid is stopped immediately and the recipient is informed by letter of the reasons for the action. Appellees' challenge to this procedure emphasizes the absence of any provisions for the personal appearance of the recipient before the reviewing official, for oral presentation of evidence, and for confrontation and cross-examination of adverse witnesses. However, the letter does inform the recipient that he may request a post-termination "fair hearing." This is a proceeding before an independent state hearing officer at which the recipient may appear personally, offer oral evidence, confront and cross-examine the witnesses against him, and have a record made of the hearing. If the recipient prevails at the "fair hearing" he is paid all funds erroneously withheld. * * * A recipient whose aid is not restored by a "fair hearing" decision may have judicial review. * * *

I

The constitutional issue to be decided, therefore, is the narrow one whether the Due Process Clause requires that the recipient be afforded an evidentiary hearing before the termination of benefits. * * *

Appellant does not contend that procedural due process is not applicable to the termination of welfare benefits. Such benefits are a matter of statutory entitlement for persons qualified to receive them.[8] Their termination involves state action that adjudicates important rights. The con-

[8] It may be realistic today to regard welfare entitlements as more like "property" than a "gratuity." Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property. It has been aptly noted that "society today is built around entitlement. The automobile dealer has his franchise, the doctor and lawyer their professional licenses, the worker his union membership, contract, and pension rights, the executive his contract and stock options; all are devices to aid security and independence. Many of the most important of these entitlements now flow from government: subsi-

stitutional challenge cannot be answered by an argument that public assistance benefits are "a 'privilege' and not a 'right.'" *Shapiro v. Thompson*, 394 U.S. 618, 627 n.6 (1969). Relevant constitutional restraints apply as much to the withdrawal of public assistance benefits as to disqualification for unemployment compensation, *Sherbert v. Verner*, 374 U.S. 398 (1963); or to denial of a tax exemption, *Speiser v. Randall*, 357 U.S. 513 (1958); or to discharge from public employment, *Slochower v. Board of Higher Education*, 350 U.S. 551 (1956). The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be "condemned to suffer grievous loss," *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring), and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication. Accordingly, as we said in *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961), "consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action."

It is true, of course, that some governmental benefits may be administratively terminated without affording the recipient a pre-termination evidentiary hearing.[10] But we agree with the District Court that when welfare is discontinued, only a pre-termination evidentiary hearing provides the recipient with procedural due process. *Cf. Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969). For qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical care. *Cf. Nash v. Florida Industrial Commission*, 389 U.S. 235, 239 (1967). Thus the crucial factor in this context – a factor not present in the case of the blacklisted government contractor, the discharged government employee, the taxpayer denied a tax exemption, or virtually anyone else whose governmental entitlements are ended – is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy.

Moreover, important governmental interests are promoted by affording recipients a pre-termination evidentiary hearing. From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders. We have come to recognize that forces not within the control of the poor contribute to their poverty. This perception, against the background of our traditions, has significantly influenced the development of the contemporary public assistance system. Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community. At the same time, welfare guards against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity. Public assistance, then, is not mere charity, but a means to "promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity." The same governmental interests that coun-

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dies to farmers and businessmen, routes for airlines and channels for television stations; long term contracts for defense, space, and education; social security pensions for individuals. Such sources of security, whether private or public, are no longer regarded as luxuries or gratuities; to the recipients they are essentials, fully deserved, and in no sense a form of charity. It is only the poor whose entitlements, although recognized by public policy, have not been effectively enforced." Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 Yale L.J. 1245, 1255 (1965). *See also* Reich, *The New Property*, 73 Yale L.J. 733 (1964).

[10] One Court of Appeals has stated: "In a wide variety of situations, it has long been recognized that where harm to the public is threatened, and the private interest infringed is reasonably deemed to be of less importance, an official body can take summary action pending a later hearing." *R. A. Holman & Co. v. SEC*, 112 U.S. App. D.C. 43, 47, 299 F.2d 127, 131, cert. denied, 370 U.S. 911 (1962) (suspension of exemption from stock registration requirement). * * *

sel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it; pre-termination evidentiary hearings are indispensable to that end.

Appellant does not challenge the force of these considerations but argues that they are outweighed by countervailing governmental interests in conserving fiscal and administrative resources. These interests, the argument goes, justify the delay of any evidentiary hearing until after discontinuance of the grants. Summary adjudication protects the public fisc by stopping payments promptly upon discovery of reason to believe that a recipient is no longer eligible. Since most terminations are accepted without challenge, summary adjudication also conserves both the fisc and administrative time and energy by reducing the number of evidentiary hearings actually held.

We agree with the District Court, however, that these governmental interests are not overriding in the welfare context. The requirement of a prior hearing doubtless involves some greater expense, and the benefits paid to ineligible recipients pending decision at the hearing probably cannot be recouped, since these recipients are likely to be judgment-proof. But the State is not without weapons to minimize these increased costs. Much of the drain on fiscal and administrative resources can be reduced by developing procedures for prompt pre-termination hearings and by skillful use of personnel and facilities. Indeed, the very provision for a post-termination evidentiary hearing in New York's Home Relief program is itself cogent evidence that the State recognizes the primacy of the public interest in correct eligibility determinations and therefore in the provision of procedural safeguards. Thus, the interest of the eligible recipient in uninterrupted receipt of public assistance, coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens. As the District Court correctly concluded, "the stakes are simply too high for the welfare recipient, and the possibility for honest error or irritable misjudgment too great, to allow termination of aid without giving the recipient a chance, if he so desires, to be fully informed of the case against him so that he may contest its basis and produce evidence in rebuttal."

II

We also agree with the District Court, however, that the pre-termination hearing need not take the form of a judicial or quasi-judicial trial. We bear in mind that the statutory "fair hearing" will provide the recipient with a full administrative review.[14] Accordingly, the pre-termination hearing has one function only: to produce an initial determination of the validity of the welfare department's grounds for discontinuance of payments in order to protect a recipient against an erroneous termination of his benefits. *Cf. Sniadach v. Family Finance Corp.*, 395 U.S. 337, 343 (1969) (Harlan, J., concurring). Thus, a complete record and a comprehensive opinion, which would serve primarily to facilitate judicial review and to guide future decisions, need not be provided at the pre-termination stage. We recognize, too, that both welfare authorities and recipients have an interest in relatively speedy resolution of questions of eligibility, that they are used to dealing with one another informally, and that some welfare departments have very burdensome caseloads. These considerations justify the limitation of the pre-termination hearing to minimum procedural safeguards, adapted to the particular characteristics of welfare recipients, and to the limited nature of the controversies to be resolved. We wish to add that we, no less than the dissenters, recognize the importance of not imposing upon the States or the Federal Government in this developing field of law any procedural requirements beyond those demanded by rudimentary due process.

"The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). The hearing must be "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). In the present context these prin-

[14] Due process does not, of course, require two hearings. If, for example, a State simply wishes to continue benefits until after a "fair" hearing there will be no need for a preliminary hearing.

ciples require that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally. These rights are important in cases such as those before us, where recipients have challenged proposed terminations as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases.

We are not prepared to say that the seven-day notice currently provided by New York City is constitutionally insufficient per se, although there may be cases where fairness would require that a longer time be given. Nor do we see any constitutional deficiency in the content or form of the notice. New York employs both a letter and a personal conference with a caseworker to inform a recipient of the precise questions raised about his continued eligibility. Evidently the recipient is told the legal and factual bases for the Department's doubts. This combination is probably the most effective method of communicating with recipients. The city's procedures presently do not permit recipients to appear personally with or without counsel before the official who finally determines continued eligibility. Thus a recipient is not permitted to present evidence to that official orally, or to confront or cross-examine adverse witnesses. These omissions are fatal to the constitutional adequacy of the procedures. The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard. It is not enough that a welfare recipient may present his position to the decision maker in writing or secondhand through his caseworker. Written submissions are an unrealistic option for most recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance. Moreover, written submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important. Particularly where credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision. The secondhand presentation to the decisionmaker by the caseworker has its own deficiencies; since the caseworker usually gathers the facts upon which the charge of ineligibility rests, the presentation of the recipient's side of the controversy cannot safely be left to him. Therefore a recipient must be allowed to state his position orally. Informal procedures will suffice; in this context due process does not require a particular order of proof or mode of offering evidence.

In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. *E.g., ICC v. Louisville & N. R. Co.*, 227 U.S. 88, 93-94 (1913), *Willner v. Committee on Character & Fitness*, 373 U.S. 96, 103-104 (1963). What we said in *Greene v. McElroy*, 360 U.S. 474, 496-497 (1959), is particularly pertinent here:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment . . . . This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . . but also in all types of cases where administrative . . . actions were under scrutiny.

Welfare recipients must therefore be given an opportunity to confront and cross-examine the wit-

nesses relied on by the department.

"The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932). We do not say that counsel must be provided at the pre-termination hearing, but only that the recipient must be allowed to retain an attorney if he so desires. Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient. We do not anticipate that this assistance will unduly prolong or otherwise encumber the hearing. * * * Finally, the decisionmaker's conclusion as to a recipient's eligibility must rest solely on the legal rules and evidence adduced at the hearing. *Ohio Bell Tel. Co. v. PUC*, 301 U.S. 292 (1937); *United States v. Abilene & S. R Co*., 265 U.S. 274, 288-289 (1924). To demonstrate compliance with this elementary requirement, the decision maker should state the reasons for his determination and indicate the evidence he relied on, *cf. Wichita R. & Light Co. v. PUC*, 260 U.S. 48, 57-59 (1922), though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law. And, of course, an impartial decision maker is essential. *Cf. In re Murchison*, 349 U.S. 133 (1955); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 45-46 (1950). We agree with the District Court that prior involvement in some aspects of a case will not necessarily bar a welfare official from acting as a decision maker. He should not, however, have participated in making the determination under review. * * *

Mr. Justice Black, dissenting.

In the last half century the United States, along with many, perhaps most, other nations of the world, has moved far toward becoming a welfare state, that is, a nation that for one reason or another taxes its most affluent people to help support, feed, clothe, and shelter its less fortunate citizens. The result is that today more than nine million men, women, and children in the United States receive some kind of state or federally financed public assistance in the form of allowances or gratuities, generally paid them periodically, usually by the week, month, or quarter. Since these gratuities are paid on the basis of need, the list of recipients is not static, and some people go off the lists and others are added from time to time. These ever-changing lists put a constant administrative burden on government and it certainly could not have reasonably anticipated that this burden would include the additional procedural expense imposed by the Court today. * * *

I would have little, if any, objection to the majority's decision in this case if it were written as the report of the House Committee on Education and Labor, but as an opinion ostensibly resting on the language of the Constitution I find it woefully deficient. Once the verbiage is pared away it is obvious that this Court today adopts the views of the District Court "that to cut off a welfare recipient in the face of . . . 'brutal need' without a prior hearing of some sort is unconscionable," and therefore, says the Court, unconstitutional. The majority reaches this result by a process of weighing "the recipient's interest in avoiding" the termination of welfare benefits against "the governmental interest in summary adjudication." Today's balancing act requires a "pre-termination evidentiary hearing," yet there is nothing that indicates what tomorrow's balance will be. Although the majority attempts to bolster its decision with limited quotations from prior cases, it is obvious that today's result does not depend on the language of the Constitution itself or the principles of other decisions, but solely on the collective judgment of the majority as to what would be a fair and humane procedure in this case.

This decision is thus only another variant of the view often expressed by some members of this Court that the Due Process Clause forbids any conduct that a majority of the Court believes "unfair," "indecent," or "shocking to their consciences." *See, e.g., Rochin v. California*, 342 U.S. 165, 172 (1952). Neither these words nor any like them appear anywhere in the Due Process Clause. If they did, they would leave the majority of Justices free to hold any conduct unconstitutional that they should conclude on their own to be unfair or shocking to them. Had the drafters of the Due Process Clause meant to leave judges such ambulatory power to declare laws unconstitutional, the chief value of a written constitution, as the Founders saw it, would have been lost. In

fact, if that view of due process is correct, the Due Process Clause could easily swallow up all other parts of the Constitution. And truly the Constitution would always be "what the judges say it is" at a given moment, not what the Founders wrote into the document. A written constitution, designed to guarantee protection against governmental abuses, including those of judges, must have written standards that mean something definite and have an explicit content. I regret very much to be compelled to say that the Court today makes a drastic and dangerous departure from a Constitution written to control and limit the government and the judges and moves toward a constitution designed to be no more and no less than what the judges of a particular social and economic philosophy declare on the one hand to be fair or on the other hand to be shocking and unconscionable. * * *

For the foregoing reasons I dissent from the Court's holding. The operation of a welfare state is a new experiment for our Nation. For this reason, among others, I feel that new experiments in carrying out a welfare program should not be frozen into our constitutional structure. They should be left, as are other legislative determinations, to the Congress and the legislatures that the people elect to make our laws.

[Chief Justice Burger and Justice Stewart also dissented.]

Mathews, Secretary of Health, Education, and Welfare v. Eldridge
424 U.S. 319 (1976)

Mr. Justice Powell delivered the opinion of the Court. * * *

I

Cash benefits are provided to workers during periods in which they are completely disabled under the disability insurance benefits program created by the 1956 amendments to Title II of the Social Security Act. Respondent Eldridge was first awarded benefits in June 1968. In March 1972, he received a questionnaire from the state agency charged with monitoring his medical condition. Eldridge completed the questionnaire, indicating that his condition had not improved and identifying the medical sources, including physicians, from whom he had received treatment recently. The state agency then obtained reports from his physician and a psychiatric consultant. After considering these reports and other information in his file the agency informed Eldridge by letter that it had made a tentative determination that his disability had ceased in May 1972. The letter included a statement of reasons for the proposed termination of benefits, and advised Eldridge that he might request reasonable time in which to obtain and submit additional information pertaining to his condition.

In his written response, Eldridge disputed one characterization of his medical condition and indicated that the agency already had enough evidence to establish his disability. The state agency then made its final determination that he had ceased to be disabled in May 1972. This determination was accepted by the Social Security Administration (SSA), which notified Eldridge in July that his benefits would terminate after that month. The notification also advised him of his right to seek reconsideration by the state agency of this initial determination within six months.

Instead of requesting reconsideration Eldridge commenced this action challenging the constitutional validity of the administrative procedures established by the Secretary of Health, Education, and Welfare for assessing whether there exists a continuing disability. * * *

III

A

Procedural due process imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. The Secretary does not contend that procedural due process is inapplicable to terminations of Social Security disability benefits. He recognizes, as has been implicit in our prior decisions, *e.g., Richardson v. Belcher*, 404 U.S. 78, 80-81 (1971); *Richardson v. Perales*, 402 U.S. 389, 401-402 (1971); *Flemming v. Nestor*, 363 U.S. 603, 611 (1960), that the interest of an individual in continued receipt of these benefits is a statutorily created "property" interest protected by the Fifth Amendment. *Cf. Arnett v. Kennedy*, 416 U.S. 134, 166 (Powell, J., concurring in part) (1974); *Board of Regents v. Roth*, 408 U.S. 564, 576-578 (1972); *Bell v. Burson*, 402 U.S. at 539; *Goldberg v. Kelly*, 397 U.S. at 261-262. Rather, the Secretary contends that the existing administrative procedures, detailed below, provide all the process that is constitutionally due before a recipient can be deprived of that interest.

This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest. *Wolff v. McDonnell*, 418 U.S. 539, 557-558 (1974). The "right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring). The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). Eldridge agrees that the review procedures available to a claimant before the initial determination of ineligibility becomes final would be adequate if disability benefits were not terminated until after the eviden-

tiary hearing stage of the administrative process. The dispute centers upon what process is due prior to the initial termination of benefits, pending review.

In recent years this Court increasingly has had occasion to consider the extent to which due process requires an evidentiary hearing prior to the deprivation of some type of property interest even if such a hearing is provided thereafter. In only one case, *Goldberg v. Kelly*, 397 U.S. at 266-271, has the Court held that a hearing closely approximating a judicial trial is necessary. In other cases requiring some type of pretermination hearing as a matter of constitutional right the Court has spoken sparingly about the requisite procedures. *Sniadach v. Family Finance Corp*., 395 U.S. 337 (1969), involving garnishment of wages, was entirely silent on the matter. In *Fuentes v. Shevin*, 407 U.S. at 96-97, the Court said only that in a replevin suit between two private parties the initial determination required something more than an ex parte proceeding before a court clerk. Similarly, *Bell v. Burson, supra*, at 540, held, in the context of the revocation of a state-granted driver's license, that due process required only that the prerevocation hearing involve a probable-cause determination as to the fault of the licensee, noting that the hearing "need not take the form of a full adjudication of the question of liability." *See also North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 607 (1975). More recently, in *Arnett v. Kennedy, supra*, we sustained the validity of procedures by which a federal employee could be dismissed for cause. They included notice of the action sought, a copy of the charge, reasonable time for filing a written response, and an opportunity for an oral appearance. Following dismissal, an evidentiary hearing was provided. These decisions underscore the truism that "[d]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected. *Arnett v. Kennedy, supra*, at 167-168 (Powell, J., concurring in part); *Goldberg v. Kelly, supra*, at 263-266; *Cafeteria Workers v. McElroy, supra*, at 895. More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *See, e.g., Goldberg v. Kelly, supra*, at 263-271. * * *

C

Despite the elaborate character of the administrative procedures provided by the Secretary, the courts below held them to be constitutionally inadequate, concluding that due process requires an evidentiary hearing prior to termination. In light of the private and governmental interests at stake here and the nature of the existing procedures, we think this was error.

Since a recipient whose benefits are terminated is awarded full retroactive relief if he ultimately prevails, his sole interest is in the uninterrupted receipt of this source of income pending final administrative decision on his claim. His potential injury is thus similar in nature to that of the welfare recipient in *Goldberg*, the nonprobationary federal employee in *Arnett*, and the wage earner in *Sniadach*.

Only in *Goldberg* has the Court held that due process requires an evidentiary hearing prior to a temporary deprivation. It was emphasized there that welfare assistance is given to persons on the very margin of subsistence:

> The crucial factor in this context – a factor not present in the case of . . . virtually anyone else whose governmental entitlements are ended – is that termination of

> aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits.

Eligibility for disability benefits, in contrast, is not based upon financial need. Indeed, it is wholly unrelated to the worker's income or support from many other sources, such as earnings of other family members, workmen's compensation awards, tort claims awards, savings, private insurance, public or private pensions, veterans' benefits, food stamps, public assistance, or the "many other important programs, both public and private, which contain provisions for disability payments affecting a substantial portion of the work force . . . ." *Richardson v. Belcher*, 404 U.S. at 85-87 (Douglas, J., dissenting). * * *

As *Goldberg* illustrates, the degree of potential deprivation that may be created by a particular decision is a factor to be considered in assessing the validity of any administrative decisionmaking process. *Cf Morrissey v. Brewer*, 408 U.S. 471 (1972). The potential deprivation here is generally likely to be less than in *Goldberg*, although the degree of difference can be overstated. As the District Court emphasized, to remain eligible for benefits a recipient must be "unable to engage in substantial gainful activity." Thus, in contrast to the discharged federal employee in *Arnett*, there is little possibility that the terminated recipient will be able to find even temporary employment to ameliorate the interim loss. As we recognized last Term in *Fusari v. Steinberg*, 419 U.S. 379, 389 (1975), "the possible length of wrongful deprivation of . . . benefits [also] is an important factor in assessing the impact of official action on the private interests." The Secretary concedes that the delay between a request for a hearing before an administrative law judge and a decision on the claim is currently between 10 and 11 months. Since a terminated recipient must first obtain a reconsideration decision as a prerequisite to invoking his right to an evidentiary hearing, the delay between the actual cutoff of benefits and final decision after a hearing exceeds one year. In view of the torpidity of this administrative review process, and the typically modest resources of the family unit of the physically disabled worker, the hardship imposed upon the erroneously terminated disability recipient may be significant. Still, the disabled worker's need is likely to be less than that of a welfare recipient. In addition to the possibility of access to private resources, other forms of government assistance will become available where the termination of disability benefits places a worker or his family below the subsistence level. *See Arnett v. Kennedy*, 416 U.S. at 169 (Powell, J., concurring in part); *id*. at 201-202 (Stevens, J., concurring in part and dissenting in part). In view of these potential sources of temporary income, there is less reason here than in Goldberg to depart from the ordinary principle, established by our decisions, that something less than an evidentiary hearing is sufficient prior to adverse administrative action.

D

An additional factor to be considered here is the fairness and reliability of the existing pretermination procedures, and the probable value, if any, of additional procedural safeguards. Central to the evaluation of any administrative process is the nature of the relevant inquiry. *See Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 617 (1974); Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1281 (1975). In order to remain eligible for benefits the disabled worker must demonstrate by means of "medically acceptable clinical and laboratory diagnostic techniques," that he is unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment. . . ." In short, a medical assessment of the worker's physical or mental condition is required. This is a more sharply focused and easily documented decision than the typical determination of welfare entitlement. In the latter case, a wide variety of information may be deemed relevant, and issues of witness credibility and veracity often are critical to the decisionmaking process. *Goldberg* noted that in such circumstances "written submissions are a wholly unsatisfactory basis for decision." By contrast, the decision whether to discontinue disability benefits will turn, in most cases, upon "routine, standard, and unbiased medical reports by physician specialists," *Richardson v. Perales*, 402 U.S. at 404, concerning a subject whom they have personally examined. In *Richardson* the Court recognized the "reliability and probative

worth of written medical reports," emphasizing that while there may be "professional disagreement with the medical conclusions" the "specter of questionable credibility and veracity is not present." To be sure, credibility and veracity may be a factor in the ultimate disability assessment in some cases. But procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions. The potential value of an evidentiary hearing, or even oral presentation to the decisionmaker, is substantially less in this context than in *Goldberg*.

The decision in *Goldberg* also was based on the Court's conclusion that written submissions were an inadequate substitute for oral presentation because they did not provide an effective means for the recipient to communicate his case to the decisionmaker. Written submissions were viewed as an unrealistic option, for most recipients lacked the "educational attainment necessary to write effectively" and could not afford professional assistance. In addition, such submissions would not provide the "flexibility of oral presentations" or "permit the recipient to mold his argument to the issues the decision maker appears to regard as important." In the context of the disability-benefits-entitlement assessment the administrative procedures under review here fully answer these objections.

The detailed questionnaire which the state agency periodically sends the recipient identifies with particularity the information relevant to the entitlement decision, and the recipient is invited to obtain assistance from the local SSA office in completing the questionnaire. More important, the information critical to the entitlement decision usually is derived from medical sources, such as the treating physician. Such sources are likely to be able to communicate more effectively through written documents than are welfare recipients or the lay witnesses supporting their cause. The conclusions of physicians often are supported by X-rays and the results of clinical or laboratory tests, information typically more amenable to written than to oral presentation.

A further safeguard against mistake is the policy of allowing the disability recipient's representative full access to all information relied upon by the state agency. In addition, prior to the cutoff of benefits the agency informs the recipient of its tentative assessment, the reasons therefore, and provides a summary of the evidence that it considers most relevant. Opportunity is then afforded the recipient to submit additional evidence or arguments, enabling him to challenge directly the accuracy of information in his file as well as the correctness of the agency's tentative conclusions. These procedures, again as contrasted with those before the Court in *Goldberg*, enable the recipient to "mold" his argument to respond to the precise issues which the decisionmaker regards as crucial. Despite these carefully structured procedures, amici point to the significant reversal rate for appealed cases as clear evidence that the current process is inadequate. Depending upon the base selected and the line of analysis followed, the relevant reversal rates urged by the contending parties vary from a high of 58.6% for appealed reconsideration decisions to an overall reversal rate of only 3.3%. Bare statistics rarely provide a satisfactory measure of the fairness of a decisionmaking process. Their adequacy is especially suspect here since the administrative review system is operated on an open file basis. A recipient may always submit new evidence, and such submissions may result in additional medical examinations. Such fresh examinations were held in approximately 30% to 40% of the appealed cases in fiscal 1973, either at the reconsideration or evidentiary hearing stage of the administrative process. In this context, the value of reversal rate statistics as one means of evaluating the adequacy of the pretermination process is diminished. Thus, although we view such information as relevant, it is certainly not controlling in this case.

E

In striking the appropriate due process balance the final factor to be assessed is the public interest. This includes the administrative burden and other societal costs that would be associated with requiring, as a matter of constitutional right, an evidentiary hearing upon demand in all cases prior to the termination of disability benefits. The most visible burden would be the incremental

cost resulting from the increased number of hearings and the expense of providing benefits to ineligible recipients pending decision. No one can predict the extent of the increase, but the fact that full benefits would continue until after such hearings would assure the exhaustion in most cases of this attractive option. Nor would the theoretical right of the Secretary to recover undeserved benefits result, as a practical matter, in any substantial offset to the added outlay of public funds. The parties submit widely varying estimates of the probable additional financial cost. We only need say that experience with the constitutionalizing of government procedures suggests that the ultimate additional cost in terms of money and administrative burden would not be insubstantial. Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision. But the Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed. At some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost. Significantly, the cost of protecting those whom the preliminary administrative process has identified as likely to be found undeserving may in the end come out of the pockets of the deserving since resources available for any particular program of social welfare are not unlimited. But more is implicated in cases of this type than ad hoc weighing of fiscal and administrative burdens against the interests of a particular category of claimants. The ultimate balance involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness. We reiterate the wise admonishment of Mr. Justice Frankfurter that differences in the origin and function of administrative agencies "preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts." *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940). The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances. The essence of due process is the requirement that "a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it." *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. at 171-172 (Frankfurter, J., concurring). All that is necessary is that the procedures be tailored, in light of the decision to be made, to "the capacities and circumstances of those who are to be heard," *Goldberg v. Kelly*, 397 U.S. at 268-269, to insure that they are given a meaningful opportunity to present their case. In assessing what process is due in this case, substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of social welfare programs that the procedures they have provided assure fair consideration of the entitlement claims of individuals. *See Arnett v. Kennedy*, 416 U.S. at 202 (White, J., concurring in part and dissenting in part). This is especially so where, as here, the prescribed procedures not only provide the claimant with an effective process for asserting his claim prior to any administrative action, but also assure a right to an evidentiary hearing, as well as to subsequent judicial review, before the denial of his claim becomes final. *Cf. Boddie v. Connecticut*, 401 U.S. 371, 378 (1971).

We conclude that an evidentiary hearing is not required prior to the termination of disability benefits and that the present administrative procedures fully comport with due process. * * *

Mr. Justice Stevens took no part in the consideration or decision of this case.

Mr. Justice Brennan, with whom Mr. Justice Marshall concurs, dissenting.

For the reasons stated in my dissenting opinion in *Richardson v. Wright*, 405 U.S. 208, 212 (1972), I agree with the District Court and the Court of Appeals that, prior to termination of benefits, Eldridge must be afforded an evidentiary hearing of the type required for welfare beneficiaries . . . . *See Goldberg v. Kelly*, 397 U.S. 254 (1970). I would add that the Court's consideration that a discontinuance of disability benefits may cause the recipient to suffer only a limited deprivation is no argument. It is speculative. Moreover, the very legislative determination to provide disability benefits, without any prerequisite determination of need in fact, presumes a need by the

recipient which is not this Court's function to denigrate. Indeed, in the present case, it is indicated that because disability benefits were terminated there was a foreclosure upon the Eldridge home and the family's furniture was repossessed, forcing Eldridge, his wife, and their children to sleep in one bed. Tr. of Oral Arg. 39, 47-48. Finally, it is also no argument that a worker, who has been placed in the untenable position of having been denied disability benefits, may still seek other forms of public assistance.

Jerry L. Mashaw, *The Supreme Court's Due Process Calculus – Three Factors in Search of a Theory of Value*
44 University of Chicago Law Review 28 (1976)

The landmark case of *Goldberg v. Kelly* . . . suggested, in its specification of the constitutionally requisite elements of adjudicatory procedure, that the Court was prepared to assume a highly interventionist posture [with respect to due process review of administrative action]. What followed was a "due process revolution"—a flood of cases seeking to extend, or simply to apply, *Goldberg's* precepts. [But, although] *Goldberg* may have indicated the Court's willingness to impose a detailed model of requisite adjudicatory procedure upon a particular administrative function, [the Court never suggested] that a single model is readily and consistently applicable to all administrative functions. * * *

In . . . *Mathews v. Eldridge*, Justice Powell's majority opinion articulates a set of criteria with a comprehensiveness that suggests a preliminary integration of the Court's recent efforts. In the majority's words, . . . the Court must consider:

> first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requisites would entail.

Although this functional formulation impliedly invites an intrusive, particularistic review and specification of procedures, it is tempered by judicial restraint. "In assessing what process is due in this case, substantial weight must be given to the good-faith judgment of the individuals charged by Congress with the administration of the social welfare system that the procedure they have provided assure fair consideration of the entitlement claims of individuals."

The thesis of this article is that the *Eldridge* approach is unsatisfactory both as employed in that case and as a general formulation of due process review of administrative procedures. The failing of *Eldridge* is its focus on questions of technique rather than on questions of value. That focus, it is argued, generates an inquiry that is incomplete because unresponsive to the full range of concerns embodied in the due process clause. * * *

The Supreme Court's analysis in *Eldridge* is not informed by systematic attention to any theory of the values underlying due process review. The approach is implicitly utilitarian but incomplete, and the Court overlooks alternative theories that might have yielded fruitful inquiry. My purpose is, first, to articulate the limits of the Court's utilitarian approach, both in Eldridge and as a general schema for evaluating administrative procedures, and second, to indicate the strengths and weaknesses of three alternative theories – individual dignity, equality, and tradition. * * *

A. Utilitarianism

Utility theory suggests that the purpose of decisional procedures – like that of social action generally – is to maximize social welfare. Indeed, the three-factor analysis enunciated in *Eldridge* appears to be a type of utilitarian, social welfare function. That function first takes into account the social value at stake in a legitimate private claim; it discounts that value by the probability that it will be preserved through the available administrative procedures, and it then subtracts from that discounted value the social cost of introducing additional procedures. When combined with the institutional posture of judicial self-restraint, utility theory can be said to yield the following plausible decision-rule: "Void procedures for lack of due process only when alternative procedures would so substantially increase social welfare that their rejection seems irrational."

The utilitarian calculus is not, however, without difficulties. The *Eldridge* Court conceives of the values of procedure too narrowly: it views the sole purpose of procedural protections as enhancing accuracy, and thus limits its calculus to the benefits or costs that flow from correct or incorrect decisions. No attention is paid to "process values" that might inhere in oral proceedings or to the demoralization costs that may result from the grant-withdrawal-grant-withdrawal sequence to which claimants like *Eldridge* are subjected. Perhaps more important, as the Court seeks to make sense of a calculus in which accuracy is the sole goal of procedure, it tends erroneously to characterize disability hearings as concerned almost exclusively with medical impairment and thus concludes that such bearings involve only medical evidence, whose reliability would be little enhanced by oral procedure. As applied by the *Eldridge* Court the utilitarian calculus tends, as cost-benefit analyses typically do, to "dwarf soft variables" and to ignore complexities and ambiguities.

The problem with a utilitarian calculus is not merely that the Court may define the relevant costs and benefits too narrowly. However broadly conceived, the calculus asks unanswerable questions. For example, what is the social value, and the social cost, of continuing disability payments until after an oral hearing for persons initially determined to be ineligible? Answers to those questions require a technique for measuring the social value and social cost of government income transfers, but no such technique exists. Even if such formidable tasks of social accounting could be accomplished, the effectiveness of oral hearings in forestalling the losses that result from erroneous terminations would remain uncertain. In the face of these pervasive indeterminacies the *Eldridge* Court was forced to retreat to a presumption of constitutionality.

Finally, it is not clear that the utilitarian balancing analysis asks the constitutionally relevant questions. The due process clause is one of those Bill of Rights protections meant to insure individual liberty in the face of contrary collective action. Therefore, a collective legislative or administrative decision about procedure, one arguably reflecting the intensity of the contending social values and representing an optimum position from the contemporary social perspective, cannot answer the constitutional question of whether due process has been accorded. A balancing analysis that would have the Court merely redetermine the question of social utility is similarly inadequate. There is no reason to believe that the Court has superior competence or legitimacy as a utilitarian balancer except as it performs its peculiar institutional role of insuring that libertarian values are considered in the calculus of decision. * * *

B. Individual Dignity

* * * State coercion must be legitimized, not only by acceptable substantive policies, but also by political processes that respond to a democratic morality's demand for participation in decisions affecting individual and group interests. At the level of individual administrative decisions this demand appears in both the layman's and the lawyer's language as the right to a "hearing" or "to be heard," normally meaning orally and in person. To accord an individual less when his property or status is at stake requires justification, not only because he might contribute to accurate determinations, but also because a lack of personal participation causes alienation and a loss of that dignity and self-respect that society properly deems independently valuable.

The obvious difficulty with a dignitary theory of procedural due process lies in defining operational limits on the procedural claims it fosters. In its purest form the theory would suggest that decisions affecting individual interests should be made only through procedures acceptable to the person affected. This purely subjective standard of procedural due process cannot be adopted: an individual's claim to a "nonalienating" procedure is not ranked ahead of all other social values.

The available techniques for limiting the procedural claims elicited by the dignitary theory, however, either appear arbitrary or render the theory wholly inoperative. One technique is to curtail the class of substantive claims in which individuals can be said to have a right to what they consider an acceptable procedure. The "life, liberty, or property" language of the due process clause suggests such a limitation, but experience with this classification of interests has been disappointing. Any standard premised simply on preexisting legal rights renders a claimant's quest for due process, as such, either unnecessary or hopeless. Another technique for confining the dignitary theory is to define "nonalienating" procedure as any procedure that is formulated democratically. The troublesome effect of this limitation is that no procedures that are legislatively authorized can be said to encroach on individual dignity.

Notwithstanding its difficulties, the dignitary theory of due process might have contributed significantly to the *Eldridge* analysis. The questions of procedural "acceptability" which the theory poses may initially seem vacuous or at best intuitive, but they suggest a broader sensitivity than the utilitarian factor analysis to the nature of governmental decisions. Whereas the utilitarian approach seems to require an estimate of the quantitative value of the claim, the dignitary approach suggests that the Court develop a qualitative appraisal of the type of administrative decision involved. While the disability decision in *Eldridge* may be narrowly characterized as a decision about the receipt of money payments, it may also be considered from various qualitative perspectives which seem pertinent in view of the general structure of the American income-support system.

That system suggests that a disability decision is a judgment of considerable social significance, and one that the claimant should rightly perceive as having a substantial moral content. The major cash income-support programs determine eligibility, not only on the basis of simple insufficiency of income, but also, or exclusively, on the basis of a series of excuses for partial or total nonparticipation in the work force: agedness, childhood, family responsibility, injury, disability. A grant under any of these programs is an official, if sometimes grudging, stamp of approval of the claimant's status as a partially disabled worker or nonworker. It proclaims, in effect, that those who obtain it have encountered one of the politically legitimate hazards to self-sufficiency in a market economy. The recipients, therefore, are entitled to society's support. Conversely, the denial of an income-maintenance claim implies that the claim is socially illegitimate, and the claimant, however impecunious, is not excused from normal work force status.

These moral and status dimensions of the disability decision indicate that there is more at stake in disability claims than temporary loss of income. They also tend to put the disability decision in a framework that leads away from the superficial conclusion that disability decisions are a routine matter of evaluating medical evidence. Decisions with substantial "moral worth" connotations are generally expected to be highly individualized and attentive to subjective evidence. The adjudication of such issues on the basis of documents submitted largely by third parties and by adjudicators who have never confronted the claimant seems inappropriate. Instead, a court approaching an analysis of the disability claims process from the dignitary perspective might emphasize those aspects of disability decisions that focus on a particular claimant's vocational characteristics, his unique response to his medical condition, and the ultimate predictive judgment of whether the claimant should be able to work.

C. Equality

* * * Notions of equality can . . . significantly inform the evaluation of any administrative

process. One question we might ask is whether an investigative procedure is designed in a fashion that systematically excludes or undervalues evidence that would tend to support the position of a particular class of parties. If so, those parties might have a plausible claim that the procedure treated them unequally. Similarly, in a large-scale inquisitorial process involving many adjudicators, the question that should be posed is whether like cases receive like attention and like evidentiary development so that the influence of such arbitrary factors as location are minimized. In order to take such equality issues into account, we need only to broaden our due process horizons to include elements of procedural fairness beyond those traditionally associated with adversary proceedings. These two inquiries might have been pursued fruitfully in *Eldridge*. First, is the state agency system of decision making, which is based on documents, particularly disadvantageous for certain classes of claimants? There is some tentative evidence that it is. Cases such as *Eldridge* involving muscular or skeletal disorders, neurological problems, and multiple impairments, including psychological overlays, are widely believed to be both particularly difficult, due to the subjectivity of the evidence, and particularly prone to be reversed after oral hearing.

Second, does the inquisitorial process at the state agency level tend to treat like cases alike? . . . According to [a General Accounting Office] study, many, perhaps half, of the decisions are made on the basis of records that other adjudicators consider so inadequate that a decision could not be rendered. The relevance of such state agency variance to *Eldridge's* claim is twofold: first, it suggests that state agency determinations are unreliable and that further development at the hearing stage might substantially enhance their reliability; alternatively, it may suggest that the hierarchical or bureaucratic model of decision making, with overhead control for consistency, does not accurately describe the Social Security disability system. * * *

D. Tradition or Evolution

Judicial reasoning, including reasoning about procedural due process, is frequently and self-consciously based on custom or precedent. In part, reliance on tradition or "authority" is a court's institutional defense against illegitimacy in a political democracy. But tradition serves other values, not the least of which are predictability and economy of effort. More importantly, the inherently conservative technique of analogy to custom and precedent seems essential to the evolutionary development and the preservation of the legal system. Traditional procedures are legitimate not only because they represent a set of continuous expectations, but because the body politic has survived their use.

The use of tradition as a guide to fundamental fairness is vulnerable, of course, to objection. Since social and economic forces are dynamic, the processes and structures that proved functional in one period will not necessarily serve effectively in the next. Indeed, evolutionary development may as often end in the extinction of a species as in adaptation and survival. For this reason alone tradition can serve only as a partial guide to judgment.

Furthermore, it may be argued that reasoning by analogy from traditional procedures does not actually provide a perspective on the values served by due process. Rather, it is a decisional technique that requires a specification of the purposes of procedural rules merely in order that the decision maker may choose from among a range of authorities or customs the particular authority or custom most analogous to the procedures being evaluated.

This objection to tradition as a theory of justification is weighty, but not devastating. What is asserted by an organic or evolutionary theory is that the purposes of legal rules cannot be fully known. Put more cogently, while procedural rules, like other legal rules, should presumably contribute to the maintenance of an effective social order, we cannot expect to know precisely how they do so and what the long-term effects of changes or revisions might be. Our constitutional stance should therefore be preservative and incremental, building carefully, by analogy, upon traditional modes of operation. So viewed, the justification "we have always done it that way" is not so much a retreat from reasoned and purposive decision making as a profound acknowledgment

of the limits of instrumental rationality.

Viewed from a traditionalist's perspective, the Supreme Court's opinion in *Eldridge* may be said to rely on the traditional proposition that property interests may be divested temporarily without hearing, provided a subsequent opportunity for contest is afforded. *Goldberg v. Kelly* is deemed an exceptional case, from which *Eldridge* is distinguished. * * *

Conclusion

The preceding discussion has emphasized the way that explicit attention to a range of values underlying due process of law might have led the *Eldridge* Court down analytic paths different from those that appear in Justice Powell's opinion. The discussion has largely ignored, however, arguments that would justify the result that the Court reached in terms of the alternative value theories here advanced. Those arguments are now set forth.

First, focus on the dignitary aspects of the disability decision can hardly compel the conclusion that an oral hearing is a constitutional necessity prior to the termination of benefits when a full hearing is available later. Knowledge that an oral hearing will be available at some point should certainly lessen disaffection and alienation. Indeed, Eldridge seemed secure in the knowledge that a just procedure was available. His desire to avoid taking a corrective appeal should not blind us to the support of dignitary values that the de novo appeal provides.

Second, arguments premised on equality do not necessarily carry the day for the proponent of prior hearings. The Social Security Administration's attempt to routinize and make consistent hundreds of thousands of decisions in a nationwide income-maintenance program can be criticized both for its failures in its own terms and for its tendency to ignore the way that disability decisions impinge upon perceptions of individual moral worth. On balance, however, the program that Congress enacted contains criteria that suggest a desire for both consistency and individualization. No adjudicatory process can avoid tradeoffs between the pursuit of one or the other of these goals. * * *

Explicit and systematic attention to the values served by a demand for due process nevertheless remains highly informative in *Eldridge* and in general. The use of analogy to traditional procedures might have helped rationalize and systematize a concern for the "desperation" of claimants that seems as impoverished in *Eldridge* as it seems profligate in *Goldberg*; and the absence in *Eldridge* of traditionalist, dignitary, or egalitarian considerations regarding the disability adjudication process permitted the Court to overlook questions of both fact and value – questions that, on reflection, seem important. The structure provided by the Court's three factors is an inadequate guide for analysis because its neutrality leaves it empty of suggestive value perspectives.

Furthermore, an attempt by the Court to articulate a set of values that informs due process decision making might provide it with an acceptable judicial posture from which to review administrative procedures. The *Goldberg* decision's approach to prescribing due process – specification of the attributes of adjudicatory hearings by analogy to judicial trial – makes the Court resemble an administrative engineer with an outdated professional education. It is at once intrusive and ineffectual. Retreating from this stance, the *Eldridge* Court relies on the administrator's good faith – an equally troublesome posture in a political system that depends heavily on judicial review for the protection of countermajoritarian values.

The path to a more appropriate and successful judicial role may lie in giving greater attention to the elaboration of the due process implications of the values that have been discussed. If the Court provided a structure of values within which procedures would be reviewed, it could then demand that administrators justify their processes in terms of the degree to which they support the elaborated value structure. The Court would have to be satisfied that the administrator had carefully considered the effects of his chosen procedures on the relevant constitutional values and had made reasonable judgments concerning those effects. * * *

The Opportunity to be Heard: A Problem

On Friday, Sandra Miller brought her three children, Cory, Thomas, and Dakota, to the Children's Hospital for physical examinations, as requested by Owen Scheer, a social worker from the Lewis & Clark County Children and Family Services Agency. Scheer made the request in connection with allegations of abuse regarding the younger child, Cory. Miller's attorney, Bob Krasne, accompanied her to the hospital.

At the hospital, Scheer met with a hospital social worker. Krasne was excluded from the meeting, at which Scheer told the hospital social worker "what he was looking for."

Dr. Henry, the attending physician, specifically gave Krasne permission to be present at the examination to prevent Scheer from making improper suggestions. Krasne waited in an adjacent hall with Scheer. After fifteen minutes, Scheer attempted, but failed, to have a hospital security guard exclude Krasne from the area.

Dr. Henry had no initial findings as to the two older children, but decided to order x-rays of all three children because of a suspicious bruise he found on Cory's back. The x-rays revealed nothing. Henry reported that his findings were negative as to Thomas and Dakota and that he could not confirm abuse as the cause of the bruise on Cory's back.

After hearing Henry's report, Scheer told Krasne and Miller that he was going to call City Attorney Deborah Mazur to get permission for Miller to leave with her children. This he did not do. Instead, Scheer asked Mazur to petition Juvenile Court Judge Sheppard for an order to remove the children from Miller's custody. Scheer misrepresented to Mazur the nature of Dr. Henry's report, and failed to inform her that Krasne was available. Krasne had asked for access to Scheer's phone conversation but was refused access by a security guard. After one hour, Krasne and Miller were informed by Mazur that Judge Sheppard had granted a restraining order.

On hearing the news, Miller became distraught; meanwhile, security guards physically restrained Krasne and then escorted him to the exit.

A shelter hearing was held on Monday, after which the three children were returned to Miller. During the intervening weekend, Scheer ordered the Children's Shelter to deny Miller access to her children despite a court order to the contrary.

Scheer and the Agency complied with all the procedural requirements of Pennsylvania's Juvenile Act in obtaining the restraining order. An *ex parte* hearing is allowed under the Act. The county child welfare agency must present a petition to a judge. The petition must allege facts that indicate that the child would not be safe in parental custody until the shelter hearing occurs. The shelter hearing must occur within 72 hours of the issuance of the restraining order. The Agency is not required to post a bond in seeking the restraining order.

What, if any, due process challenge could Miller make to the seizure of her children?

What if Dr. Henry had been able to confirm abuse and he informed Scheer, but Scheer then acted as above (telling Krasne and Miller that he would call the City Attorney to get permission for Miller to leave with her children, actually asking her to petition for an emergency order, etc.) – would the due process challenge play out the same way?

Ashcroft v. Iqbal
556 U.S. ___, 129 S.Ct. 1937 (2009)

Justice Kennedy delivered the opinion of the Court.

Respondent Javaid Iqbal is a citizen of Pakistan and a Muslim. In the wake of the September 11, 2001, terrorist attacks he was arrested in the United States on criminal charges and detained by federal officials. Respondent claims he was deprived of various constitutional protections while in federal custody. To redress the alleged deprivations, respondent filed a complaint against numerous federal officials, including John Ashcroft, the former Attorney General of the United States, and Robert Mueller, the Director of the Federal Bureau of Investigation (FBI). Ashcroft and Mueller are the petitioners in the case now before us. As to these two petitioners, the complaint alleges that they adopted an unconstitutional policy that subjected respondent to harsh conditions of confinement on account of his race, religion, or national origin.

In the District Court petitioners raised the defense of qualified immunity and moved to dismiss the suit, contending the complaint was not sufficient to state a claim against them. The District Court denied the motion to dismiss, concluding the complaint was sufficient to state a claim despite petitioners' official status at the times in question. Petitioners brought an interlocutory appeal in the Court of Appeals for the Second Circuit. The court, without discussion, assumed it had jurisdiction over the order denying the motion to dismiss; and it affirmed the District Court's decision.

Respondent's account of his prison ordeal could, if proved, demonstrate unconstitutional misconduct by some governmental actors. But the allegations and pleadings with respect to these actors are not before us here. This case instead turns on a narrower question: Did respondent, as the plaintiff in the District Court, plead factual matter that, if taken as true, states a claim that petitioners deprived him of his clearly established constitutional rights. We hold respondent's pleadings are insufficient.

I

Following the 2001 attacks, the FBI and other entities within the Department of Justice began an investigation of vast reach to identify the assailants and prevent them from attacking anew. The FBI dedicated more than 4,000 special agents and 3,000 support personnel to the endeavor. By September 18 “the FBI had received more than 96,000 tips or potential leads from the public.” Dept. of Justice, Office of Inspector General, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* 1, 11-12 (Apr. 2003) (hereinafter OIG Report).

In the ensuing months the FBI questioned more than 1,000 people with suspected links to the attacks in particular or to terrorism in general. Of those individuals, some 762 were held on immigration charges; and a 184-member subset of that group was deemed to be “of ‘high interest’” to the investigation. The high-interest detainees were held under restrictive conditions designed to prevent them from communicating with the general prison population or the outside world.

Respondent was one of the detainees. According to his complaint, in November 2001 agents of the FBI and Immigration and Naturalization Service arrested him on charges of fraud in relation to identification documents and conspiracy to defraud the United States. Pending trial for those crimes, respondent was housed at the Metropolitan Detention Center (MDC) in Brooklyn, New York. Respondent was designated a person “of high interest” to the September 11 investigation and in January 2002 was placed in a section of the MDC known as the Administrative Maximum Special Housing Unit (ADMAX SHU). As the facility's name indicates, the ADMAX SHU incorporates the maximum security conditions allowable under Federal Bureau of Prison regulations. ADMAX SHU detainees were kept in lockdown 23 hours a day, spending the remaining hour outside their cells in handcuffs and leg irons accompanied by a four-officer escort.

Respondent pleaded guilty to the criminal charges, served a term of imprisonment, and was removed to his native Pakistan. He then filed a *Bivens* action in the United States District Court for the Eastern District of New York against 34 current and former federal officials and 19 "John Doe" federal corrections officers. See *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971). The defendants range from the correctional officers who had day-to-day contact with respondent during the term of his confinement, to the wardens of the MDC facility, all the way to petitioners – officials who were at the highest level of the federal law enforcement hierarchy. First Amended Complaint in No. 04-CV-1809 (JG)(JA), ¶¶ 1011 (hereinafter Complaint).

The 21-cause-of-action complaint does not challenge respondent's arrest or his confinement in the MDC's general prison population. Rather, it concentrates on his treatment while confined to the ADMAX SHU. The complaint sets forth various claims against defendants who are not before us. For instance, the complaint alleges that respondent's jailors "kicked him in the stomach, punched him in the face, and dragged him across" his cell without justification, subjected him to serial strip and body-cavity searches when he posed no safety risk to himself or others, and refused to let him and other Muslims pray because there would be "[n]o prayers for terrorists."

The allegations against petitioners are the only ones relevant here. The complaint contends that petitioners designated respondent a person of high interest on account of his race, religion, or national origin, in contravention of the First and Fifth Amendments to the Constitution. The complaint alleges that "the [FBI], under the direction of Defendant MUELLER, arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11." It further alleges that "[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were 'cleared' by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001." Lastly, the complaint posits that petitioners "each knew of, condoned, and willfully and maliciously agreed to subject" respondent to harsh conditions of confinement "as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest." The pleading names Ashcroft as the "principal architect" of the policy and identifies Mueller as "instrumental in [its] adoption, promulgation, and implementation."

Petitioners moved to dismiss the complaint for failure to state sufficient allegations to show their own involvement in clearly established unconstitutional conduct. The District Court denied their motion. [Relying on *Conley v. Gibson*, 355 U.S. 41 (1957) and] [a]ccepting all of the allegations in respondent's complaint as true, the court held that "it cannot be said that there [is] no set of facts on which [respondent] would be entitled to relief as against" petitioners. Invoking the collateral-order doctrine petitioners filed an interlocutory appeal in the United States Court of Appeals for the Second Circuit. While that appeal was pending, this Court decided *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007), which discussed the standard for evaluating whether a complaint is sufficient to survive a motion to dismiss.

The Court of Appeals . . . concluded that *Twombly* called for a "flexible 'plausibility standard,' which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*." The court found that petitioners' appeal did not present one of "those contexts" requiring amplification. As a consequence, it held respondent's pleading adequate to allege petitioners' personal involvement in discriminatory decisions which, if true, violated clearly established constitutional law.

Judge Cabranes concurred [but] expressed concern at the prospect of subjecting high-ranking Government officials – entitled to assert the defense of qualified immunity and charged with responding to "a national and international security emergency unprecedented in the history of the American Republic" – to the burdens of discovery on the basis of a complaint as nonspecific as respondent's. . . .

III

In *Twombly*, the Court found it necessary first to discuss the antitrust principles implicated by the complaint. Here too we begin by taking note of the elements a plaintiff must plead to state a claim of unconstitutional discrimination against officials entitled to assert the defense of qualified immunity.

In *Bivens* . . . this Court "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." *Correctional Services Corp.* v. *Malesko*, 534 U.S. 61, 66 (2001). Because implied causes of action are disfavored, the Court has been reluctant to extend *Bivens* liability "to any new context or new category of defendants." [W]hile we have allowed a *Bivens* action to redress a violation of the equal protection component of the Due Process Clause of the Fifth Amendment, see *Davis* v. *Passman*, 442 U.S. 228 (1979), we have not found an implied damages remedy under the Free Exercise Clause. Indeed, we have declined to extend *Bivens* to a claim sounding in the First Amendment. *Bush* v. *Lucas*, 462 U.S. 367 (1983). [W]e assume, without deciding, that respondent's First Amendment claim is actionable under *Bivens*.

In the limited settings where *Bivens* does apply, the implied cause of action is the "federal analog to suits brought against state officials under Rev. Stat. §1979, 42 U. S. C. §1983." Based on the rules our precedents establish, respondent correctly concedes that Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*. See *Monell* v. *New York City Dept. of Social Servs.*, 436 U.S. 658, 691 (1978) (finding no vicarious liability for a municipal "person" under 42 U. S. C. §1983); see also *Dunlop* v. *Munroe*, 7 Cranch 242, 269 (1812) (a federal official's liability "will only result from his own neglect in not properly superintending the discharge" of his subordinates' duties); *Robertson* v. *Sichel*, 127 U.S. 507, 515-16 (1888) ("A public officer or agent is not responsible for the misfeasances or position wrongs, or for the nonfeasances, or negligences, or omissions of duty, of the subagents or servants or other persons properly employed by or under him, in the discharge of his official duties"). Because vicarious liability is inapplicable to *Bivens* and §1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution.

The factors necessary to establish a *Bivens* violation will vary with the constitutional provision at issue. Where the claim is invidious discrimination in contravention of the First and Fifth Amendments, our decisions make clear that the plaintiff must plead and prove that the defendant acted with discriminatory purpose. *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U.S. 520, 540-41 (1993) (First Amendment); *Washington* v. *Davis*, 426 U.S. 229, 240 (1976) (Fifth Amendment). Under extant precedent purposeful discrimination requires more than "intent as volition or intent as awareness of consequences." *Personnel Administrator of Mass.* v. *Feeney*, 442 U.S. 256, 279 (1979). It instead involves a decisionmaker's undertaking a course of action "'because of,' not merely 'in spite of,' [the action's] adverse effects upon an identifiable group." It follows that, to state a claim based on a violation of a clearly established right, respondent must plead sufficient factual matter to show that petitioners adopted and implemented the detention policies at issue not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion, or national origin.

Respondent disagrees. He argues that, under a theory of "supervisory liability," petitioners can be liable for "knowledge and acquiescence in their subordinates' use of discriminatory criteria to make classification decisions among detainees." That is to say, respondent believes a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution. We reject this argument. Respondent's conception of "supervisory liability" is inconsistent with his accurate stipulation that petitioners may not be held accountable for the misdeeds of their agents. In a § 1983 suit or a *Bivens* action – where masters do not answer for the

torts of their servants – the term "supervisory liability" is a misnomer. Absent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct. In the context of determining whether there is a violation of clearly established right to overcome qualified immunity, purpose rather than knowledge is required to impose *Bivens* liability on the subordinate for unconstitutional discrimination; the same holds true for an official charged with violations arising from his or her superintendent responsibilities.

IV

A

We turn to respondent's complaint. Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." As the Court held in *Twombly*, the pleading standard Rule 8 announces does not require "detailed factual allegations," but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement."

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief."

Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. (Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we "are not bound to accept as true a legal conclusion couched as a factual allegation"). Rule 8 marks a notable and generous departure from the hypertechnical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not "show[n]" – "that the pleader is entitled to relief." Fed. Rule Civ. Proc. 8(a)(2).

In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Our decision in *Twombly* illustrates the two-pronged approach. There, we considered the sufficiency of a complaint alleging that incumbent telecommunications providers had entered an agreement not to compete and to forestall competitive entry, in violation of the Sherman Act, 15 U. S. C. §1. Recognizing that §1 enjoins only anticompetitive conduct "effected by a contract, combination, or conspiracy," the plaintiffs in *Twombly* flatly pleaded that the defendants "ha[d] entered into a contract, combination or conspiracy to prevent competitive entry . . . and ha[d] agreed not to compete with one another." The complaint also alleged that the defendants' "paral-

lel course of conduct . . . to prevent competition" and inflate prices was indicative of the unlawful agreement alleged.

The Court held the plaintiffs' complaint deficient under Rule 8. In doing so it first noted that the plaintiffs' assertion of an unlawful agreement was a "'legal conclusion'" and, as such, was not entitled to the assumption of truth. Had the Court simply credited the allegation of a conspiracy, the plaintiffs would have stated a claim for relief and been entitled to proceed perforce. The Court next addressed the "nub" of the plaintiffs' complaint – the well-pleaded, nonconclusory factual allegation of parallel behavior – to determine whether it gave rise to a "plausible suggestion of conspiracy." Acknowledging that parallel conduct was consistent with an unlawful agreement, the Court nevertheless concluded that it did not plausibly suggest an illicit accord because it was not only compatible with, but indeed was more likely explained by, lawful, unchoreographed free-market behavior. Because the well-pleaded fact of parallel conduct, accepted as true, did not plausibly suggest an unlawful agreement, the Court held the plaintiffs' complaint must be dismissed.

B

Under *Twombly*'s construction of Rule 8, we conclude that respondent's complaint has not "nudged [his] claims" of invidious discrimination "across the line from conceivable to plausible."

We begin our analysis by identifying the allegations in the complaint that are not entitled to the assumption of truth. Respondent pleads that petitioners "knew of, condoned, and willfully and maliciously agreed to subject [him]" to harsh conditions of confinement "as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest." The complaint alleges that Ashcroft was the "principal architect" of this invidious policy and that Mueller was "instrumental" in adopting and executing it. These bare assertions, much like the pleading of conspiracy in *Twombly*, amount to nothing more than a "formulaic recitation of the elements" of a constitutional discrimination claim, namely, that petitioners adopted a policy "'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." As such, the allegations are conclusory and not entitled to be assumed true. To be clear, we do not reject these bald allegations on the ground that they are unrealistic or nonsensical. We do not so characterize them any more than the Court in *Twombly* rejected the plaintiffs' express allegation of a "'contract, combination or conspiracy to prevent competitive entry'" because it thought that claim too chimerical to be maintained. It is the conclusory nature of respondent's allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth.

We next consider the factual allegations in respondent's complaint to determine if they plausibly suggest an entitlement to relief. The complaint alleges that "the [FBI], under the direction of Defendant MUELLER, arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11." It further claims that "[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were 'cleared' by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001." Taken as true, these allegations are consistent with petitioners' purposefully designating detainees "of high interest" because of their race, religion, or national origin. But given more likely explanations, they do not plausibly establish this purpose.

The September 11 attacks were perpetrated by 19 Arab Muslim hijackers who counted themselves members in good standing of al Qaeda, an Islamic fundamentalist group. Al Qaeda was headed by another Arab Muslim – Osama bin Laden – and composed in large part of his Arab Muslim disciples. It should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims. On the facts respondent alleges the arrests Mueller oversaw were likely lawful and justified by his nondiscriminatory intent to detain aliens who were illegally

present in the United States and who had potential connections to those who committed terrorist acts. As between that "obvious alternative explanation" for the arrests, and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible conclusion.

But even if the complaint's well-pleaded facts give rise to a plausible inference that respondent's arrest was the result of unconstitutional discrimination, that inference alone would not entitle respondent to relief. It is important to recall that respondent's complaint challenges neither the constitutionality of his arrest nor his initial detention in the MDC. Respondent's constitutional claims against petitioners rest solely on their ostensible "policy of holding post-September-11th detainees" in the ADMAX SHU once they were categorized as "of high interest." To prevail on that theory, the complaint must contain facts plausibly showing that petitioners purposefully adopted a policy of classifying post-September-11 detainees as "of high interest" because of their race, religion, or national origin.

This the complaint fails to do. Though respondent alleges that various other defendants, who are not before us, may have labeled him a person of "of high interest" for impermissible reasons, his only factual allegation against petitioners accuses them of adopting a policy approving "restrictive conditions of confinement" for post-September-11 detainees until they were "'cleared' by the FBI." Accepting the truth of that allegation, the complaint does not show, or even intimate, that petitioners purposefully housed detainees in the ADMAX SHU due to their race, religion, or national origin. All it plausibly suggests is that the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity. Respondent does not argue, nor can he, that such a motive would violate petitioners' constitutional obligations. He would need to allege more by way of factual content to "nudg[e]" his claim of purposeful discrimination "across the line from conceivable to plausible." *Twombly*, 550 U. S., at 570.

To be sure, respondent can attempt to draw certain contrasts between the pleadings the Court considered in *Twombly* and the pleadings at issue here. In *Twombly*, the complaint alleged general wrongdoing that extended over a period of years, whereas here the complaint alleges discrete wrongs – for instance, beatings – by lower level Government actors. The allegations here, if true, and if condoned by petitioners, could be the basis for some inference of wrongful intent on petitioners' part. Despite these distinctions, respondent's pleadings do not suffice to state a claim. Unlike in *Twombly*, where the doctrine of *respondeat superior* could bind the corporate defendant, here, as we have noted, petitioners cannot be held liable unless they themselves acted on account of a constitutionally protected characteristic. Yet respondent's complaint does not contain any factual allegation sufficient to plausibly suggest petitioners' discriminatory state of mind. His pleadings thus do not meet the standard necessary to comply with Rule 8.

It is important to note, however, that we express no opinion concerning the sufficiency of respondent's complaint against the defendants who are not before us. Respondent's account of his prison ordeal alleges serious official misconduct that we need not address here. Our decision is limited to the determination that respondent's complaint does not entitle him to relief from petitioners.

C

Respondent offers three arguments that bear on our disposition of his case, but none is persuasive.

1

Respondent first says that our decision in *Twombly* should be limited to pleadings made in the context of an antitrust dispute. This argument is not supported by *Twombly* and is incompatible with the Federal Rules of Civil Procedure. Though *Twombly* determined the sufficiency of a complaint sounding in antitrust, the decision was based on our interpretation and application of

Rule 8. That Rule in turn governs the pleading standard "in all civil actions and proceedings in the United States district courts." Fed. Rule Civ. Proc. 1. Our decision in *Twombly* expounded the pleading standard for "all civil actions," and it applies to antitrust and discrimination suits alike.

2

Respondent next implies that our construction of Rule 8 should be tempered where, as here, the Court of Appeals has "instructed the district court to cabin discovery in such a way as to preserve" petitioners' defense of qualified immunity "as much as possible in anticipation of a summary judgment motion." We have held, however, that the question presented by a motion to dismiss a complaint for insufficient pleadings does not turn on the controls placed upon the discovery process. *Twombly*, *supra*, at 559. . . .

Our rejection of the careful-case-management approach is especially important in suits where Government-official defendants are entitled to assert the defense of qualified immunity. The basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including "avoidance of disruptive discovery." There are serious and legitimate reasons for this. If a Government official is to devote time to his or her duties, and to the formulation of sound and responsible policies, it is counterproductive to require the substantial diversion that is attendant to participating in litigation and making informed decisions as to how it should proceed. Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government. The costs of diversion are only magnified when Government officials are charged with responding to, as Judge Cabranes aptly put it, "a national and international security emergency unprecedented in the history of the American Republic."

It is no answer to these concerns to say that discovery for petitioners can be deferred while pretrial proceedings continue for other defendants. It is quite likely that, when discovery as to the other parties proceeds, it would prove necessary for petitioners and their counsel to participate in the process to ensure the case does not develop in a misleading or slanted way that causes prejudice to their position. Even if petitioners are not yet themselves subject to discovery orders, then, they would not be free from the burdens of discovery.

We decline respondent's invitation to relax the pleading requirements on the ground that the Court of Appeals promises petitioners minimally intrusive discovery. That promise provides especially cold comfort in this pleading context, where we are impelled to give real content to the concept of qualified immunity for high-level officials who must be neither deterred nor detracted from the vigorous performance of their duties. Because respondent's complaint is deficient under Rule 8, he is not entitled to discovery, cabined or otherwise.

3

Respondent finally maintains that the Federal Rules expressly allow him to allege petitioners' discriminatory intent "generally," which he equates with a conclusory allegation. It follows, respondent says, that his complaint is sufficiently well pleaded because it claims that petitioners discriminated against him "on account of [his] religion, race, and/or national origin and for no legitimate penological interest." Were we required to accept this allegation as true, respondent's complaint would survive petitioners' motion to dismiss. But the Federal Rules do not require courts to credit a complaint's conclusory statements without reference to its factual context.

It is true that Rule 9(b) requires particularity when pleading "fraud or mistake," while allowing "[m]alice, intent, knowledge, and other conditions of a person's mind [to] be alleged generally." But "generally" is a relative term. In the context of Rule 9, it is to be compared to the particularity requirement applicable to fraud or mistake. Rule 9 merely excuses a party from pleading discriminatory intent under an elevated pleading standard. It does not give him license to evade the less rigid – though still operative – strictures of Rule 8. And Rule 8 does not empower respondent to

plead the bare elements of his cause of action, affix the label "general allegation," and expect his complaint to survive a motion to dismiss.

V

We hold that respondent's complaint fails to plead sufficient facts to state a claim for purposeful and unlawful discrimination against petitioners. The Court of Appeals should decide in the first instance whether to remand to the District Court so that respondent can seek leave to amend his deficient complaint. . . .

Justice Souter, with whom Justice Stevens, Justice Ginsburg, and Justice Breyer join, dissenting. . . .

I

[Justice Souter first argued that Ashcroft and Mueller had conceded that under some circumstances they could be liable as supervisors of the people who actually confined and harmed Iqbal, and he criticized the Court's holding that Ashcroft and Mueller could only be liable for harms that they inflicted.]

II

Given petitioners' concession, the complaint satisfies Rule 8(a)(2). Ashcroft and Mueller admit they are liable for their subordinates' conduct if they "had actual knowledge of the assertedly discriminatory nature of the classification of suspects as being 'of high interest' and they were deliberately indifferent to that discrimination." Iqbal alleges that after the September 11 attacks the Federal Bureau of Investigation (FBI) "arrested and detained thousands of Arab Muslim men," that many of these men were designated by high-ranking FBI officials as being "'of high interest,'" and that in many cases, including Iqbal's, this designation was made "because of the race, religion, and national origin of the detainees, and not because of any evidence of the detainees' involvement in supporting terrorist activity." The complaint further alleges that Ashcroft was the "principal architect of the policies and practices challenged," and that Mueller "was instrumental in the adoption, promulgation, and implementation of the policies and practices challenged." According to the complaint, Ashcroft and Mueller "knew of, condoned, and willfully and maliciously agreed to subject [Iqbal] to these conditions of confinement as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest." The complaint thus alleges, at a bare minimum, that Ashcroft and Mueller knew of and condoned the discriminatory policy their subordinates carried out. Actually, the complaint goes further in alleging that Ashcroft and Muller affirmatively acted to create the discriminatory detention policy. If these factual allegations are true, Ashcroft and Mueller were, at the very least, aware of the discriminatory policy being implemented and deliberately indifferent to it.

Ashcroft and Mueller argue that these allegations fail to satisfy the "plausibility standard" of *Twombly*. They contend that Iqbal's claims are implausible because such high-ranking officials "tend not to be personally involved in the specific actions of lower-level officers down the bureaucratic chain of command." But this response bespeaks a fundamental misunderstanding of the enquiry that *Twombly* demands. *Twombly* does not require a court at the motion-to-dismiss stage to consider whether the factual allegations are probably true. We made it clear, on the contrary, that a court must take the allegations as true, no matter how skeptical the court may be. The sole exception to this rule lies with allegations that are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff's recent trip to Pluto, or experiences in time travel. That is not what we have here.

Under *Twombly*, the relevant question is whether, assuming the factual allegations are true, the plaintiff has stated a ground for relief that is plausible. That is, in *Twombly*'s words, a plaintiff must "allege facts" that, taken as true, are "suggestive of illegal conduct." In *Twombly*, we were faced with allegations of a conspiracy to violate §1 of the Sherman Act through parallel conduct.

The difficulty was that the conduct alleged was "consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market." We held that in that sort of circumstance, "[a]n allegation of parallel conduct is . . . much like a naked assertion of conspiracy in a §1 complaint: it gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of 'entitlement to relief.'" Here, by contrast, the allegations in the complaint are neither confined to naked legal conclusions nor consistent with legal conduct. The complaint alleges that FBI officials discriminated against Iqbal solely on account of his race, religion, and national origin, and it alleges the knowledge and deliberate indifference that, by Ashcroft and Mueller's own admission, are sufficient to make them liable for the illegal action. Iqbal's complaint therefore contains "enough facts to state a claim to relief that is plausible on its face."

I do not understand the majority to disagree with this understanding of "plausibility" under *Twombly*. Rather, the majority discards the allegations discussed above with regard to Ashcroft and Mueller as conclusory, and is left considering only two statements in the complaint: that "the [FBI], under the direction of Defendant MUELLER, arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11," and that "[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were 'cleared' by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001." I think the majority is right in saying that these allegations suggest only that Ashcroft and Mueller "sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity," and that this produced "a disparate, incidental impact on Arab Muslims." And I agree that the two allegations selected by the majority, standing alone, do not state a plausible entitlement to relief for unconstitutional discrimination.

But these allegations do not stand alone as the only significant, nonconclusory statements in the complaint, for the complaint contains many allegations linking Ashcroft and Mueller to the discriminatory practices of their subordinates. See Complaint ¶10, App. to Pet. for Cert. 157a (Ashcroft was the "principal architect" of the discriminatory policy); *id.*, ¶11 (Mueller was "instrumental" in adopting and executing the discriminatory policy); *id.*, ¶96, at 172a-173a (Ashcroft and Mueller "knew of, condoned, and willfully and maliciously agreed to subject" Iqbal to harsh conditions "as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest").

The majority says that these are "bare assertions" that, "much like the pleading of conspiracy in *Twombly*, amount to nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim" and therefore are "not entitled to be assumed true." The fallacy of the majority's position, however, lies in looking at the relevant assertions in isolation. The complaint contains specific allegations that, in the aftermath of the September 11 attacks, the Chief of the FBI's International Terrorism Operations Section and the Assistant Special Agent in Charge for the FBI's New York Field Office implemented a policy that discriminated against Arab Muslim men, including Iqbal, solely on account of their race, religion, or national origin. Viewed in light of these subsidiary allegations, the allegations singled out by the majority as "conclusory" are no such thing. Iqbal's claim is not that Ashcroft and Mueller "knew of, condoned, and willfully and maliciously agreed to subject" him to a discriminatory practice that is left undefined; his allegation is that "they knew of, condoned, and willfully and maliciously agreed to subject" him to a particular, discrete, discriminatory policy detailed in the complaint. Iqbal does not say merely that Ashcroft was the architect of some amorphous discrimination, or that Mueller was instrumental in an ill-defined constitutional violation; he alleges that they helped to create the discriminatory policy he has described. Taking the complaint as a whole, it gives Ashcroft and Mueller "'fair

notice of what the . . . claim is and the grounds upon which it rests.'" *Twombly*, 550 U.S. at 555 (quoting *Conley* v. *Gibson*, 355 U.S. 41, 47 (1957)).

That aside, the majority's holding that the statements it selects are conclusory cannot be squared with its treatment of certain other allegations in the complaint as nonconclusory. For example, the majority takes as true the statement that "[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were 'cleared' by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001." This statement makes two points: (1) after September 11, the FBI held certain detainees in highly restrictive conditions, and (2) Ashcroft and Mueller discussed and approved these conditions. If, as the majority says, these allegations are not conclusory, then I cannot see why the majority deems it merely conclusory when Iqbal alleges that (1) after September 11, the FBI designated Arab Muslim detainees as being of "'high interest'" "because of the race, religion, and national origin of the detainees, and not because of any evidence of the detainees' involvement in supporting terrorist activity," and (2) Ashcroft and Mueller "knew of, condoned, and willfully and maliciously agreed" to that discrimination. By my lights, there is no principled basis for the majority's disregard of the allegations linking Ashcroft and Mueller to their subordinates' discrimination.

I respectfully dissent.

Justice Breyer, dissenting.

I agree with Justice Souter and join his dissent. I write separately to point out that, like the Court, I believe it important to prevent unwarranted litigation from interfering with "the proper execution of the work of the Government." But I cannot find in that need adequate justification for the Court's interpretation of [*Twombly*] and Federal Rule of Civil Procedure 8. The law, after all, provides trial courts with other legal weapons designed to prevent unwarranted interference. As the Second Circuit explained, where a Government defendant asserts a qualified immunity defense, a trial court, responsible for managing a case and "mindful of the need to vindicate the purpose of the qualified immunity defense," can structure discovery in ways that diminish the risk of imposing unwarranted burdens upon public officials. A district court, for example, can begin discovery with lower level government defendants before determining whether a case can be made to allow discovery related to higher level government officials. Neither the briefs nor the Court's opinion provides convincing grounds for finding these alternative case-management tools inadequate, either in general or in the case before us. For this reason, as well as for the independently sufficient reasons set forth in Justice Souter's opinion, I would affirm the Second Circuit.

Notes and Questions

1. Does *Iqbal* simply apply *Twombly*, or does it extend the reasoning of that decision? Put differently, is the result in *Iqbal* foreordained by *Twombly*, or does the *Iqbal* Court have to provide additional analysis to get where it wants to go? Is the *Iqbal* majority's treatment of the relationship between Rule 8 and Rule 9 convincing?

2. What is the status of notice pleading under Rule 8 after these cases? One survey of the post-Iqbal cases suggests a meaningful but not dramatic impact:

> [A]s of July 21, 2010, *Iqbal* had been cited nearly 11,000 times, in case law alone. . . . With respect to district court cases, as of July 21, 2010, there were approximately 4,570 cases listed on Westlaw as either "examining" or "discussing" *Iqbal*. . . .
>
> But the case law to date does not appear to indicate that *Iqbal* has dramatically changed the application of the standards used to determine pleading sufficiency.

> Instead, the appellate courts are taking a subtle and context-specific approach to applying *Twombly* and *Iqbal* and are instructing the district courts to be careful in determining whether to dismiss a complaint. One appellate court has even indicated that *Iqbal* made clear that the circuit's heightened pleading standard in cases brought under 42 U.S.C. § 1983 could no longer be applied. Some courts have emphasized that notice pleading remains intact. Many courts also continue to rely on pre-*Twombly* case law to support some of the propositions cited in *Twombly* and *Iqbal* – that legal conclusions need not be accepted as true and that at least some factual averments are necessary to survive the pleadings stage. In addition, some of the post-*Iqbal* cases dismissing complaints note that those complaints would have been deficient even before *Twombly* and *Iqbal*. And some courts discuss *Twombly* and *Iqbal* but dismiss based on the conclusion that the law does not provide relief, not based on a lack of plausible facts. The approach taken by many courts may suggest that *Twombly* and *Iqbal* are providing a new framework in which to analyze familiar pleading concepts, rather than an entirely new pleading standard.
>
> At the same time, some cases state that *Twombly* and *Iqbal* have raised the bar for defeating a motion to dismiss based on failure to state a claim. Although some of the courts making such statements actually deny motions to dismiss and find the pleadings sufficient, there are also cases in which courts have expressly stated or implied that the claims might have survived before *Twombly* and *Iqbal* but do not survive under current pleading standards. One circuit court recently indicated that *Iqbal* superseded its earlier holding that a "class of one" equal protection claim was adequately pleaded without specifying others similarly situated. At least one district court has gone so far as to intimate that *Iqbal* will cause certain plaintiffs to avoid federal court when possible. While it seems likely that *Twombly* and *Iqbal* have resulted in screening out some claims that might have survived before those cases, it is difficult to determine from the case law whether meritorious claims are being screened under the *Iqbal* framework or whether the new framework is effectively working to sift out only those claims that lack merit earlier in the proceedings.

Andrea Kuperman, Memorandum to Federal Civil Rules Committee: Review of Case Law Applying *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal* (July 26, 2010), http://www. uscourts.gov/uscourts/RulesAndPolicies/rules/Iqbal_memo_072610.pdf

4. Does Justice Breyer's discussion of discovery provide an alternate way to resolve *Iqbal*? Is his resolution likely to be available across the board or only in certain cases? If only in certain cases, what do we do about the rest?

5. Should the Civil Rules Committee attempt to change Rule 8 to nullify or mitigate the impact of *Twombly* and *Iqbal*? If so, how should the committee rewrite the rule?

6. It will take a while for lower court to figure out what *Twombly* and *Iqbal* mean in relation to other precedents, as well as for more other fact patterns. For example:

In *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309 (2011), the Court unanimously affirmed a Ninth Circuit reversal of a dismissal in a securities fraud class action, which are governed by a special heightened pleading standard established by the Private Securities Litigation Reform Act of 1995. The claim was that defendant had not disclosed that it had received adverse incident reports indicating that its zinc-based cold remedy Zicam was linked to anosmia (loss of smell). Defendant argued that it did not have to disclose because the number of reports it had received was not statistically significant, and urged the Court that there should be no duty to disclose until the number of adverse incident reports reached statistical significance. The Court re-

sisted this bright-line rule, noting that this one product accounted for 70% of defendant's sales. Under its "total mix" standard, the huge importance of this product to defendant's success could support a duty to disclose.

Writing for the Court, Justice Sotomayor repeatedly said that plaintiffs' very detailed complaint made the conclusion that defendant should have disclosed "plausible" under the PSLRA standard. Stressing details in the complaint, she invoked *Twombly* and *Iqbal* on the question whether the non-disclosed information was "material" (*i.e*., important and/or relevant):

> Assuming the complaint's allegations to be true, as we must, Matrixx received information that plausibly indicated a reliable causal link between Zicam and anosmia. That information included reports from three medical professionals and researchers about more than 10 patients who had lost their sense of smell after using Zicam. * * * (In addition, during the class period, nine plaintiffs commenced four product liability lawsuits against Matrixx alleging a causal link between Zicam use and anosmia.) Further, Matrixx knew that Linschoten and Dr. Jafek had presented their findings about a causal link between Zicam and anosmia to a national medical conference devoted to treatment of diseases of the nose. * * *
>
> Critically, both Dr. Hirsch and Linschoten had also drawn Matrixx's attention to previous studies that had demonstrated a biological causal link between intranasal application of zinc and anosmia. Before his conversation with Linschoten, Clarot, Matrixx's vice president of research and development, was seemingly unaware of these studies, and the complaint suggests that, as of the class period, Matrixx had not conducted any research of its own relating to anosmia. * * * Accordingly, it can reasonably be inferred from the complaint that Matrixx had no basis for rejecting Dr. Jafek's findings out of hand.
>
> We believe that these allegations suffice to "raise a reasonable expectation that discovery will reveal evidence satisfying the materiality requirement," Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556 (2007), and to "allo[w] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at __ slip op. at 14).

In a footnote, the Court added that "to survive a motion to dismiss, respondents need only allege 'enough facts to state a claim to relief that is plausible on its face.' Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)."

Consider also *Skinner v. Switzer*, 131 S.Ct. 1289 (2011), dealing principally with whether a state prisoner could seek DNA testing in a § 1983 action rather than a petition for habeas corpus, and the Court here answers that this § 1983 action was a proper method. Justice Ginsburg wrote the opinion in this 6-3 decision, and she did not cite either *Twombly* or *Iqbal*:

> Because this case was resolved on a motion to dismiss for failure to state a claim, the question below was "not whether [Skinner] will ultimately prevail" on his procedural due process claim, see Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), but whether his complaint was sufficient to the federal court's threshold, see Swierkiewicz v. Sorema, NA., 534 U.S. 506, 514 (2002). Skinner's complaint is not a model of the careful drafter's art, but under the Federal Rules of Civil Procedure, a complaint need not pin plaintiff's claim for relief to a precise legal theory. Rule 8(a)(2) of the Federal Rules of Civil Procedure generally requires only a "short and plain" statement of the plaintiff's claim, not an exposition of his legal argument.

At least in the Supreme Court, then, *Swierkiewicz* remains a viable authority.

Consider also the comments of Judge William Fletcher (a former civil procedure professor) in *Starr v. Baca*, 633 F.3d 1191, 1204 (9th Cir. 2011):

> The juxtaposition of *Swierkiewicz* and *Erickson*, on the one hand, and *Dura*, *Twombly*, and *Iqbal*, on the other, is perplexing. Even though the Court stated in all five cases that it was applying Rule 8(a), it is hard to avoid the conclusion that, in fact, the Court applied a higher pleading standard in *Dura*, *Twombly*, and *Iqbal*. The Court in *Dura* and *Twombly* appeared concerned that in some complex commercial cases the usual lenient pleading standard under Rule 8(a) gave too much settlement leverage to plaintiffs. That is, if a non-specific complaint was enough to survive a motion to dismiss, plaintiffs would be able to extract undeservedly high settlements from deep-pocket companies. In *Iqbal*, by contrast, the Court was concerned that the usual lenient standard under Rule 8(a) would provide too little protection for high-level executive branch officials who allegedly engaged in misconduct in the aftermath of September 11, 2001. To the extent that we perceive a difference in the application of Rule 8(a) in the two groups of cases, it is difficult to know in cases that come before us whether we should apply the more lenient or the more demanding standard.
>
> But whatever the difference between these cases, we can at least state the following two principles common to all of them. First, allegations in a complaint or counterclaim must be sufficiently detailed to give fair notice to the opposing party of the nature of the claim so that the party may effectively defend against it. Second, the allegations must be sufficiently plausible that it is not unfair to require the opposing party to be subject to the expense of discovery.

For the continued adherence of some lower courts to somewhat receptive attitudes about complaints, see *Hamilton v. Palm*, 621 F.3d 816 (8th Cir. 2010), in which plaintiff alleged that he fell and was injured while working on defendants' house and his complaint said that he was "employed" by defendants. Defendants persuaded the district court to dismiss because plaintiff did not adequately plead a master-servant relationship. The district court said that plaintiff "merely alleges generally that he was Defendants' employee and has not alleged facts to plausibly support such a conclusion." The Court of Appeals concluded that "this was an unwarranted extension of the pleading standards" in *Twombly* and *Iqbal*, and that those two decisions "did not abrogate the notice pleading standard of Rule 8(a)(2)." Defendants' contention that plaintiffs' allegations supported the conclusion he was an independent contractor did not matter. "Common sense and judicial experience counsel that pleading this issue does not require great detail or recitation of all potentially relevant facts in order to put the defendant on notice of a plausible claim." "Hamilton's complaint raised plausible inferences of both employee and independent contractor status. Which inference will prove to be correct is not an issue to be determined by a motion to dismiss."

Consider, finally, the debate between Judges Wood and Posner in the following case:

Swanson v. Citibank, N.A.

614 F.3d 400 (7th Cir. 2010)

Before Easterbrook, Chief Judge, and Posner and Wood, Circuit Judges.

Wood, *Circuit Judge*.

Gloria Swanson sued Citibank, Andre Lanier, and Lanier's employer, PCI Appraisal Services, because she believed that all three had discriminated against her on the basis of her race (African-American) when Citibank turned down her application for a home-equity loan. . . .

Swanson based her complaint on the following set of events, which we accept as true for purposes of this appeal. In February 2009 Citibank announced a plan to make loans using funds that it had received from the federal government's Troubled Assets Relief Program. Encouraged by this prospect, Swanson went to a Citibank branch to apply for a home-equity loan. A representative named Skertich told Swanson that she could not apply alone, because she owned her home jointly with her husband; he had to be present as well. Swanson was skeptical, suspecting that Skertich's demand was a ploy to discourage loan applications from African-Americans. She therefore asked to speak to a manager. When the manager joined the group, Swanson disclosed to both Skertich and the manager that Washington Mutual Bank previously had denied her a home-equity loan. The manager warned Swanson that, although she did not want to discourage Swanson from applying for the loan, Citibank's loan criteria were more stringent than those of other banks.

Still interested, Swanson took a loan application home and returned the next day with the necessary information. She was again assisted by Skertich, who entered the information that Swanson had furnished into the computer. When he reached a question regarding race, Skertich told Swanson that she was not required to respond. At some point during this exchange, Skertich pointed to a photograph on his desk and commented that his wife and son were part African-American.

A few days later Citibank conditionally approved Swanson for a home-equity loan of $50,000. It hired Andre Lanier, who worked for PCI Appraisal Services, to visit Swanson's home for an onsite appraisal. Although Swanson had estimated in her loan application that her house was worth $270,000, Lanier appraised it at only $170,000. The difference was critical: Citibank turned down the loan and explained that its conditional approval had been based on the higher valuation. Two months later Swanson paid for and obtained an appraisal from Midwest Valuations, which thought her home was worth $240,000.

Swanson saw coordinated action in this chain of events, and so she filed a complaint (later amended) charging that Citibank, Lanier, and PCI disfavor providing home-equity loans to African-Americans, and so they deliberately lowered the appraised value of her home far below its actual market value, so that they would have an excuse to deny her the loan. She charges that in so doing, they violated the Fair Housing Act, 42 U.S.C. § 3605, and the Equal Credit Opportunity Act, 15 U.S.C. § 1691(a)(1). The district court granted the defendants' motions to dismiss both theories. . . .

Before turning to the particulars of Swanson's case, a brief review of the standards that apply to dismissals for failure to state a claim is in order. It is by now well established that a plaintiff must do better than putting a few words on paper that, in the hands of an imaginative reader, *might* suggest that something has happened to her that *might* be redressed by the law. *Cf. Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), disapproved by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 563 (2007) ("after puzzling the profession for 50 years, this famous observation [the 'no set of facts' language] has earned its retirement"). The question with which courts are still struggling is how much higher the Supreme Court meant to set the bar, when it decided not only *Twombly*, but also *Erickson v. Pardus*, 551 U.S. 89 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). This is not an easy question to answer, as the thoughtful dissent from this opinion demonstrates. On the one hand, the Supreme Court has adopted a "plausibility" standard, but on the other hand, it has insisted that it is not requiring fact pleading, nor is it adopting a single pleading standard to replace Rule 8, Rule 9, and specialized regimes like the one in the Private Securities Litigation Reform Act ("PSLRA"), 15 U.S.C. § 78u-4(b)(2).

Critically, in none of the three recent decisions--*Twombly*, *Erickson*, or *Iqbal*--did the Court cast any doubt on the validity of Rule 8 of the Federal Rules of Civil Procedure. To the contrary: at all times it has said that it is interpreting Rule 8, not tossing it out the window. It is therefore useful to begin with a look at the language of the rule:

> (a) Claim for Relief. A pleading that states a claim for relief must contain: * * *
>
> (2) a short and plain statement of the claim showing that the pleader is entitled to relief[.]

Fed. R. Civ. P. 8(a)(2). As one respected treatise put it in 2004,

> all that is necessary is that the claim for relief be stated with brevity, conciseness, and clarity …. [T]his portion of Rule 8 indicates that a basic objective of the rules is to avoid civil cases turning on technicalities and to require that the pleading discharge the function of giving the opposing party fair notice of the nature and basis or grounds of the pleader's claim and a general indication of the type of litigation that is involved. . . .

5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1215 at 165-173 (3d ed. 2004).

Nothing in the recent trio of cases has undermined these broad principles. As *Erickson* underscored, "[s]pecific facts are not necessary." The Court was not engaged in a *sub rosa* campaign to reinstate the old fact-pleading system called for by the Field Code or even more modern codes. We know that because it said so in *Erickson*: "the statement need only give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." Instead, the Court has called for more careful attention to be given to several key questions: what, exactly, does it take to give the opposing party "fair notice"; how much detail realistically can be given, and should be given, about the nature and basis or grounds of the claim; and in what way is the pleader expected to signal the type of litigation that is being put before the court?

This is the light in which the Court's references in *Twombly*, repeated in *Iqbal*, to the pleader's responsibility to "state a claim to relief that is plausible on its face" must be understood. "Plausibility" in this context does not imply that the district court should decide whose version to believe, or which version is more likely than not. Indeed, the Court expressly distanced itself from the latter approach in *Iqbal*, "the plausibility standard is not akin to a probability requirement." As we understand it, the Court is saying instead that the plaintiff must give enough details about the subject-matter of the case to present a story that holds together. In other words, the court will ask itself *could* these things have happened, not *did* they happen. For cases governed only by Rule 8, it is not necessary to stack up inferences side by side and allow the case to go forward only if the plaintiff's inferences seem more compelling than the opposing inferences. Compare *Makor Issues & Rights, Ltd. v. Tellabs Inc*., 513 F.3d 702, 705 (7th Cir. 2008) (applying PSLRA standards).

The Supreme Court's explicit decision to reaffirm the validity of *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), which was cited with approval in *Twombly*, indicates that in many straightforward cases, it will not be any more difficult today for a plaintiff to meet that burden than it was before the Court's recent decisions. A plaintiff who believes that she has been passed over for a promotion because of her sex will be able to plead that she was employed by Company X, that a promotion was offered, that she applied and was qualified for it, and that the job went to someone else. That is an entirely plausible scenario, whether or not it describes what "really" went on in this plaintiff's case. A more complex case involving financial derivatives, or tax fraud that the parties tried hard to conceal, or antitrust violations, will require more detail, both to give the opposing party notice of what the case is all about and to show how, in the plaintiff's mind at least, the dots should be connected. Finally, as the Supreme Court warned in *Iqbal* and as we acknowledged later in *Brooks v. Ross*, 578 F.3d 574 (7th Cir. 2009), "abstract recitations of the elements of a cause of action or conclusory legal statements," do nothing to distinguish the particular case that is before the court from every other hypothetically possible case in that field of law. Such statements therefore do not add to the notice that Rule 8 demands.

We realize that one powerful reason that lies behind the Supreme Court's concern about pleading standards is the cost of the discovery that will follow in any case that survives a motion to dismiss on the pleadings. The costs of discovery are often asymmetric, as the dissent points out, and one way to rein them in would be to make it more difficult to earn the right to engage in discovery. That is just what the Court did, by interring the rule that a complaint could go forward if any set of facts at all could be imagined, consistent with the statements in the complaint, that would permit the pleader to obtain relief. Too much chaff was moving ahead with the wheat. But, in other contexts, the Supreme Court has drawn a careful line between those things that can be accomplished by judicial interpretation and those that should be handled through the procedures set up in the Rules Enabling Act, 28 U.S.C. §§ 2071 *et seq.*. In fact, the Judicial Conference's Advisory Committee on Civil Rules is engaged in an intensive study of pleading rules, discovery practice, and the costs of litigation, as its recent 2010 Civil Litigation Conference, held at Duke Law School May 10-11, 2010, demonstrates.

Returning to Swanson's case, we must analyze her allegations defendant-by-defendant. We begin with Citibank. On appeal, Swanson challenges only the dismissal of her Fair Housing Act and fraud claims. The Fair Housing Act prohibits businesses engaged in residential real estate transactions, including "[t]he making … of loans or providing other financial assistance . . . secured by residential real estate," from discriminating against any person on account of race. Swanson's complaint identifies the type of discrimination that she thinks occurs (racial), by whom (Citibank, through Skertich, the manager, and the outside appraisers it used), and when (in connection with her effort in early 2009 to obtain a home-equity loan). This is all that she needed to put in the complaint. See *Swierkiewicz*, 534 U.S. at 511-12 (employment discrimination); see also *Fritz v. Charter Twp. of Comstock*, 592 F.3d 718, 723-24 (6th Cir. 2010); *Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690, 715 (9th Cir. 2009).

The fact that Swanson included other, largely extraneous facts in her complaint does not undermine the soundness of her pleading. She points to Citibank's announced plan to use federal money to make more loans, its refusal to follow through in her case, and Skertich's comment that he has a mixed-race family. She has not pleaded herself out of court by mentioning these facts; whether they are particularly helpful for proving her case or not is another matter that can safely be put off for another day. It was therefore error for the district court to dismiss Swanson's Fair Housing Act claim against Citibank.

Her fraud claim against Citibank stands on a different footing. Rule 9(b) of the Federal Rules of Civil Procedure provides that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Of special relevance here, a plaintiff must plead actual damages arising from her reliance on a fraudulent statement. Without a contract, only out-of-pocket losses allegedly arising from the fraud are recoverable. Swanson asserts that Citibank falsely announced plans to make federal funds available in the form of loans to all customers, when it actually intended to exclude African-American customers from those who would be eligible for the loans. Swanson relied, she says, on that false information when she applied for her home-equity loan. But she never alleged that she lost anything from the process of applying for the loan. We do not know, for example, whether there was a loan application fee, or if Citibank or she covered the cost of the appraisal. This is the kind of particular information that Rule 9 requires, and its absence means that the district court was entitled to dismiss the claim.

We now turn to Swanson's claims against Lanier and PCI. Here again, she pursues only her Fair Housing Act and fraud claims. (The appraisal defendants point out that they do not extend credit, and thus their actions are not covered in any event by the Equal Credit Opportunity Act.) The Fair Housing Act makes it "unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of

race . . . ." The statute goes on to define the term "residential real estate-related transaction" to include "the selling, brokering, or appraising of residential real property." There is an appraisal exemption also, . . . but it provides only that nothing in the statute prohibits appraisers from taking into consideration factors other than race or the other protected characteristics.

Swanson accuses the appraisal defendants of skewing their assessment of her home because of her race. It is unclear whether she believes that they did so as part of a conspiracy with Citibank, or if she thinks that they deliberately undervalued her property on their own initiative. Once again, we find that she has pleaded enough to survive a motion under Rule 12(b)(6). The appraisal defendants knew her race, and she accuses them of discriminating against her in the specific business transaction that they had with her. When it comes to proving her case, she will need to come up with more evidence than the mere fact that PCI (through Lanier) placed a far lower value on her house than Midwest Valuations did. See *Latimore*, 151 F.3d at 715 (need more at the summary judgment stage than evidence of a discrepancy between appraisals). All we hold now is that she is entitled to take the next step in this litigation.

This does not, however, save her common-law fraud claim against Lanier and PCI. She has not adequately alleged that she relied on their appraisal, nor has she pointed to any out-of-pocket losses that she suffered because of it.

We therefore REVERSE the judgment of the district court insofar as it dismissed Swanson's Fair Housing Act claims against all three defendants, and we AFFIRM insofar as it dismissed the common-law fraud claims against all three. Each side will bear its own costs on appeal.

Posner, *Circuit Judge*, dissenting in part.

I join the majority opinion except with respect to reversing the dismissal of the plaintiff's claim of housing discrimination. I have difficulty squaring that reversal with *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), unless *Iqbal* is limited to cases in which there is a defense of official immunity--especially if as in that case it is asserted by very high-ranking officials (the Attorney General of the United States and the Director of the FBI)--because the defense is compromised if the defendants have to respond to discovery demands in a case unlikely to have merit.

The majority opinion does not suggest that the Supreme Court would limit *Iqbal* to immunity cases. The Court said that "our decision in *Twombly* expounded the pleading standard for 'all civil actions.'" It did add that a district judge's promise of minimally intrusive discovery "provides especially cold comfort in this pleading context, where we are impelled to give real content to the concept of qualified immunity for high-level officials who must be neither deterred nor detracted from the vigorous performance of their duties." But this seems just to mean that the Court thought *Iqbal* a strong case for application of the *Twombly* standard, rather than thinking it the only type of discrimination case to which the standard applies.

There is language in my colleagues' opinion to suggest that discrimination cases are outside the scope of *Iqbal*, itself a discrimination case. The opinion says that "a plaintiff who believes that she has been passed over for a promotion because of her sex will be able to plead that she was employed by Company X, that a promotion was offered, that she applied and was qualified for it, and that the job went to someone else." Though this is not a promotion case, the opinion goes on to say that "Swanson's complaint identifies the type of discrimination that she thinks occurs (racial), by whom (Citibank, through Skertich, the manager, and the outside appraisers it used), and when (in connection with her effort in early 2009 to obtain a home equity loan). This is all that she needed to put in the complaint." In contrast, "a more complex case involving financial derivatives, or tax fraud that the parties tried hard to conceal, or antitrust violations, will require more detail, both to give the opposing party notice of what the case is all about and to show how, in the plaintiff's mind at least, the dots should be connected." The "more complex" case to which this passage is referring is *Twombly*, an antitrust case. But *Iqbal*, which charged the defendants with having subjected Pakistani Muslims to harsh conditions of confinement because of their re-

ligion and national origin, was a discrimination case, as is the present case, and was not especially complex.

Suppose this *were* a promotion case, and several people were vying for a promotion, all were qualified, several were men and one was a woman, and one of the men received the promotion. No complexity; yet the district court would "draw on its judicial experience and common sense," to conclude that discrimination would not be a plausible explanation of the hiring decision, without additional allegations.

This case is even stronger for dismissal because it lacks the competitive situation--man and woman, or white and black, vying for the same job and the man, or the white, getting it. . . . "A bank does not announce, 'We are making a $51,000 real estate loan today; please submit your applications, and we'll choose the application that we like best and give that applicant the loan.'" . . . "[A]bsent direct evidence of discrimination, there is no basis for a trier of fact to assume that a decision to deny a loan was motivated by discriminatory animus unless the plaintiff makes a showing that a pattern of lending suggests the existence of discrimination.

There is no allegation that the plaintiff in this case was competing with a white person for a loan. It was the low appraisal of her home that killed her chances for the $50,000 loan that she was seeking. The appraiser thought her home worth only $170,000, and she already owed $146,000 on it (a first mortgage of $121,000 and a home-equity loan of $25,000). A further loan of $50,000 would thus have been undersecured. We must assume that the appraisal was a mistake, and the house worth considerably more, as she alleges. But errors in appraising a house are common because "real estate appraisal is not an exact science"--common enough to have created a market for "Real Estate Appraisers Errors & Omissions" insurance policies. The Supreme Court would consider error the plausible inference in this case, rather than discrimination, for it said in *Iqbal* that "as between that 'obvious alternative explanation' for the [injury of which the plaintiff is complaining] and the purposeful, invidious discrimination [the plaintiff] asks us to infer, discrimination is not a plausible conclusion."

Even before *Twombly* and *Iqbal*, complaints were dismissed when they alleged facts that refuted the plaintiffs' claims. Under the new regime, it should be enough that the allegations render a claim implausible. The complaint alleges that Citibank was the second bank to turn down the plaintiff's application for a home-equity loan. This reinforces the inference that she was not qualified. We further learn that, subject to the appraisal, which had not yet been conducted, Citibank had approved the $50,000 home-equity loan that the plaintiff was seeking on the basis of her representation that her house was worth $270,000. But she didn't think it was worth that much when she applied for the loan. The house had been appraised at $260,000 in 2004, and the complaint alleges that home values had fallen by "only" 16 to 20 percent since. This implies that when she applied for the home-equity loan her house was worth between $208,000 and $218,400--much less than what she told Citibank it was worth.

If the house was worth $208,000, she would have owed a total of $196,000 had she gotten the loan, or just a shade under the market value of the house. If the bank had insisted that she have a 20 percent equity in the house, which would be $41,600, it would have lent her only $20,400 ($166,400--80 percent of $208,000--minus the $146,000 that she already owed on the house). The loan figure rises to $28,720 if the house was worth $218,400 rather than $208,000. In either case a $50,000 loan would have been out of the question, especially in the wake of the financial crash of September 2008, when credit, including home-equity credit, became extremely tight. For it was a home-equity loan that the plaintiff was seeking in early February of 2009, at the nadir of the economic collapse--and seeking it from troubled Citibank, one of the banks that required a federal bailout in the wake of the crash. Financial reports in the weeks surrounding the plaintiff's application make clear the difficulty of obtaining credit from Citibank during that period.

In *Erickson v. Pardus*, 551 U.S. 89 (2007) (per curiam), decided two weeks after *Twombly*, the Supreme Court, without citing *Twombly*, reinstated a prisoner's civil rights suit that had been dismissed on the ground that the allegations of the complaint were "conclusory." The suit had charged deliberate indifference to the plaintiff's need for medical treatment. In the key passage in the Court's opinion, we learn that "the complaint stated that Dr. Bloor's decision to remove the petitioner [that is, the plaintiff] from his prescribed hepatitis C medication was 'endangering [his] life.' It alleged this medication was withheld 'shortly after' petitioner had commenced a treatment program that would take one year, that he was 'still in need of treatment for this disease,' and that the prison officials were in the meantime refusing to provide treatment. *This alone was enough to satisfy Rule 8(a)(2).* Petitioner, in addition, bolstered his claim by making more specific allegations in documents attached to the complaint and in later filings" (emphasis added, record citations omitted). It was reasonable to infer from these allegations, assuming their truth, that the defendants (who included Dr. Bloor, a prison doctor) had acted with deliberate indifference to the petitioner's serious medical need by refusing to provide him with any medical treatment after taking away his medication. Indeed it's difficult (again assuming the truth of the allegations) to imagine an alternative interpretation. Hepatitis C is a serious disease and the prisoner had been put in a treatment program expected to last a year. To refuse him any treatment whatsoever seemed (as the other allegations to which the Court referred confirmed) to be punitive. I think *Erickson* is good law even after *Iqbal*, but I also think it's miles away from a case in which all that's alleged (besides pure speculation about the defendants' motive) is that someone was denied a loan because her house is mistakenly appraised for less than its market value.

The majority opinion relies heavily on *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), cited with approval in *Twombly* (though not cited in *Iqbal*) and not overruled. Although it is regarded in some quarters as dead after *Iqbal*, lower-court judges are not to deem a Supreme Court decision overruled even if it is plainly inconsistent with a subsequent decision. But that principle is not applicable here; *Swierkiewicz* is distinguishable.

The Court rejected a rule that the Second Circuit had created which required "heightened pleading" in Title VII cases. The basic requirement for a complaint ("a short and plain statement of the claim showing that the pleader is entitled to relief") is set forth in Rule 8(a)(2) of the Federal Rules of Civil Procedure. Rule 9 requires heightened pleading (that is, a specific allegation) of certain elements in particular cases, such as fraud and special damages. There is no reference to heightened pleading of discrimination claims, however, and *Swierkiewicz* holds that the judiciary is not authorized to amend Rule 9 without complying with the procedures in the Rules Enabling Act. As the Court explained in *Twombly*, "*Swierkiewicz* did not change the law of pleading, but simply re-emphasized . . . that the Second Circuit's use of a heightened pleading standard for Title VII cases was contrary to the Federal Rules." But Title VII cases are not exempted by *Swierkiewicz* from the doctrine of the *Iqbal* case. *Iqbal* establishes a general requirement of "plausibility" applicable to all civil cases in federal courts.

It does so, however, in opaque language: "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." In statistics the range of probabilities is from 0 to 1, and therefore encompasses "sheer possibility" along with "plausibility." It seems (no stronger word is possible) that what the Court was driving at was that even if the district judge doesn't think a plaintiff's case is more likely than not to be a winner (that is, doesn't think $p > .5$), as long as it is substantially justified that's enough to avert dismissal. But when a bank turns down a loan applicant because the appraisal of the security for the loan indicates that the loan would not be adequately secured, the alternative hypothesis of racial discrimination does not have substantial merit; it is implausible.

Behind both *Twombly* and *Iqbal* lurks a concern with asymmetric discovery burdens and the potential for extortionate litigation . . . that such an asymmetry creates. In most suits against corporations or other institutions, and in both *Twombly* and *Iqbal*--but also in the present case--the

plaintiff wants or needs more discovery of the defendant than the defendant wants or needs of the plaintiff, because the plaintiff has to search the defendant's records (and, through depositions, the minds of the defendant's employees) to obtain evidence of wrongdoing. With the electronic archives of large corporations or other large organizations holding millions of emails and other electronic communications, the cost of discovery to a defendant has become in many cases astronomical. And the cost is not only monetary; it can include, as well, the disruption of the defendant's operations. If no similar costs are borne by the plaintiff in complying with the defendant's discovery demands, the costs to the defendant may induce it to agree early in the litigation to a settlement favorable to the plaintiff.

It is true, as critics of *Twombly* and *Iqbal* point out, that district courts have authority to limit discovery. But especially in busy districts, which is where complex litigation is concentrated, the judges tend to delegate that authority to magistrate judges. And because the magistrate judge to whom a case is delegated for discovery only is not responsible for the trial or the decision and can have only an imperfect sense of how widely the district judge would want the factual inquiry in the case to roam to enable him to decide it, the magistrate judge is likely to err on the permissive side. "One common form of unnecessary discovery (and therefore a ready source of threatened discovery) is delving into ten issues when one will be dispositive. A magistrate lacks the authority to carve off the nine unnecessary issues; for all the magistrate knows, the judge may want evidence on any one of them. So the magistrate stands back and lets the parties have at it. Pursuit of factual and legal issues that will not matter to the outcome of the case is a source of enormous unnecessary costs, yet it is one hard to conquer in a system of notice pleading and even harder to limit when an officer lacking the power to decide the case supervises discovery." Frank H. Easterbrook, "Discovery as Abuse," 69 *B.U. L. Rev*. 635, 639 (1989).

This structural flaw helps to explain and justify the Supreme Court's new approach. It requires the plaintiff to conduct a more extensive precomplaint investigation than used to be required and so creates greater symmetry between the plaintiff's and the defendant's litigation costs, and by doing so reduces the scope for extortionate discovery. If the plaintiff shows that he can't conduct an even minimally adequate investigation without limited discovery, the judge presumably can allow that discovery, meanwhile deferring ruling on the defendant's motion to dismiss. No one has suggested such a resolution for this case.

The plaintiff has an implausible case of discrimination, but she will now be permitted to serve discovery demands that will compel elaborate document review by Citibank and require its executives to sit for many hours of depositions. (Not that the plaintiff is capable of conducting such proceedings as a pro se, but on remand she may--indeed she would be well advised to--ask the judge to help her find a lawyer.) The threat of such an imposition will induce Citibank to consider settlement even if the suit has no merit at all. That is the pattern that the Supreme Court's recent decisions are aimed at disrupting.

We should affirm the dismissal of the suit in its entirety.

Who gets the better of this exchange?

Iqbal and Affirmative Defenses

A question that is percolating through the lower courts is whether *Twombly* affects the pleading of defenses, particularly affirmative defenses. Rule 11 by its terms does apply evenhandedly to plaintiff's and defendant's pleadings. Should *Twombly*? As quoted above, Judge Fletcher thinks that the "plausibility" standard applies equally to counterclaims. The matter continues to be debated in the lower courts. In Hayne v. Green Ford Sales, Inc., 263 F.R.D. 647 (D. Kan. 2009), the court held that the newly-revived pleading standard does apply to affirmative defenses. The court reviewed a number of other decisions coming out different ways on the question, and reasoned as follows (*id*. at 650):

> It makes no sense to find that a heightened pleading standard applies to claims but not to affirmative defenses. In both instances, the purpose of pleading requirements is to provide enough notice to the opposing party that indeed there is some plausible, factual basis for the assertion and not simply a suggestion of possibility that it may apply in the case. Moreover, Fed.R.Civ.P. 8 is consistent in at least [implying] that the pleading requirements for affirmative defenses are essentially the same as for claims for relief. Although Rule 8(c) for affirmative defenses does not contain the same language as 8(a)(2), requiring "a short and plain statement of the claims," 8(b)(1)(A) nevertheless does require a defendant to "state in short and plain terms its defenses to each claim." * * * Applying the standard for heightened pleading to affirmative defenses serves a valid purpose in requiring at least some valid factual basis for pleading an affirmative defense and not adding it to the case simply upon some conjecture that it may somehow apply.

Regarding raising an affirmative defense on a motion to dismiss (p. 214), it may be useful to caution that although the statute of limitations is the leading example of a "built-in affirmative defense," it is not always available on a Rule 12(b)(6) motion. For example, in Joyce v. Armstrong Teasdale, LLP, 635 F.3d 364 (8th Cir. 2011), plaintiff sued his former law firm in 2008 for malpractice allegedly committed in 2000 in connection with drafting a license agreement he signed on Jan. 1, 2001. The district court dismissed, ruling that the five-year statute of limitations barred the claim because plaintiff could understand immediately that the documents transferred the interests in the way he later claimed was malpractice. The pertinent state law did not require the client to double-check on the lawyer, and the complaint alleged that plaintiff continued to be represented by the law firm into 2006. Referring only to the allegations of the complaint, therefore, defendants could not show that the limitations period had run.

Krupski v. Costa Crociere S.p.A.

560 U.S. ___, 130 S.Ct. ___ (2010)

Justice Sotomayor delivered the opinion of the Court.

Rule 15(c) of the Federal Rules of Civil Procedure governs when an amended pleading "relates back" to the date of a timely filed original pleading and is thus itself timely even though it was filed outside an applicable statute of limitations. Where an amended pleading changes a party or a party's name, the Rule requires, among other things, that "the party to be brought in by amendment ... knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity." Rule 15(c)(1)(C). In this case, the Court of Appeals held that Rule 15(c) was not satisfied because the plaintiff knew or should have known of the proper defendant before filing her original complaint. The court also held that relation back was not appropriate because the plaintiff had unduly delayed in seeking to amend. We hold that relation back under Rule 15(c)(1)(C) depends on what the party to be added knew or should have known, not on the amending party's knowledge or its timeliness in seeking to amend the pleading. Accordingly, we reverse the judgment of the Court of Appeals.

I

On February 21, 2007, petitioner, Wanda Krupski, tripped over a cable and fractured her femur while she was on board the cruise ship Costa Magica. Upon her return home, she acquired counsel and began the process of seeking compensation for her injuries. Krupski's passenger ticket -- which explained that it was the sole contract between each passenger and the carrier -- included a variety of requirements for obtaining damages for an injury suffered on board one of the carrier's ships. The ticket identified the carrier as

> "Costa Crociere S.p.A., an Italian corporation, and all Vessels and other ships owned, chartered, operated, marketed or provided by Costa Crociere, S.p.A., and all officers, staff members, crew members, independent contractors, medical providers, concessionaires, pilots, suppliers, agents and assigns onboard said Vessels, and the manufacturers of said Vessels and all their component parts."

The ticket required an injured party to submit "written notice of the claim with full particulars ... to the carrier or its duly authorized agent within 185 days after the date of injury." The ticket further required any lawsuit to be "filed within one year after the date of injury" and to be "served upon the carrier within 120 days after filing." For cases arising from voyages departing from or returning to a United States port in which the amount in controversy exceeded $75,000, the ticket designated the United States District Court for the Southern District of Florida in Broward County, Florida, as the exclusive forum for a lawsuit. The ticket extended the "defenses, limitations and exceptions ... that may be invoked by the CARRIER" to "all persons who may act on behalf of the CARRIER or on whose behalf the CARRIER may act," including "the CARRIER's parents, subsidiaries, affiliates, successors, assigns, representatives, agents, employees, servants, concessionaires and contractors" as well as "Costa Cruise Lines N.V.," identified as the "sales and marketing agent for the CARRIER and the issuer of this Passage Ticket Contract." The front of the ticket listed Costa Cruise Lines' address in Florida and stated that an entity called "Costa Cruises" was "the first cruise company in the world" to obtain a certain certification of quality.

On July 2, 2007, Krupski's counsel notified Costa Cruise Lines of Krupski's claims. On July 9, 2007, the claims administrator for Costa Cruise requested additional information from Krupski "[i]n order to facilitate our future attempts to achieve a pre-litigation settlement." The parties were unable to reach a settlement, however, and on February 1, 2008 – three weeks before the 1-year limitations period expired – Krupski filed a negligence action against Costa Cruise, invoking the diversity jurisdiction of the Federal District Court for the Southern District of Florida. The

complaint alleged that Costa Cruise "owned, operated, managed, supervised and controlled" the ship on which Krupski had injured herself; that Costa Cruise had extended to its passengers an invitation to enter onto the ship; and that Costa Cruise owed Krupski a duty of care, which it breached by failing to take steps that would have prevented her accident. The complaint further stated that venue was proper under the passenger ticket's forum selection clause and averred that, by the July 2007 notice of her claims, Krupski had complied with the ticket's presuit requirements. Krupski served Costa Cruise on February 4, 2008.

Over the next several months -- after the limitations period had expired -- Costa Cruise brought Costa Crociere's existence to Krupski's attention three times. First, on February 25, 2008, Costa Cruise filed its answer, asserting that it was not the proper defendant, as it was merely the North American sales and marketing agent for Costa Crociere, which was the actual carrier and vessel operator. Second, on March 20, 2008, Costa Cruise listed Costa Crociere as an interested party in its corporate disclosure statement. Finally, on May 6, 2008, Costa Cruise moved for summary judgment, again stating that Costa Crociere was the proper defendant.

On June 13, 2008, Krupski responded to Costa Cruise's motion for summary judgment, arguing for limited discovery to determine whether Costa Cruise should be dismissed. According to Krupski, the following sources of information led her to believe Costa Cruise was the responsible party: The travel documents prominently identified Costa Cruise and gave its Florida address; Costa Cruise's Web site listed Costa Cruise in Florida as the United States office for the Italian company Costa Crociere; and the Web site of the Florida Department of State listed Costa Cruise as the only "Costa" company registered to do business in that State. Krupski also observed that Costa Cruise's claims administrator had responded to her claims notification without indicating that Costa Cruise was not a responsible party. With her response, Krupski simultaneously moved to amend her complaint to add Costa Crociere as a defendant.

On July 2, 2008, after oral argument, the District Court denied Costa Cruise's motion for summary judgment without prejudice and granted Krupski leave to amend, ordering that Krupski effect proper service on Costa Crociere by September 16, 2008. Complying with the court's deadline, Krupski filed an amended complaint on July 11, 2008, and served Costa Crociere on August 21, 2008. On that same date, the District Court issued an order dismissing Costa Cruise from the case pursuant to the parties' joint stipulation, Krupski apparently having concluded that Costa Cruise was correct that it bore no responsibility for her injuries.

Shortly thereafter, Costa Crociere -- represented by the same counsel who had represented Costa Cruise -- moved to dismiss, contending that the amended complaint did not relate back under Rule 15(c) and was therefore untimely. The District Court agreed. Rule 15(c), the court explained, imposes three requirements before an amended complaint against a newly named defendant can relate back to the original complaint. First, the claim against the newly named defendant must have arisen "out of the conduct, transaction, or occurrence set out-or attempted to be set out-in the original pleading." Fed. Rules Civ. Proc. 15(c)(1)(B), (C). Second, "within the period provided by Rule 4(m) for serving the summons and complaint" (which is ordinarily 120 days from when the complaint is filed, see Rule 4(m)), the newly named defendant must have "received such notice of the action that it will not be prejudiced in defending on the merits." Rule 15(c)(1)(C)(i). Finally, the plaintiff must show that, within the Rule 4(m) period, the newly named defendant "knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity." Rule 15(c)(1)(C)(ii).

The first two conditions posed no problem, the court explained: The claim against Costa Crociere clearly involved the same occurrence as the original claim against Costa Cruise, and Costa Crociere had constructive notice of the action and had not shown that any unfair prejudice would result from relation back. But the court found the third condition fatal to Krupski's attempt to relate back, concluding that Krupski had not made a mistake concerning the identity of the proper

party. Relying on Eleventh Circuit precedent, the court explained that the word "mistake" should not be construed to encompass a deliberate decision not to sue a party whose identity the plaintiff knew before the statute of limitations had run. Because Costa Cruise informed Krupski that Costa Crociere was the proper defendant in its answer, corporate disclosure statement, and motion for summary judgment, and yet Krupski delayed for months in moving to amend and then in filing an amended complaint, the court concluded that Krupski knew of the proper defendant and made no mistake.

The Eleventh Circuit affirmed in an unpublished per curiam opinion. Rather than relying on the information contained in Costa Cruise's filings, all of which were made after the statute of limitations had expired, as evidence that Krupski did not make a mistake, the Court of Appeals noted that the relevant information was located within Krupski's passenger ticket, which she had furnished to her counsel well before the end of the limitations period. Because the ticket clearly identified Costa Crociere as the carrier, the court stated, Krupski either knew or should have known of Costa Crociere's identity as a potential party. It was therefore appropriate to treat Krupski as having chosen to sue one potential party over another. Alternatively, even assuming that she first learned of Costa Crociere's identity as the correct party from Costa Cruise's answer, the Court of Appeals observed that Krupski waited 133 days from the time she filed her original complaint to seek leave to amend and did not file an amended complaint for another month after that. In light of this delay, the Court of Appeals concluded that the District Court did not abuse its discretion in denying relation back.

We granted certiorari to resolve tension among the Circuits over the breadth of Rule 15(c)(1)(C)(ii),2 and we now reverse.

II

Under the Federal Rules of Civil Procedure, an amendment to a pleading relates back to the date of the original pleading when:

> "(A) the law that provides the applicable statute of limitations allows relation back;
>
> "(B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out -- or attempted to be set out -- in the original pleading; or
>
> "(C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:
>
> "(i) received such notice of the action that it will not be prejudiced in defending on the merits; and
>
> "(ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity." Rule 15(c)(1).

In our view, neither of the Court of Appeals' reasons for denying relation back under Rule 15(c)(1)(C)(ii) finds support in the text of the Rule. We consider each reason in turn.

A

The Court of Appeals first decided that Krupski either knew or should have known of the proper party's identity and thus determined that she had made a deliberate choice instead of a mistake in not naming Costa Crociere as a party in her original pleading. By focusing on Krupski's knowledge, the Court of Appeals chose the wrong starting point. The question under Rule 15(c)(1)(C)(ii) is not whether Krupski knew or should have known the identity of Costa Crociere as the proper defendant, but whether Costa Crociere knew or should have known that it would have been named as a defendant but for an error. Rule 15(c)(1)(C)(ii) asks what the prospective

defendant knew or should have known during the Rule 4(m) period, not what the plaintiff knew or should have known at the time of filing her original complaint.[3]

Information in the plaintiff's possession is relevant only if it bears on the defendant's understanding of whether the plaintiff made a mistake regarding the proper party's identity. For purposes of that inquiry, it would be error to conflate knowledge of a party's existence with the absence of mistake. A mistake is "[a]n error, misconception, or misunderstanding; an erroneous belief." Black's Law Dictionary 1092 (9th ed.2009); see also Webster's Third New International Dictionary 1446 (2002) (defining "mistake" as "a misunderstanding of the meaning or implications of something"; "a wrong action or statement proceeding from faulty judgment, inadequate knowledge, or inattention"; "an erroneous belief"; or "a state of mind not in accordance with the facts"). That a plaintiff knows of a party's existence does not preclude her from making a mistake with respect to that party's identity. A plaintiff may know that a prospective defendant -- call him party A -- exists, while erroneously believing him to have the status of party B. Similarly, a plaintiff may know generally what party A does while misunderstanding the roles that party A and party B played in the "conduct, transaction, or occurrence" giving rise to her claim. If the plaintiff sues party B instead of party A under these circumstances, she has made a "mistake concerning the proper party's identity" notwithstanding her knowledge of the existence of both parties. The only question under Rule 15(c)(1)(C)(ii), then, is whether party A knew or should have known that, absent some mistake, the action would have been brought against him.

Respondent urges that the key issue under Rule 15(c)(1)(C)(ii) is whether the plaintiff made a deliberate choice to sue one party over another. We agree that making a deliberate choice to sue one party instead of another while fully understanding the factual and legal differences between the two parties is the antithesis of making a mistake concerning the proper party's identity. We disagree, however, with respondent's position that any time a plaintiff is aware of the existence of two parties and chooses to sue the wrong one, the proper defendant could reasonably believe that the plaintiff made no mistake. The reasonableness of the mistake is not itself at issue. As noted, a plaintiff might know that the prospective defendant exists but nonetheless harbor a misunderstanding about his status or role in the events giving rise to the claim at issue, and she may mistakenly choose to sue a different defendant based on that misimpression. That kind of deliberate but mistaken choice does not foreclose a finding that Rule 15(c)(1)(C)(ii) has been satisfied.

This reading is consistent with the purpose of relation back: to balance the interests of the defendant protected by the statute of limitations with the preference expressed in the Federal Rules of Civil Procedure in general, and Rule 15 in particular, for resolving disputes on their merits. A prospective defendant who legitimately believed that the limitations period had passed without any attempt to sue him has a strong interest in repose. But repose would be a windfall for a prospective defendant who understood, or who should have understood, that he escaped suit during the limitations period only because the plaintiff misunderstood a crucial fact about his identity. Because a plaintiff's knowledge of the existence of a party does not foreclose the possibility that she has made a mistake of identity about which that party should have been aware, such knowledge does not support that party's interest in repose.

Our reading is also consistent with the history of Rule 15(c)(1)(C). That provision was added in 1966 to respond to a recurring problem in suits against the Federal Government, particularly in the Social Security context. Individuals who had filed timely lawsuits challenging the administrative denial of benefits often failed to name the party identified in the statute as the proper defen-

[3] Rule 15(c)(1)(C) speaks generally of an amendment to a "pleading" that changes "the party against whom a claim is asserted," and it therefore is not limited to the circumstance of a plaintiff filing an amended complaint seeking to bring in a new defendant. Nevertheless, because the latter is the "typical case" of Rule 15(c)(1)(C)'s applicability, we use this circumstance as a shorthand throughout this opinion.

dant -- the current Secretary of what was then the Department of Health, Education, and Welfare -- and named instead the United States; the Department of Health, Education, and Welfare itself; the nonexistent "Federal Security Administration"; or a Secretary who had recently retired from office. By the time the plaintiffs discovered their mistakes, the statute of limitations in many cases had expired, and the district courts denied the plaintiffs leave to amend on the ground that the amended complaints would not relate back. Rule 15(c) was therefore "amplified to provide a general solution" to this problem. It is conceivable that the Social Security litigants knew or reasonably should have known the identity of the proper defendant either because of documents in their administrative cases or by dint of the statute setting forth the filing requirements. Nonetheless, the Advisory Committee clearly meant their filings to qualify as mistakes under the Rule. * * *

B

The Court of Appeals offered a second reason why Krupski's amended complaint did not relate back: Krupski had unduly delayed in seeking to file, and in eventually filing, an amended complaint. The Court of Appeals offered no support for its view that a plaintiff's dilatory conduct can justify the denial of relation back under Rule 15(c)(1)(C), and we find none. The Rule plainly sets forth an exclusive list of requirements for relation back, and the amending party's diligence is not among them. Moreover, the Rule mandates relation back once the Rule's requirements are satisfied; it does not leave the decision whether to grant relation back to the district court's equitable discretion. See Rule 15(c)(1) ("An amendment ... *relates back* ... when" the three listed requirements are met (emphasis added)).

The mandatory nature of the inquiry for relation back under Rule 15(c) is particularly striking in contrast to the inquiry under Rule 15(a), which sets forth the circumstances in which a party may amend its pleading before trial. By its terms, Rule 15(a) gives discretion to the district court in deciding whether to grant a motion to amend a pleading to add a party or a claim. Following an initial period after filing a pleading during which a party may amend once "as a matter of course," "a party may amend its pleading only with the opposing party's written consent or the court's leave," which the court "should freely give ... when justice so requires." Rules 15(a)(1)-(2). We have previously explained that a court may consider a movant's "undue delay" or "dilatory motive" in deciding whether to grant leave to amend under Rule 15(a). Foman v. Davis, 371 U.S. 178, 182 (1962). As the contrast between Rule 15(a) and Rule 15(c) makes clear, however, the speed with which a plaintiff moves to amend her complaint or files an amended complaint after obtaining leave to do so has no bearing on whether the amended complaint relates back.

Rule 15(c)(1)(C) does permit a court to examine a plaintiff's conduct during the Rule 4(m) period, but not in the way or for the purpose respondent or the Court of Appeals suggests. As we have explained, the question under Rule 15(c)(1)(C)(ii) is what the prospective defendant reasonably should have understood about the plaintiff's intent in filing the original complaint against the first defendant. To the extent the plaintiff's postfiling conduct informs the prospective defendant's understanding of whether the plaintiff initially made a "mistake concerning the proper party's identity," a court may consider the conduct. Cf. Leonard v. Parry, 219 F.3d 25, 29 (C.A.1 2000) ("[P]ost-filing events occasionally can shed light on the plaintiff's state of mind at an earlier time" and "can inform a *defendant's* reasonable beliefs concerning whether her omission from the original complaint represented a mistake (as opposed to a conscious choice)"). The plaintiff's postfiling conduct is otherwise immaterial to the question whether an amended complaint relates back.[5]

[5] Similarly, we reject respondent's suggestion that Rule 15(c) requires a plaintiff to move to amend her complaint or to file and serve an amended complaint within the Rule 4(m) period. Rule 15(c)(1)(C)(i) simply requires that the prospective defendant has received sufficient "notice of the action" within the Rule 4(m) period that he will not be prejudiced in defending the case on the merits. The Advisory Committee Notes to the 1966 Amendment clarify that "the notice need not be formal."

C

Applying these principles to the facts of this case, we think it clear that the courts below erred in denying relation back under Rule 15(c)(1)(C)(ii). The District Court held that Costa Crociere had "constructive notice" of Krupski's complaint within the Rule 4(m) period. Costa Crociere has not challenged this finding. Because the complaint made clear that Krupski meant to sue the company that "owned, operated, managed, supervised and controlled" the ship on which she was injured, and also indicated (mistakenly) that Costa Cruise performed those roles, Costa Crociere should have known, within the Rule 4(m) period, that it was not named as a defendant in that complaint only because of Krupski's misunderstanding about which "Costa" entity was in charge of the ship-clearly a "mistake concerning the proper party's identity."

Respondent contends that because the original complaint referred to the ticket's forum requirement and presuit claims notification procedure, Krupski was clearly aware of the contents of the ticket, and because the ticket identified Costa Crociere as the carrier and proper party for a lawsuit, respondent was entitled to think that she made a deliberate choice to sue Costa Cruise instead of Costa Crociere. As we have explained, however, that Krupski may have known the contents of the ticket does not foreclose the possibility that she nonetheless misunderstood crucial facts regarding the two companies' identities. Especially because the face of the complaint plainly indicated such a misunderstanding, respondent's contention is not persuasive. Moreover, respondent has articulated no strategy that it could reasonably have thought Krupski was pursuing in suing a defendant that was legally unable to provide relief.

Respondent also argues that Krupski's failure to move to amend her complaint during the Rule 4(m) period shows that she made no mistake in that period. But as discussed, any delay on Krupski's part is relevant only to the extent it may have informed Costa Crociere's understanding during the Rule 4(m) period of whether she made a mistake originally. Krupski's failure to add Costa Crociere during the Rule 4(m) period is not sufficient to make reasonable any belief that she had made a deliberate and informed decision not to sue Costa Crociere in the first instance.[6] Nothing in Krupski's conduct during the Rule 4(m) period suggests that she failed to name Costa Crociere because of anything other than a mistake.

It is also worth noting that Costa Cruise and Costa Crociere are related corporate entities with very similar names; "crociera" even means "cruise" in Italian. Cassell's Italian Dictionary 137, 670 (1967). This interrelationship and similarity heighten the expectation that Costa Crociere should suspect a mistake has been made when Costa Cruise is named in a complaint that actually describes Costa Crociere's activities. Cf. Morel v. DaimlerChrysler AG, 565 F.3d 20, 27 (C.A.1 2009) (where complaint conveyed plaintiffs' attempt to sue automobile manufacturer and erroneously named the manufacturer as Daimler-Chrysler Corporation instead of the actual manufacturer, a legally distinct but related entity named DaimlerChrysler AG, the latter should have realized it had not been named because of plaintiffs' mistake); Goodman v. Praxair, Inc., 494 F.3d 458, 473-475 (C.A.4 2007) (en banc) (where complaint named parent company Praxair, Inc., but described status of subsidiary company Praxair Services, Inc., subsidiary company knew or should have known it had not been named because of plaintiff's mistake). In addition, Costa Crociere's own actions contributed to passenger confusion over "the proper party" for a lawsuit. The front of the ticket advertises that "Costa Cruises" has achieved a certification of quality, without clarifying whether "Costa Cruises" is Costa Cruise Lines, Costa Crociere, or some other related

[6] The Court of Appeals concluded that Krupski was not diligent merely because she did not seek leave to add Costa Crociere until 133 days after she filed her original complaint and did not actually file an amended complaint for another a month after that. It is not clear why Krupski should have been found dilatory for not accepting at face value the unproven allegations in Costa Cruise's answer and corporate disclosure form. In fact, Krupski moved to amend her complaint to add Costa Crociere within the time period prescribed by the District Court's scheduling order.

"Costa" company. Indeed, Costa Crociere is evidently aware that the difference between Costa Cruise and Costa Crociere can be confusing for cruise ship passengers. See, e.g., Suppa v. Costa Crociere, S.p.A., No. 07-60526-CIV, 2007 WL 4287508, *1, (S.D.Fla., Dec.4, 2007) (denying Costa Crociere's motion to dismiss the amended complaint where the original complaint had named Costa Cruise as a defendant after "find[ing] it simply inconceivable that Defendant Costa Crociere was not on notice ... that ... but for the mistake in the original Complaint, Costa Crociere was the appropriate party to be named in the action").

In light of these facts, Costa Crociere should have known that Krupski's failure to name it as a defendant in her original complaint was due to a mistake concerning the proper party's identity. We therefore reverse the judgment of the Court of Appeals for the Eleventh Circuit and remand the case for further proceedings consistent with this opinion.

[Concurring opinion by Justice Scalia omitted.]

NOTES AND QUESTIONS

1. The Supreme Court's decision seems to have changed some things. For example, in Joseph v. Elan Motorsports Technologies Racing Corp., 638 F.3d 555 (7th Cir. 2011), the district judge refused relation back, citing Seventh Circuit authority that plaintiff has the responsibilty to determine who is the right defendant before the limitations period expires, and that relation back is not allowed if plaintiff makes a mistake about who is liable, not about the defendant's name. As Judge Posner explained in reversing (id. at 559-60):

> [T]he Supreme Court's decision in *Krupski*, hewing closely to the language of Rule 15(c)(1)(C), has cut the ground out from under the district court's decision. The only two inquiries that the district court is now permitted to make in deciding whether an amended complaint relates back to the date of the original one are, first, whether the defendant who is sought to be added by the amendmenets knew or should have known that the plaintiff, had it not been for the mistake, would have sued him instead or in addition to suing the named defendant; and second, whether, even if so, the delay in the plaintiff's discovering his mistake impaired the new defendant's ability to defend himself.

2. *Why have statutes of limitations?* "Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs." Wood v. Carpenter, 101 U.S. 135, 139 (1879). Besides giving defendants peace of mind, they can serve additional purposes, as summarized in Marcus, *Fraudulent Concealment in Federal Court: Toward a More Disparate Standard?*, 71 Geo. L.J. 829, 837 (1983):

> [T]he passage of time could seriously impair a defendant's ability to defend himself. Coping with stale claims also poses substantial logistical difficulties for courts. At trial, factfinders would be presented with mountains of moldy evidence resulting from discovery relating to events that occurred, perhaps, decades ago. In addition, it may be necessary to contrive alternatives to live testimony when important witnesses are unavailable or cannot recall events. These logistical difficulties are not mere inconveniences that vex judges. To the extent that overburdened courts are entangled in such problems, they may be unable to attend to timely claims.

At their heart, statutes of limitations insist that lawsuits be commenced within a certain time. The "relation back" problem cannot arise unless that occurs; it looks to whether later amendments in the lawsuit should treated, for limitations purposes, as though they were included in the party's original pleading. What should a defendant who is sued do in response to the suit? Should those actions by defendant be sufficient to protect it against prejudice resulting from the belated amendment to the complaint? Consider, for instance, the role of Rule 15(c)(1)(B) in relation to

the policies underlying statutes of limitations. How should courts address situations in which plaintiffs seek to amend to assert claims originally asserted against one original defendant against another original defendant instead? See the Court's footnote 3.

In *Krupski*, suppose the plaintiff later seeks to amend her complaint to assert an additional claim against Costa Crociere for faulty medical treatment provided by the ship's doctor the day after her accident. Assuming the doctor is an employee of the defendant, should that new claim relate back? *See* Rule 15(c)(1)(B) and Rule 15(c)(1)(C)(i).

3. In *Krupski*, plaintiff served the original defendant three days after she filed suit, and before the statute of limitations ran out. Would it have made a difference if plaintiff had delayed serving the original defendant until Feb. 22, the day after the one-year statute of limitations expired?

It has long been recognized that plaintiff usually "tolls" (suspends the running of) the limitations period simply by filing suit, and that a reasonable time is allowed for service thereafter. Rule 4(m) provides that plaintiffs should serve defendants within 120 days. Providing plaintiff serves defendant within that time, there is no limitations defense.

What if plaintiff amends the complaint to substitute the right defendant after the limitations period expires and then serves the right defendant? In *Krupski*, for example, suppose plaintiff had realized her mistake a month after filing her complaint and before she served the original defendant. Under Rule 15(a)(1)(A), she would then be permitted to amend her complaint as a matter of right to substitute the correct defendant. Suppose that she then served the correct defendant. Would it have a valid limitations defense? In Schiavone v. Fortune, 477 U.S. 21 (1986), the Court held that Rule 15(c) as then written required that the added party must be notified *before* the expiration of the limitations period even though there was no corresponding requirement for to notify a properly named defendant. How is the problem handled under Rule 15(c) now?

Note the role played there by Rule 4(m). How would current Rule 15(c) apply if the applicable limitations period in Krupski's case were two years, and she sought to amend after learning of the additional defendant's involvement six months after filing suit?

3. Should the filing of a suit have any effect on the protection limitations provides for those *not* sued? At least the plaintiff has, by filing the suit, made a sort of public announcement that she believes she is entitled to relief for the event that prompted the suit. But she may not yet have acquired the necessary information to appreciate whom she should sue.

Should wrongdoers who have escaped plaintiff's attention be protected once she has made the decision to sue? Under California procedure, a plaintiff may name "Doe defendants" if ignorant of their identities, and substitute their true identity once those become known. *See* Cal. Code Civ. Proc. § 474. California does not require that these added defendants have notice of the suit within the limitations period. For discussion, see Hogan, *California's Unique Doe Defendant Practice: A Fiction Stranger Than Truth*, 30 Stan. L. Rev. 51 (1977). Is Rule 15(c)(1)(C) a better way of handling the belated assertion of claims against those not initially sued?

5. Does Rule 15(c)(1)(C)(i) adequately protect the interests of those not originally sued? On whom should the burden rest to show that its requirements are satisfied? How were they satisfied in *Krupski*? If the burden to prove that this rule is satisfied rests on the plaintiff, is there a reason to require that plaintiff satisfy Rule 15(c)(1)(C)(ii) also?

6. In *Krupski*, plaintiff sought discovery to identify the proper defendant after the original defendant raised the problem. Should a plaintiff who sues the wrong person be allowed discovery to identify the right one? Although Rule 27 authorizes prelitigation discovery in exceptional circumstances, the courts have rejected the idea that it may be generally be used to determine whether a claim exists or who should be sued. *See* In re I-35W Bridge Collapse Site, 243 F.R.D. 349 (D. Minn. 2007) (Rule 27 may not be used for pre-litigation discovery to determine whether a

cause of action exists or against whom it should be initiated). Should plaintiff obtain the right to do discovery because she has filed a suit against the wrong defendant?

7. How should a court handle a situation in which plaintiff knows there are additional potential defendants but does not know who they are? In Worthington v. Wilson, 8 F.3d 1253 (7th Cir. 1993), plaintiff was arrested by three police officers and sued the village that employed them for violating his rights, adding that he wanted also to sue "three unknown police officers." When plaintiff later sought to amend the complaint to add claims against two of the officers, the court ruled that relation back would not be allowed because plaintiff had been aware from the outset that he did not know the identities of these officers:

> "[A]mendment with relation back is generally permitted in order to correct a misnomer of a defendant where the proper defendant is already before the court and the effect is merely to correct the name under which he is sued. But a new defendant cannot normally be substituted or added by amendment after the statute of limitations has run."

In Burdine v. Kaiser, 2010 WL 2606257 (N.D. Ohio, June 25, 2010), plaintiff sued after a relative died in police custody. After the limitations period expired, plaintiff sought to add claims against three officers. The court ruled that relation back was not available because "lack of knowledge pertaining to an intended defendant's identity does not constitute a 'mistake concerning the party's identity' within the meaning of Rule 15(c).'" It ruled that *Krupski* did not direct a different result: "Unlike *Krupski*, the plaintiff's problem here is not that she knew the parties' identities and simply failed to sue the correct one. Here, instead, plaintiff did not know the identity of Cook, Hirt and Fligor until after the statute of limitations ran." Is this interpretation of *Krupski* correct?

Note that the Supreme Court invokes a Webster's Dictionary definition of "mistake" that includes "inadequate knowledge," and emphasizes that the crucial issue for relation back is what the defendant knew, not what the plaintiff knew.

8. In *Krupski*, plaintiff initially sought to *add* a defendant without dropping her claim against the defendant she originally sued. Should that be allowed? In Goodman v. Praxair, Inc., 494 F.3d 458 (4th Cir. 2007), plaintiff initially asserted a breach of contract claim against a parent company and later concluded that claim should have been asserted against a subsidiary company. He then sought to amend to assert the breach of contract claim against the subsidiary, but wanted to continue asserting a claim against the parent company as well. Defendants urged that Rule 15(c) allows relation back only for an amendment that "changes the party or the naming of the party against whom the claim is asserted." The court rejected this argument:

> [W]e can discern no policy that would be served by the Praxair defendants' restrictive reading of "changes," which would force the amending party to drop a defendant for each defendant he adds. Praxair, Inc. [the original defendant], was placed on notice within the limitations period of the claims relating to the transactions alleged in the original complaint, and no unfairness to it resulted from leaving it as a defendant in the amended complaint. Any unfairness caused by the amendment could only be claimed by Praxair Services, Inc., the new party. But the protections for Praxair Services are addressed by considering the requirements of Rule 15(c)[1(1)(B)] and [(C)], not from reading the term 'changes" narrowly.

Is this ruling consistent with the Supreme Court's definition of "mistake"?

9. In *Krupski*, the lower courts emphasized plaintiff's delay in moving to amend. Could the original defendant have moved for sanctions under Rule 11 when plaintiff failed to dismiss even though notified of the problem in the answer? Could the court have denied plaintiff's motion to amend under Rule 15(a) due to this delay? Note that the Court contrasts the "mandatory" nature

of relation back under Rule 15(c) with the "discretionary" authority conferred by Rule 15(a). At least some judges fear that a liberal interpretation of Rule 15(c) will have undesirable effects. In Goodman v. Praxair, Inc, 494 F.3d 458 (4th Cir. 2007) (*supra* note 8), a dissenting judge objected that the majority's ruling upholding relation back abandoned prior circuit precedent and would have undesirable effects:

> I see no reason to abandon our precedent of almost twenty years in favor of a policy that will decrease the incentives for plaintiffs to investigate their cases fully before filing a lawsuit. I think it good that our former interpretation of the Rule limited the mistakes courts would forgive to the clerical and inconsequential. Rule 15(c)([(1)(C)] is not intended to excuse errant lawyering, but to forgive technical, clerical errors. It is reasonable to expect plaintiffs properly to identify those whom they hale into court. It is likewise reasonable to penalize careless plaintiffs who tarry too long by forbidding them to substitute the correct defendant after the limitations period has expired.

Id. at 477-78 (Gregory, J. dissenting). Judge Gregory also worried that "a future plaintiff will be free to file suit against a placeholder defendant while continuing to search for the proper one any time the plaintiff can make a plausible claim that he believed the originally named defendant was the correct one."

10. *Krupski* places considerable weight on the protections defendants get from the notice requirement of Rule 15(c)(1)(C)(ii). What sort of notice should suffice? Some courts treat informal notice of the commencement of litigation as sufficient. *See* Loveall v. Employer Health Servs., Inc., 196 F.R.D. 399, 403 (D. Kan. 2000) (letter from corporation named as defendant to the company that had sold the allegedly defective product advising that, in the view of its attorneys, the other company would likely be drawn into the action was sufficient notice). However, some courts have stated that "only service constitutes notice," Williams v. Army & Air Force Exchange Serv., 830 F.2d 27, 30 n.2 (3d Cir.1987), and others have required more than mere awareness of the suit. *See* Gardner v. Gartman, 880 F.2d 797, 799 (4th Cir.1989) (suits against the U.S. and certain officials did not constitute notice to the head of the U.S. department where plaintiff worked); Bell v. Veterans Administration Hospital, 826 F.2d 357 (5th Cir.1987) (relation back not allowed even though administrative hearings put the party to be joined on notice of the suit). However, the better practice seems to be otherwise. "The conclusion of a growing number of courts and commentators is that sufficient notice may be deemed to have occurred where a party who has some reason to expect his potential involvement as a defendant hears of the commencement of the litigation through some informal means." Kinnally v. Bell of Pennsylvania, 748 F.Supp. 1136, 1141 (E.D.Pa.1990). Does *Krupski* shed light on this question? See the Court's footnote 5.

CARPENTER v. DEE – RELEVANT STATUTES AND COURT FILINGS

Statutes Relevant to the Complaint, from State of Portlandia, Consolidated Statutes [PCL]

PCL ch. 229, § 2, Wrongful Death*

A person who

> (1) by his negligence causes the death of a person, or
>
> (2) by willful, wanton or reckless act causes the death of a person under such circumstances that the deceased could have recovered damages for personal injuries if his death had not resulted, or
>
> (3) operates a common carrier of passengers and by his negligence causes the death of a passenger, or
>
> (4) operates a common carrier of passengers and by his willful, wanton or reckless act causes the death of a passenger under such circumstances that the deceased could have recovered damages for personal injuries if his death had not resulted, or
>
> (5) is responsible for a breach of warranty arising under Article 2 of chapter one hundred and six which results in injury to a person that causes death,

shall be liable in damages in the amount of

> (1) the fair monetary value of the decedent to the persons entitled to receive the damages recovered, as provided in section one, including but not limited to compensation for the loss of the reasonably expected net income, services, protection, care, assistance, society, companionship comfort, guidance, counsel, and advice of the decedent to the persons entitled to the damages recovered;
>
> (2) the reasonable funeral and burial expenses of the decedent;
>
> (3) punitive damages in an amount of not less than five thousand dollars in such case as the decedent's death was caused by the malicious, willful, wanton or reckless conduct of the defendant or by the gross negligence of the defendant;

except that:

> (1) the liability of an employer to a person in his employment shall not be governed by this section,

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* *Note*: Ordinarily, a plaintiff would bring a common law tort action for negligence that causes injury. But common law tort doctrine also provided that the death of the victim abated the victim's personal injury claim against the defendant. Beginning in the mid-1800s, states enacted "wrongful death statutes" that provide a statutory cause of action, brought by the decedents representative, and which prevents tortfeasors from escaping liability for their conduct in circumstances where the victim happened to die.

(2) a person operating a railroad shall not be liable for negligence in causing the death of a person while walking or being upon such railroad contrary to law or to the reasonable rules and regulations of the carrier and

(3) a person operating a street railway or electric railroad shall not be liable for negligence for causing the death of a person while walking or being upon that part of the street railway or electric railroad not within the limits of a highway.

A person shall be liable for the negligence or the willful, wanton or reckless act of his agents or servants while engaged in his business to the same extent and subject to the same limits as he would be liable under this section for his own act. Damages under this section shall be recovered in an action of tort by the executor or administrator of the deceased. An action to recover damages under this section shall be commenced within three years from the date of death or within such time thereafter as is provided by section four, four B, nine or ten or chapter two hundred and sixty.

PCL ch. 229 § 3 Distribution of Damages

Any damages awarded in a wrongful death action brought pursuant to chapter 229 § 1 shall be distributed as follows:

(1) If the deceased shall have been survived by a wife or husband and no children or issue surviving, then to the use of such surviving spouse.

(2) If the deceased shall have been survived by a wife or husband and by one child or by the issue of one deceased child, then one half to the use of such surviving spouse and one half to the use of such child or his issue by right of representation.

(3) If the deceased shall have been survived by a wife or husband and by more than one child surviving either in person or by issue, then one third to the use of such surviving spouse and two thirds to the use of such surviving children or their issue by right of representation.

(4) If there is no surviving wife or husband, then to the use of the next of kin.

PCL ch. 229 § 6, Conscious Suffering

In any civil action brought under [the Wrongful Death section reprinted above, damages may be recovered for conscious suffering resulting from the same injury, but any sum so recovered shall be held and disposed of by the executors or administrators as assets of the estate of the deceased.

PCL ch. 109A §§ 1-10, Fradulent Conveyance

§ 1 *Definitions*. In this chapter "Assets" of a debtor means property not exempt from liability for his debts. To the extent that any property is liable for any debts of the debtor, such property shall be included in his assets.

"Conveyance" includes every payment of money, assignment, release, transfer, lease, mortgage or pledge of tangible or intangible property, and also the creation of any lien or encumbrance.

> "Creditor" is a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent.
>
> "Debt" includes any legal liability, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent.

§ 2 *Insolvency of persons*. A person is insolvent within the meaning of this chapter when the present fair salable value of his assets is less than the amount that will be required to pay his probable liability on his existing debts as they become absolute and matured. . . .

§ 3 *Fair consideration.* Fair consideration is given for property or obligation—

> (a) When in exchange for such property or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied, or
> (b) When such property or obligation is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compared with the value of the property or obligation obtained. . . .

§ 4 *Conveyances by insolvent*. Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration. . . .

§ 6 *Conveyances by person about to incur debts beyond ability to pay*. Every conveyance made and every obligation incurred without fair consideration when the person making the conveyance or entering into the obligation intends or believes that he will incur debts beyond his ability to pay as they mature is fraudulent as to both present and future creditors.

§ 7 *Conveyances made with intent to defraud*. Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors. . . .

§ 9 *Rights of creditors; matured claims*.

> (1) Where a conveyance or obligation is fraudulent as to a creditor, such creditor, when his claim has matured, may, as against any person except a purchaser for fair consideration without knowledge of the fraud at the time of the purchase, or one who has derived title immediately or immediately from such a purchaser –
>
> > (a) Have the conveyance set aside or obligation annulled to the extent necesasry to satisfy his claim, or
> >
> > (b) Disregard the conveyance and attach or levy execution upon property conveyed.
>
> (2) A purchaser who without actual fraudulent intent has given less than a fair consideration for the conveyance or obligation may retain the property or obligation as security for repayment.

§ 10 *Rights of creditors; immature claims*. Where a conveyance made or obligation incurred is fraudulent as to a creditor whose claim has not matured, he may proceed in the supreme judicial or superior court against any person against whom he could have proceeded had his claim matured, and the court may –

(a) Restrain the defendant from disposing of his property,

(b) Appoint a receiver to take charge of the property

(c) Set aside the conveyance or annul the obligation, or

(d) Make any order which the circumstances of the case may require.

Note: The following documents are the complaint that initiated the case of *Carpenter v. Dee*, as well as the documents filed in response to it. These documents, and the ones that appear later on, are not meant to represent ideal pleadings. They are instead both typical and undistinguished – but they are also illustrative of the procedural steps and issues that we will be discussing.

IN THE UNITED STATES DISTRICT COURT
for the
DISTRICT OF PORTLANDIA

NANCY CARPENTER, Administratratix of the Estate of Charles Carpenter vs. RANDALL DEE and PETER DEE, Defendants.	CIVIL ACTION NO. 08-6144 PLAINTFF CLAIMS TRIAL BY JURY

COMPLAINT

Parties and Jurisdiction

1. The plaintiff Nancy Carpenter is a resident of Coveport, Vancouver County, New Columbia. She brings this action in her capacity as the administratrix of the estate of Charles Carpenter, her late husband, of Coveport, Vancouver County, New Columbia. She was duly appointed as administratrix by the Vacouver Probate Court, docket number 07P3875A.

2. The defendant Randall Dee is a resident of the city of Hawthorne, in the State of Portlandia.

3. The defendant Peter Dee is a resident of the city of Belmont, in the State of Portlandia.

4. This Court has subject matter jurisdiction over this case based on the diversity of citizenship between plaintiff and defendants, under 28 U.S.C. § 1332.

Facts

5. On or about August 31, 2007, the plaintiff's intestate, Charles Carpenter, was riding as a passenger in a 1986 Jeep CJ-7 (hereinafter "the jeep").

6. The jeep was owned by one Twyla Burrell, and operated by the defendant Randall Dee.

7. At or near the intersection of Palmer and Franklin Streets in Hawthorne, the operator lost control of the jeep, and it rolled over, pinning Charles Carpenter beneath it.

8. The loss of control and resulting accident was caused by the negligent and/or grossly negligent and/or wanton and willful, and reckless conduct of the defendant Randall Dee as operator of the jeep including, but not limited to, the following acts and omissions:

(a) excessive speed;
(b) failing to stop at an intersection, and
(c) illegal and dangerous alteration of the chassis, causing unsafe handling characteristics.

Count I—Wrongful Death

9. The plaintiff repeats and incorporates herein the allegations of paragraphs 1 through 8.

10. As a result of the negligent and/or grossly negligent and/or wanton and willful, and reckless conduct of the defendant Randall Dee, the plaintiff's intestate was killed on August 31, 2007.

Count II—Conscious Suffering

11. The plaintiff repeats and incorporates herein the allegations of' paragraphs 1 through 8.

12. As a result of the conduct of the defendant Randall Dee, as described above, the plaintiff's intestate sustained serious personal injuries, from which he suffered consciously, prior to his death on August 31, 2007.

Count III—Fraudulent Conveyance

13. The plaintiff repeats and incorporates herein the allegations of paragraphs 1 through 8.

14. At the time of the accident on August 31, 2007, the defendant Randall Dee and the defendant Peter Dee owned as joint tenants a certain parcel of land at 91 Douglas Fir Road, East Burnside, Portlandia, containing approximately 11,604 square feet.

15. The defendants Randall Dee and Peter Dee had purchased said property from the estate of their deceased father Rick Dee, for the amount of $80,000 on or about February 13, 2007.

16. On or about October 8, 2007, the defendant Randall Dee conveyed all his right, title and interest in the above property to Peter Dee for "nominal consideration."

17. On information and belief, the transfer of such interest was fraudulent as to creditors, including, but not limited to, the plaintiff, within the meaning of Portlandia Consolidated Laws ch. 109A, §4; in that:

(a) The conveyance was made without fair consideration, and Randall Dee was thereby rendered insolvent, within the meaning of Portlandia Consolidated Laws ch. 109A §4; and/or

(b) The conveyance was made without fair consideration at a time when the defendant Randall Dee believed that he would incur debts beyond his ability to pay, within the meaning of Portlandia Consolidated Laws ch. 109A, § 6; and/or

(c) The transfer was made with an actual intent to hinder, delay, or defraud creditors, including but not limited to the plaintiff, within the meaning of Portlandia Consolidated Laws ch. 109A § 7.

WHEREFORE, the plaintiff prays for the following relief:

1. Judgment on Count I against the defendant Randall Dee

(a) To compensate the survivors of the plaintiff's intestate for the fair monetary value of the deceased for reasonably expected net income lost, services, protection, care, assistance, society, companionship, comfort, guidance, counsel and advice of the deceased;

(b) Reasonable funeral and burial expenses;

(c) Punitive damages in an amount of at least $5,000.00, pursuant to Portlandia Consolidated Laws ch. 229 § 2

2. Judgment on Count II against the defendant Randall Dee to compensate the estate of Charles Carpenter for his pain and conscious suffering.

3. That the Court issue a temporary restraining order enjoining the defendant, Randall Dee, until further order of this court, from conveying, encumbering, or in any other manner transferring any interest, legal or equitable, in any of his assets, including but not limited to real estate, bank accounts, certificates of deposit, securities, valuables, and any other asset not immune from execution, except in the ordinary course of business.

4. That the Court issue a preliminary injunction enjoining the defendant Randall Dee, until the disposition of this action on the merits, from conveying, encumbering, or in any other manner transferring any interest, legal or equitable, in any of his assets, including but not limited to real estate, bank accounts, certificates of deposit, securities, valuables, and any other asset not immune from execution, except in the ordinary course of business.

5. That the Court issue a temporary restraining order enjoining the defendant Peter Dee, until further order of this court, from conveying, encumbering, or in any other manner transferring any interest, legal or equitable, in the real estate at 91 Douglas Fir Road, East Burnside, Portlandia.

6. That the Court issue a preliminary injunction, enjoining the defendant Peter Dee, until the disposition of this action on the merits, from conveying, encumbering, or in any other manner transferring any interest, legal or equitable, in the real estate at 91 Douglas Fir Road, East Burnside, Portlandia.

7. That the Court, under Count III, declare null and void the conveyance of the interest of Randall Dee in the property at 91 Douglas Fir Road, East Burnside, Portlandia, and/or allow satisfaction of any judgment in this action Randall Dee to be satisfied against the interest he held in said property prior to the fraudulent conveyance.

8. That the Court issue a temporary restraining order enjoining the defendants, until further order of the Court, from selling, or transferring in any way the jeep vehicle involved or in any way modifying it, or changing its present condition.

9. That the Court issue a preliminary injunction enjoining the defendants until the disposition of this action on the merits, from selling, or transferring in any way the jeep vehicle involved or in any way modifying it, or changing its present condition.

By her attorneys,

/s/ Watt Four
Watt Four (Portlandia Bar #000001)
Urning, Mony, Four, Botes & Bier
635 Riverway Avenue
Coveport, New Columbia 98765

Dated: /d/

Note: At the beginning of this complaint, there is a civil action number, No. 08-6144. Although practices vary among jurisdictions, the "08" usually represents the year the case was filed, 2008. The remainder is a unique identification number issued by the clerk of the court upon filing of the complaint and which will appear on all subsequent court filings. Docket numbers sometimes include a letter or a set of initials that indicate to what judge or court session the case is assigned.

You will also notice another number in the signature block of the filing attorney. Upon admission to the bar of a state, new lawyers are usually issued a unique identification number. Various state or federal rules may require lawyers to include their bar number on documents filed with that court. Note as well that plaintiff's lawyers have their offices in New Columbia but provided a Portlandia bar number on the Complaint. Many lawyers are admitted to practice in more than one state.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF PORTLANDIA

NANCY CARPENTER, Administratratix of the Estate of Charles Carpenter	
	CIVIL ACTION NO. 08-6144
vs.	
RANDALL DEE and PETER DEE, Defendant.	

MOTION TO DISMISS AND, IN THE ALTERNATIVE, FOR MORE DEFINITE STATEMENT

Motion to Dismiss

The defendant Randall Dee moves to dismiss Counts I, II, and III (Wrongful Death, Conscious Suffering, and Fraudulent Conveyance) of the Complaint against said defendant pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state claims upon which relief can be granted.

Plaintiff's Complaint alleges three causes of action against said defendant. It further alleges that on August 31, 2007, the Plaintiff's intestate was injured and killed while a passenger in a Jeep CJ-7 that rolled over because said jeep was being driven at an excessive speed while failing to stop at an intersection and with illegal and dangerous alteration of the chassis. The specific allegations against the defendants include the following:

> (a) On Count I, the defendant's conduct was negligent and/or grossly negligent and/or wanton, willful and reckless;
>
> (b) On Count II, the defendant's conduct resulted in serious personal injuries to the plaintiff's intestate which resulted in conscious suffering; and
>
> (c) On Count III, the defendant fraudulently conveyed a certain parcel of land that was purchased for the amount of $80,000; and that defendant Randall Dee conveyed all his right, title, and interest in said property to Peter Dee for nominal consideration and that transfer of such interest was fraudulent.

All three counts should be dismissed for the three reasons hereunder set forth:

> (1) Randall Dee was not the owner of said Jeep CJ-7.
>
> (2) The complaint does not allege that Randall Dee owed a duty to Charles Carpenter.
>
> (3) Plaintiff has failed to make plausible allegations against defendant Randall Dee.

Count III should also be dismissed for failure to plead the circumstances with particularity as reauired by Federal Rule of Civil Procedure 9.

Motion for More Definite Statement

In the event that the Court does not grant defendant Randall Dee's Motion to Dismiss, or grants it only in part, defendant Randall Dee moves the Court, in the alternative, to issue an order for a more definite statement pursuant to Federal Rule of Civil Procedure 12(e).

The complaint is so vague and ambiguous that defendant should not reasonably be required to prepare a responsive pleading. Plaintiff should be ordered to furnish a more definite statement of the nature of her claim as set forth in her complaint in the following respects:

(1) With respect to the allegations contained in Paragraph 7, page 1 of the complaint, plaintiff should be required to state the facts supporting her conclusion that on August 31, 2007, Randall Dee lost control of the 1986 Jeep CJ-7 because of his negligent and/or grossly negligent and/or wanton and willful, conduct by stating the circumstances surrounding the accident: weather conditions, speed of vehicle, proximity to other vehicles, condition and experience of defendant-driver.

(2) With respect to the prayer for relief, plaintiff has failed to provide the amount which she is claiming for loss of the value of the decedent's net income, services, protection, care, assistance, society, companionship, comfort, guidance, counsel and advice of the deceased.

RANDALL DEE, by his attorney,

By: /s/ Jasper Cheatham
Jasper Cheatham (NC Bar #627841)
Dewy, Cheatham & Howe
1 Center City Tower
Hawthorne, Portlandia 99887

Dated: /d/

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF PORTLANDIA

NANCY CARPENTER, Administratratix of the Estate of Charles Carpenter	
	CIVIL ACTION NO. 08-6144
vs.	
RANDALL DEE and PETER DEE, Defendant.	

ANSWER OF DEFENDANT RANDALL DEE AS TO COUNTS I AND II ONLY

Parties

1. The Defendant, Randall Dee, admits the allegations contained in Paragraph 1 of the Complaint.

2. The Defendant, Randall Dee, admits the allegations contained in Paragraph 2 of the Complaint.

3. The Defendant, Randall Dee, admits the allegations contained in Paragraph 3 of the Complaint.

4. The Defendant, Randall Dee, agrees that this Court has jurisdiction over this case on the basis of the diversity of citizenship between plaintiff and defendants, as required by 28 U.S.C. § 1332.

Facts

5. The Defendant, Randall Dee, admits the allegations contained in Paragraph 5 of the Complaint.

6. The Defendant, Randall Dee, admits the allegations contained in Paragraph 6 of the Complaint.

7. The Defendant, Randall Dee, denies each and every allegation contained in Paragraph 6 of the Complaint.

8. The Defendant, Randall Dee, denies each and every allegation contained in Paragraph 7 of the Complaint.

Count I—WRONGFUL DEATH

9. The Defendant, Randall Dee, repeats and realleges his answers contained in Paragraphs 1 through 8, as if fully stated herein.

10. The Defendant, Randall Dee, denies each and every allegation contained in Paragraph 10 of the Complaint.

Count II—Conscious Suffering

11. The Defendant, Randall Dee, repeats and realleges his answers contained in Paragraphs 1 through 7, as if fully stated herein.

12. The Defendant, Randall Dee, denies each and every allegation contained in Paragraph 12 of the Complaint.

FIRST DEFENSE

And further answering, the Defendant says that the Plaintiff's intestate's own negligence caused or contributed to the accident and damages alleged, and therefore the Plaintiff cannot recover.

SECOND DEFENSE

And further answering, the Defendant says that the Plaintiff's intestate was more than 50 percent negligent in causing or contributing to the accident and damages alleged, and therefore the Plaintiff either cannot recover or any verdict or finding in his favor must be reduced by the percentage of negligence attributed to the said Plaintiff's intestate.

THIRD DEFENSE

And further answering, the Defendant says that the Plaintiff's intestate assumed the risk of the accident and damages alleged, and therefore the Plaintiff cannot recover.

FOURTH DEFENSE

And further answering, the Defendant says that the Plaintiff's intestate was in violation of the law at the time and place of the alleged accident, which violation of the law caused or contributed to the happening of said accident, and therefore the Plaintiff cannot recover.

FIFTH DEFENSE

And further answering, the Defendant says that the Plaintiff's intestate's alleged injuries and subsequent death, were caused by persons other than the Defendant, his agents, servants, or employees, and plaintiff's intestate's alleged injuries, if any, were caused by persons for whose conduct the defendant is not responsible, and therefore, the Plaintiff cannot recover.

SIXTH DEFENSE

And further answering, the Defendant says that the Plaintiff's intestate's alleged injuries, and subsequent death, do not come within one of the exceptions to the Portlandia No-Fault Insurance Law, being Portlandia Consolidated Laws, Chapter 231, Section 6D, and therefore the Plaintiff is barred from bringing this action and cannot recover.

SEVENTH DEFENSE

And further answering, the Defendant says that the alleged cause of action referred to in the Plaintiff's complaint falls within the purview of Portlandia Consolidated Laws, Chapter 90, Sec-

tion 34(m) [this is a reference to another part of Portlandia's no-fault insurance law], and therefore this action is brought in violation of the law and the Plaintiff cannot recover.
WHEREFORE, the Defendant, Randall Dee, demands judgment against the Plaintiff and further demands that said action be dismissed.

AND FURTHER, the Defendant, Randall Dee, claims a trial by jury on all the issues.

RANDALL DEE, by his attorney,

By: /s/ Jasper Cheatham
Jasper Cheatham (NC Bar #627841)
Dewy, Cheatham & Howe
1 Center City Tower
Hawthorne, Portlandia 99887

Dated: /d/

Note: Randall Dee did not answer the allegations in Count III of the complaint. One possible explanation for this is that the parties may have reached an agreement on what to do about the alleged fraudulent conveyance pending a trial on the merits. It also is conceivable that Randall Dee intended later to answer Count III, but the parties then simply forgot. Unusual things sometimes happen during litigation.

IN THE UNITED STATES DISTRICT COURT
for the
DISTRICT OF PORTLANDIA

NANCY CARPENTER, Administratratix of the Estate of Charles Carpenter	
	CIVIL ACTION NO. 08-6144
vs.	
RANDALL DEE and PETER DEE, Defendant.	

MOTION TO AMEND

Now comes the plaintiff and moves for leave to file an Amended Complaint, a copy of which is attached hereto.

By her attorneys,

/s/ Watt Four
Watt Four (NC Bar #000001)
Urning, Mony, Four, Botes & Bier
635 Riverway Avenue
Coveport, New Columbia 98765

Dated: /d/

IN THE UNITED STATES DISTRICT COURT
for the
DISTRICT OF PORTLANDIA

NANCY CARPENTER, Administratratix of the Estate of Charles Carpenter	CIVIL ACTION NO. 08-6144
vs.	PLAINTIFF CLAIMS TRIAL BY JURY
RANDALL DEE and PETER DEE, Defendant.	

AMENDED COMPLAINT

Parties

1. The plaintiff Nancy Carpenter is a resident of Coveport, Vancouver County, New Columbia. She this action in her capacity as the administratix of the estate of Charles Carpenter, her late husband, of Coveport, Vancouver County, New Columbia. She was duly appointed as administratix by the Vancouver Probate Court, docket number 07P3875A.

2. The defendant Randall Dee is a resident of the city of Hawthorne, in the State or Portlandia.

3. The defendant Peter Dee is a resident of the city of Belmont, in the State of Portlandia.

4. Ultimate Auto, Inc. is a Portlandia corporation, with a usual place of business in the city of Hawthorne, in the State of Portlandia.

5. The City of Hawthorne ("the City"), is a body politic and corporate under the laws of Portlandia, with executive offices at100 Main Street, Hawthorne, Portlandia.

6. This Court has subject matter jurisdiction over this case based on the diversity of citizenship between plaintiff and defendants, under 28 U.S.C. § 1332.

Facts

7. On or about August 31, 2007,the plaintiff's intestate, Charles Carpenter was riding as a passenger in a 1986 Jeep CJ-7 (hereinafter "the jeep").

8. The jeep was owned by one Twyla Burrell, and operated by the defendant Randall Dee.

9. At or near the intersection of Palmer and Franklin Streets in Hawthorne, the operator lost control of the jeep, and it rolled over pinning Charles Carpenter beneath it.

10. The loss of control and resulting accident was caused by the negligent and/or grossly negligent and/or wanton, willful, and reckless conduct of the defendant Randall Dee as operator of the jeep including, but not limited to; the following acts and omissions:

(a) Excessive speed;
(b) Failing to stop at an intersection; and
(c) Illegal and dangerous alteration of the chassis, causing unsafe handling characteristics.

11. The defendant Randall Dee modified the jeep, by means of a suspension lift kit and oversize tires. He purchased both items at a retail store owned and operated by the defendant Ultimate Auto.

12. The raised suspension and oversized tires markedly affected the handling characteristics (including, but not limited to, propensity to roll over) of the jeep, and such modifications were a substantial contributing cause to the accident on August 31, 2007.

13. On several occasions prior to August 31, 2007, police officers of the City of Hawthorne, acting within the scope of their employment, stopped the defendant Randall Dee while operating the jeep, in connection with suspected motor vehicle offenses. On no occasion, did any of the officers advise the defendant Dee that the vehicle was illegally modified or take any other action to prevent the vehicle from being operated in its dangerous condition The failure of the police to act was a substantial contributing cause to the accident on August 31, 2007

Count I (Wrongful Death, Randall Dee)

14. The plaintiff repeats and incorporates herein the allegations of paragraphs 1-10.

15. As a result of the negligent and/or grossly negligent and/or wanton, willful and reckless conduct of the defendant Randall Dee, the plaintiff's intestate was killed on August 31, 2007.

Count II (Conscious Suffering, Randall Dee)

16. The plaintiff repeats and incorporates herein the allegations of paragraphs 1-10.

17. As a result of the conduct of the defendant Randall Dee, as described above, the plaintiff's intestate sustained serious personal injuries, from which he suffered consciously, prior to his death on August 31, 2007.

Count III (Fraudulent Conveyance)

18. The plaintiff repeats and incorporates herein the allegations of paragraphs 1-10.

19. At the time of the accident on August 31, 2007, the defendant Randall Dee and the defendant Peter Dee owned as joint tenants a certain parcel of land at 91 Douglas Fir Road, East Burnside, Portlandia, containing approximately 11,604 square feet.

20. The defendants Randall Dee and Peter Dee had purchased said property from the estate of their deceased father Richard Dee, for the amount of $80,000.00 on or about February 13, 2007.

21. On or about October 8, 2007, the defendant Randall Dee conveyed all his right, title and interest in the above property to Peter Dee for "nominal consideration."

22. On information and belief, the transfer of such interest was fraudulent as to the creditors, including, but not limited to, the plaintiff, within the means of Portlandia Consolidated Laws ch. 109A, in that:

(a) The conveyance was made without fair consideration and Randall Dee was thereby rendered insolvent, within the meaning of Portlandia Consolidated Laws ch. 109A. §4; and/or

(b) The conveyance was made without fair consideration at a time when the defendant Randall Dee believed that he would incur debts beyond his ability to pay, within the meaning of Portlandia Consolidated Laws ch. 109A, § 6; and/or

(c) The transfer was made with an actual intent to hinder, delay or defraud creditors, including but not limited to the plaintiff, within the meaning of Portlandia Consolidated Laws ch. 109A, § 7.

Count IV (Wrongful Death, Ultimate Auto)

23. The plaintiff repeats and incorporates herein the allegations of paragraphs 1-12.

24. The defendant Ultimate Auto as a retailer of automotive parts, owed a duty to Randall Dee (and to the public generally) to provide appropriate technical advice with regard to the sale of products that could be used to modify vehicles.

25. In breach of that duty, the defendant Ultimate Auto was guilty of negligent and/or grossly negligent and/or wanton, willful and reckless conduct, including, but not limited to, the following acts and ommissions:

(a) Selling a suspension lift kit and oversized tires which, individually and in combination, altered the height of the jeep, affecting its handling characteristics (including, but not limited to, its propensity to roll over) and rendered it unsafe;

(b) Failing to give any kind of warning or instruction to Randall Dee with respect to the effect of such parts on the handling characteristics of the jeep;

(c) Selling automotive parts which constituted per se a violation of Portlandia Consolidated Laws ch. 90 § 7P, with regard to modification of vehicle height;

(d) Failing to advise Randall Dee that the installation of the parts constituted a violation of Portlandia Consolidated Laws ch. 90, § 7P.

26. As a result of the above acts and omissions, the defendant Randall Dee installed the suspension lift kit and oversized tires, and the acts and omissions of Ultimate Auto were a substantial contributing cause to the loss of control and resulting accident on August 31, 2007.

27. As a result of the negligent and/or grossly negligent and/or wanton, willful and reckless conduct of the defendant, Ultimate Auto, the plaintiff's intestate was killed on August 31, 2007.

Count V (Conscious Suffering, Ultimate Auto)

28. The plaintiff repeats and incorporates herein the allegations of paragraphs 1-12 and 24-27.

29. As a result of the conduct of the defendant Ultimate Auto, as described above, the plaintiff's intestate sustained serious personal injuries, from which he suffered consciously, prior to his death on August 31, 2007.

Count VI (Wrongful Death, Warranties, Ultimate Auto)

30. The plaintiff repeats and incorporates herein the allegations of paragraphs 1-12 and 24-27.

31. The defendant Ultimate Auto was a merchant with respect to sale of the suspension lift kit and oversized tires. The defendant Ultimate Auto breached implied warranties of merchantability and fitness for a particular purpose, by selling to the defendant Randall Dee, a suspension lift kit and oversized tires which, individually and in combination, rendered the jeep unreasonably dangerous and/or by selling the suspension lift kit and oversized tires, without adequate warning or instruction with regard to their dangerous propensity.

32. As a result of the said breaches of warranty, the defendant Randall Dee installed the suspension lift kit and oversized tires. The breaches of the defendant Ultimate Auto were a substantial contributing cause to the loss of control and resulting accident on August 31, 2007. As a result of the defendant's breaches of warranty, the plaintiff's intestate was killed on August 31, 2007.

Count VII (Conscious Suffering, Warranties, Ultimate Auto)

33. Plaintiff repeats and incorporates herein the allegations of paragraphs 1-12, 24-27 and 30-32.

34. As a result of the breaches of warranty of the defendant Ultimate Auto, as described above, the plaintiff's intestate sustained serious personal injuries, from which he suffered consciously, prior to his death on August 31, 2007.

Count VIII (Wrongful Death, City of Lowell)

35. Plaintiff repeats and incorporates herein the allegations of paragraphs 1-13.

36. On or about February 19, 2008, the year after the accident, the plaintiff, through her attorney and pursuant to Portlandia Consolidated Laws ch. 258, § 4, gave written notice of its claim to the City. No substantive response to that notice has been forthcoming.

37. The modification of the jeep represented an imminent danger to persons that might be affected by it, in particular, its occupants, and a clear violation of Portlandia Consolidated Laws ch. 90, § 7P. As such, it created a special duty of care to those who might be affected by it, including the plaintiff's intestate.

38. Despite the obvious danger of immediate and foreseeable injury presented by the jeep, police officers of the City of Lowell failed to take any effective action to reduce or eliminate the danger.

39. As a result, the jeep was being operated in a condition of imminent danger on August 31, 2007, and the negligence of the City, through its police officers was a substantial contributing cause to the loss of control and resulting accident on that date.

40. As a result of the negligence of the City, its agents and employees, the plaintiff's intestate was killed on August 31, 2007.

Count IX (City of Lowell, Conscious Suffering)

41. The plaintiff repeats and incorporates herein the allegations of paragraphs 1-13 and 35-40.

42. As a result of the conduct of the defendant City as described above, the plaintiff's intestate sustained serious personal injuries, from which he suffered consciously, prior to his death on August 31, 2007.

WHEREFORE the plaintiff prays for the following relief:

1. Judgment on Counts I, IV, VI and VIII against the defendants Randall Dee, Ultimate Auto and City of Lowell.

(a) To compensate the survivors of the plaintiff's intestate for the fair monetary value of the deceased for reasonably expected net income lost services, protection, care, assistance, society, companionship, comfort, guidance, counsel and advice of the deceased.

(b) Reasonable funeral and burial expenses.

(c) Punitive damages in an amount of at least $5,000.00, pursuant to Portlandia Consolidated Laws ch. 229, § 2.

2. Judgment on Counts II, V, VII and IX against the defendants Randall Dee, Ultimate Auto and City of Lowell to compensate the estate of Charles Carpenter for his pain and conscious suffering.

3. That the Court issue a temporary restraining order enjoining the defendant, Randall Dee, until further order of this court, from conveying, encumbering, or in any other manner transferring any interest, legal or equitable, in any of his assets, including but not limited to real estate, bank accounts, certificates of deposit, securities, valuables, and any other asset not immune from execution, except in the ordinary course of business.

4. That the Court issue a preliminary injunction enjoining the defendant Randall Dee, until the disposition of this action on the merits, from conveying, encumbering or in any other manner transferring any interest, legal or equitable, in any of his assets, including but not limited to real estate, bank accounts, certificates of deposit, securities, valuables, and any other asset not immune from execution, except in the ordinary course of business.

5. That the Court issue a Temporary Restraining Order enjoining the defendant Peter Dee, until further order of this court, from conveying, encumbering, or in any other manner transferring any interest, legal or equitable, in the real estate at 91 Douglas Fir Road, East Burnside, Portlandia.

6. That the Court issue a preliminary injunction enjoining the defendant, Peter Dee, until the disposition of this action on the merits, from conveying, encumbering, or in any other manner transferring any interest, legal or equitable, in the real estate at 91 Douglas Fir Road, East Burnside, Portlandia.

7. That the Court, under Count III, declare null and void the conveyance of the interest of Randall Dee in the property at 91 Douglas Fir Road, East Burnside, Portlandia, and/or allow satisfaction of any judgment in this action against Randall Dee to be satisfied against the interest he held in said property prior to the fraudulent conveyance.

8. That the Court issue a temporary restraining order enjoining the defendants, until further Order of the Court, from selling, or transferring in any way the jeep vehicle involved or in any way modifying it, or changing its present condition.

9. That the Court issue a preliminary injunction enjoining the defendants, until the disposition of this action on the merits, from selling, or transferring in any way the jeep vehicle involved or in any way modifying it, or changing its present condition.

10. PLAINTIFF CLAIMS TRIAL BY JURY.

By her attorneys,

/s/ Watt Four
Watt Four (NC Bar #000001)
Urning, Mony, Four, Botes & Bier
635 Riverway Avenue
Coveport, New Columbia 98765

Dated: /d/

Statutes Relevant to the Amended Complaint

Uniform Commercial Code
§ 2-314, Implied Warranty: Merchantability; Usage of Trade
(adopted by the Portlandia legislature)

(1) Unless excluded or modified . . . , a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. . . .

(2) Goods to be merchantable must be at least such as

> (a) pass without objection in the trade under the contract description; and
>
> (b) in the case of fungible goods, are of fair average quality within the description; and
>
> (c) are fit for the ordinary purposes for which such goods are used; and
>
> (d) run, within the variations permitted by the agreement, of even kind quality and quantity within each unit and among all units involved; and
>
> (e) are adequately contained, packaged, and labeled as the agreement may require; and
>
> (f) conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified . . . other implied warranties may arise from course of dealing or usage of trade.

> **COMMENT**
>
> 1. The seller's obligation applies to present sales as well as to contracts.
>
> 2. The question when the warranty is imposed turns basically on the meaning of the terms of the agreement as recognized in the trade.
>
> 3. In an action based on breach of warranty, it is of course necessary to show not only the existence of the warranty but the fact that the warranty was broken and that the breach of the warranty was the proximate cause of the loss sustained. In such an action an affirmative showing by the seller that the loss resulted from some action or event following his own delivery of the goods can operate as a defense. Equally, evidence indicating that the seller exercised care in the manufacture, processing or selection of the goods is relevant to the issue of whether the warranty was in fact broken. Action by the buyer following an examination of the goods which ought to have indicated the defect complained of can be shown as matter bearing on whether the breach itself was the cause of the injury.

Uniform Commercial Code
§ 2-315, Implied Warranty: Fitness for Particular Purpose
(adopted by the Portlandia legislature)

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or

furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

COMMENT

1. Whether or not this warranty arises in any individual case is basically a question of fact to be determined by the circumstances of the contracting. Under this section the buyer need not bring home to the seller actual knowledge of the particular purpose for which the goods are intended or of his reliance on the seller's skill and judgment, if the circumstances are such that the seller has reason to realize the purpose intended or that the reliance exists.

2. A "particular purpose" differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature ofhis business whereas the ordinary purposes for which goods are used are those envisaged in the concept of merchantability and go to uses which are customarily made of the goods in question. For example, shoes are generally used for the purpose of walking upon ordinary ground, but a seller may know that a particular pair was selected to be used for climbing mountains.

A contract may of course include both a warranty of merchantability and one of fitness for a particular purpose.

PCL ch. 90 § 7P, Height of Motor Vehicles; Alteration Restricted

No person shall alter, modify or change the height of a motor vehicle with an original manufacturer's gross vehicle weight rating of up to and including ten thousand pounds, by elevating or lowering the chassis or body by more than two inches above or below the original manufacturer's specified height by use of so-called "shackle lift kits" for leaf springs or by use of lift kits for coil springs, tires, or any other means or device.

The registrar of vehicles shall establish such rules and regulations for such changes in the height of motor vehicles beyond said two inches. No motor vehicle that has been so altered, modified or changed beyond the provisions of this section or the rules and regulations established by the registrar shall be operated on any way.

PCL ch. 231B § 85, Comparative Negligence; Limited Effect of Contributory Negligence as Defense

Contributory negligence shall not bar recovery in any action by any person or legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not greater than the total amount of negligence attributable to the person or persons against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person for whose injury, damage or death recovery is made.

In determining by what amount the plaintiff's damages shall be diminished in such a case, the negligence of each plaintiff shall be compared to the total negligence of all persons against whom recovery is sought. The combined total of the plaintiff's negligence taken together with all of the negligence of all defendants shall equal one hundred per cent.

The violation of a criminal statute, ordinance or regulation by a plaintiff which contributed to said injury, death or damage, shall be considered as evidence of negligence of that plaintiff, but the violation of said statute, ordinance or regulation shall not as a matter of law and for that reason alone, serve to bar a plaintiff from recovery.

The defense of assumption of risk is hereby abolished in all actions hereunder.

The burden of alleging and proving negligence which serves to diminish a plaintiff's damages or bar recovery under this section shall be upon the person who seeks to establish such negligence, and the plaintiff shall be presumed to have been in the exercise of due care.

PCL ch. 231B §§ 1-4, Contribution Among Joint Tortfeasors

§ 1. (a) Except as otherwise provided in this chapter, where two or more persons become jointly liable in tort for the same injury to person or property, there shall be a right of contribution among them even though judgment has not been recovered against all or any of them.

(b) The right of contribution shall exist only in favor of a joint tortfeasor, hereinafter called tortfeasor, who has paid more than his pro rata share of the common liability, and his total recovery shall be limited to the amount paid by him in excess of his pro rata share. No tortfeasor shall be compelled to make contribution beyond his own pro rata share of the entire liability.

(c) A tortfeasor who enters into a settlement with a claimant shall not be entitled to recover contribution from another tortfeasor in respect to any amount paid in a settlement which is in excess of what was reasonable.

(d) A liability insurer, who by payment has discharged in full or in part the liability of a tortfeasor and has thereby discharged in full its obligation as insurer, shall be subrogated to the tortfeasor's right of contribution to the extent of the amount it has paid in excess of the tortfeasor's pro rata share of the common liability. This provision shall not limit or impair any right of subrogation arising from any other relationship.

(e) This chapter shall not impair any right of indemnity under existing law. Where one tortfeasor is entitled to indemnity from another, the right of the indemnity obligee shall be for indemnity and not contribution, and the indemnity obligor shall not be entitled to contribution from the obligee for any portion of his indemnity obligation.

§ 2. In determining the pro rata shares of tortfeasors in the entire liability

(a) their relative degrees of fault shall not be considered;

(b) if equity requires the collective liability of some as a group shall constitute a single share; and

(c) principles of equity applicable to contribution generally shall apply.

§ 3. (a) Whether or not judgment has been entered in an action against two or more tortfeasors

for the same injury, contribution may be enforced by separate action

(b) Where a judgment has been entered in an action against two or more tortfeasors for the same injury, contribution may be enforced in that action by judgment in favor of one against other judgment defendants by motion upon notice to all parties to the action.

(c) If there is a judgment for the injury against the tortfeasor seeking contribution, any separate action by him to enforce contribution must be commenced within one year after the judgment has become final by lapse of time for appeal or after appellate review.

(d) If there is no judgment for the injury against the tortfeasor seeking contribution, his right of contribution shall be barred unless he has either (1) discharged by payment, the common liability within the statute of limitations period applicable to claimant's right of action against him and has commenced his action for contribution within one year after payment, or (2) agreed, while action is pending against him, to discharge the common liability and has, within one year after the agreement, paid the liability and commenced his action for contribution.

(e) The recovery of a judgment for an injury against one tortfeasor shall not, of itself, discharge the other tortfeasors from liability for the injury unless the judgment is satisfied The satisfaction of the judgment shall not impair any right of contribution

(f) The judgment of the court in determining the liability of the several defendants to the claimant for an injury shall be binding as among such defendants in determining their right to contribution.

§ 4. When a release or covenant not to sue or not to enforce judgment is given in good faith to one or two or more persons liable in tort for the same injury:

(a) It shall not discharge any of the other tortfeasors from liability for the injury unless its terms so provide; but it shall reduce the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and

(b) It shall discharge the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF PORTLANDIA

NANCY CARPENTER, Administratratix of the Estate of Charles Carpenter Plaintiff vs. RANDALL DEE; PETER DEE, CITY OF LOWELL, Defendants. ULTIMATE AUTO, INC., Defendant and Third-Party Plaintiff vs. DALE MCGILL and MCGILL'S GARAGE, INC., Third-Party Defendants.	CIVL ACTION NO. 08-6144

MOTION OF DEFENDANT ULTIMATE AUTO, INC.
TO FILE A THIRD PARTY COMPLAINT

The defendant, Ultimate Auto, Inc., moves that the Court allow it to file the attached third-party complaint for contribution against Dale McGill and McGill's Garage, Inc.

In support thereof, the defendant Ultimate Auto, Inc. states that discovery has shown that the vehicle, which was allegedly in a defective condition at the time of the accident, had been issued an inspection sticker was in violation of applicable Massachusetts regulations. Accordingly, the third-party defendants would be liable as joint tortfeasors for the claims made by the plaintiff.

By its Attorneys,

/s/ Herbert V. Waggen
Herbert V. Waggen
Edsel, Olds & Packard
111 Deisel Street
Hawthorne, Portlandia 99998

Dated: /d/

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF PORTLANDIA

NANCY CARPENTER, Administratratix of the Estate of Charles Carpenter Plaintiff vs. RANDALL DEE; PETER DEE, CITY OF LOWELL, Defendants. ULTIMATE AUTO, INC., Defendant and Third-Party Plaintiff vs. DALE MCGILL and MCGILL'S GARAGE, INC., Third-Party Defendants.	CIVL ACTION NO. 08-6144

THIRD PARTY COMPLAINT OF ULTIMATE AUTO, INC.

Count I

1. The third-party defendant, Dale McGill, is an individual residing station doing business as McGill's Garage, Inc., in Belmont, Portlandia.

2. The defendant/third-party plaintiff, Ultimate Auto, Inc., has been named as a party defendant in an action sounding in tort against it and in which it is alleged that the negligence of the defendant/third-party plaintiff entitled the plaintiff to recover for damages allegedly sustained as a result of a motor vehicle accident on August 31, 2007.

3. If the plaintiff did sustain injuries and damages as alleged, such injuries and damages occurred as a direct and proximate result of the negligence and carelessness of the third-party defendant, Dale McGill in approving an inspection sticker on the vehicle involved in the accident alleged in the plaintiff's complaint.

4. The third-party defendant is jointly liable for the injuries and damages allegedly sustained by the plaintiff pursuant to Portlandia Consolidated Laws ch. 231B, § 1-3.

WHEREFORE, the defendant/third-party plaintiff, says that if it is found liable to the plaintiff, the third-party defendant, Dale McGill, is liable to the defendant/third-party plaintiff as a joint tortfeasor.

Count II

5. The third-party defendant, McGill's Garage, Inc., is a Portlandia corporation with a usual place of business in Belmont, Portlandia, and at all time material was in the business of conducting motor vehicle inspections.

6. The defendant/third-party plaintiff, Ultimate Auto, Inc., has been named as a party defendant in an action sounding in tort against it and in which it is alleged that the negligence of the defendant/third-party plaintiff entitled the plaintiff to recover for damages allegedly sustained as a result of a motor vehicle accident on August 31, 2007.

7. If the plaintiff did sustain injuries and damages as alleged, such injuries and damages occurred as a direct and proximate result of the negligence and carelessness of employees or agents of the third-party defendant, McGill's Garage, Inc., in approving or issuing an inspection sticker on the vehicle involved in the accident alleged in the plaintiff's complaint.

8. The third-party defendant is jointly liable for the injuries and damages allegedly sustained by the plaintiff pursuant to Portlandia Consolidated Laws ch. 231B, § 1-3.

WHEREFORE, the defendant/third-party plaintiff, says that if it is found liable to the plaintiff, the third-party defendant, McGill's Garage, Inc., is liable to the defendant/third-party plaintiff as a joint tortfeasor.

By its Attorneys,

/s/ Herbert V. Waggen
Herbert V. Waggen
Edsel, Olds & Packard
111 Deisel Street
Hawthorne, Portlandia 99998

Dated: /d/

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF PORTLANDIA

NANCY CARPENTER, Administratratix of the Estate of Charles Carpenter Plaintiff vs. RANDALL DEE; PETER DEE, CITY OF LOWELL, Defendants. ULTIMATE AUTO, INC., Defendant and Third-Party Plaintiff vs. DALE MCGILL and MCGILL'S GARAGE, INC., Third-Party Defendants.	CIVL ACTION NO. 08-6144

ANSWER AND CROSS-CLAIMS OF ULTIMATE AUTO, INC.

First Defense

The Defendant, Ultimate Auto, Inc., ("Ultimate Auto") addresses the separately numbered paragraphs of the Complaint as follows:

1. The Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 1.

2. The Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 2.

3. The Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 3.

4. The Defendant admits the allegations contained in Paragraph 4.

5. The Defendant admits the allegations contained in Paragraph 5.

6. The Defendant admits that this court has subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1332.

7. The Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 7.

8. The Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 8.

9. The Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 9.

10. The Defendant denies the allegations contained in Paragraph 10.

11. The Defendant denies the allegations contained in Paragraph 11.

12. The Defendant denies the allegations contained in Paragraph 12.

13. The Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 13.

14-22. The Defendant makes no answer to the allegations of these Paragraphs because they do not purport to make a claim against it.

23. The Defendant repeats and realleges its answers to Paragraphs 1-12.

24. The Defendant denies the allegations contained in Paragraph 24.

25. The Defendant denies the allegations contained in Paragraph 25.

26. The Defendant denies the allegations contained in Paragraph 26.

27. The Defendant denies the allegations contained in Paragraph 27.

28. The Defendant repeats and realleges its answers to Paragraphs 1-12 and 24-27.

29. The Defendant denies the allegations contained in Paragraph 29.

30. The Defendant repeats and realleges its answers to Paragraphs 1-12 and 24-27.

31. The Defendant denies the allegations contained in Paragraph 31.

32. The Defendant denies the allegations contained in Paragraph 32.

33. The Defendant repeats and realleges its answers to Paragraphs 1-12, 24-27, and 30-32.

34. The Defendant denies the allegations contained in Paragraph 34.

35-42. The Defendant makes no answer to the allegations of these Paragraphs because they do not purport to make a claim against this Defendant.

Second Defense

This action is barred by operation of the applicable statute of limitations.

Third Defense

If the Plaintiff is entitled to recover against the Defendant, any such recovery must be reduced in accordance with the comparative negligence statute as enacted in the Commonwealth, since the Plaintiff's own negligence was the proximate cause of the injury sustained.

Fourth Defense

Any loss sustained by the Plaintiff resulted from his own negligence, which was greater in degree than any negligence of the Defendant and therefore the Plaintiff is barred from recovery in this action.

Fifth Defense

The Defendant is exempt from liability to the extent provided by the Massachusetts "no fault" statutes, Portlandia Consolidated Law c. 90, section 34m, and Portlandia Consolidated Laws ch. 231 section 6d.

Sixth Defense

The Plaintiff has failed to give notice of breach of warranty, and the Defendant has thereby been prejudiced.

CROSS-CLAIM AGAINST RANDALL DEE, PETER DEE AND THE CITY OF LOWELL

1. If the Plaintiff's decedent was injured as alleged by the Plaintiff he was injured as a result of the negligence of the Defendants, Randall Dee, Peter Dee, and/or the City of Lowell.

2. The Defendants, Randall Dee, Peter Dee, and the City of Lowell, are liable to the Defendant, Ultimate Auto, Inc. for contribution pursuant to Portlandia Consolidated Laws ch. 231B.

WHEREFORE, the Defendant Ultimate Auto, Inc., demands judgment for contribution against the Defendants, Randall Dee and Peter Dee.

THE DEFENDANT, ULTIMATE AUTO, INC., DEMANDS TRIAL BY JURY ON ALL CLAIMS.

By its Attorneys,

/s/ Herbert V. Waggen
Herbert V. Waggen
Edsel, Olds & Packard
111 Deisel Street
Hawthorne, Portlandia 99998
Dated: /d/

IN THE UNITED STATES DISTRICT COURT
for the
DISTRICT OF PORTLANDIA

NANCY CARPENTER, Administratratix of the Estate of Charles Carpenter Plaintiff	
vs.	CIVIL ACTION NO. 08-6144
RANDALL DEE; PETER DEE, ULTIMATE AUTO, INC.; and CITY OF LOWELL, Defendants.	

PLAINTIFF'S REQUEST FOR PRODUCTION OF DOCUMENTS BY ULTIMATE AUTO, INC.

The plaintiff, Nancy Carpenter, hereby requests of defendant, Ultimate Auto, Inc., that the plaintiff be permitted to inspect and copy the originals and copies of the following designated documents, writings, photographs, or tangible things. Production, inspection and copying shall take place at the office of defendant's counsel, within thirty days of the receipt of this notice or at such other place and time as may be agreed upon by counsel for the parties.

If, in response to any of the following requests, production of a document is denied on the basis of attorney-client privilege or trial-preparation/work-product materials, kindly indicate sufficient information concerning said document and the claimed privilege to enable the court to assess the applicability of said privilege, including the nature of the document withheld, the identity of its author, the current custodian of the document, the date the document was prepared, and the exact privilege being asserted.

Definitions

A. "The accident" refers to the alleged accident described in plaintiff's complaint as occurring on or about August 31, 2007.

B. "The motor vehicle" means the jeep alleged to have caused the plaintiff's injuries and described in the plaintiff's complaint.

C. "Ultimate Auto, Inc." means the defendant Ultimate Auto, Inc., its officers, agents, and employees.

D. The term "documents" as used herein includes writings of any sort drawings, graphs, charts, photographs, and other data compilations.

Requests

1. All promotional and descriptive material in your possession relating in any way to oversize tires.

2. All promotional and descriptive material in your possession relating in any way to suspension lift kits.

3. All documents in your possession which comment upon, or relate in any way to, Portlandia Consolidated Laws ch. 90, § 7P.

4. A copy of all warnings and instructions which accompany suspension lift kits and/or oversize tires.

5. All warranties pertaining to the above products.

6. All complaints, letters, notices, claims or suit papers which constitute, reflect or relate to any claims as described in plaintiff's Interrogatory No. 11.[*]

7. All studies, reports, literature, research or documents of any other kind and description, relating in any way to the alteration in vehicle handling or driving characteristics (including, but not limited to change in its propensity to roll over) as result of alteration of vehicle height.

8. Copies of all industry and trade standards which reflect, or relate in any way to, the design, construction or configuration of automobile parts which have the purpose or effect of altering vehicle height.

9. Copies of all insurance policies (primary or excess) affording coverage to the defendant for this loss.

10. Copies of all statements secured at any time from plaintiff, or from any member of the plaintiff's family, and whether such statements be recorded or written, signed or unsigned.

11. All written warnings or instructions, which you have ever furnished to any customer, relating in any way to alteration of the handling or driving characteristics of the vehicle (including, but not limited to, its propensity to roll over) as a result of modification of vehicle height.

By her attorneys,

/s/ Watt Four
Watt Four (Portlandia Bar #000001)
Urning, Mony, Four, Botes & Bier
635 Riverway Avenue
Coveport, New Columbia 98765

Dated: /d/

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[*] *Note*. Plaintiff's Interrogatory No. 11 can be found reprinted in Ultimate Auto's Answers Interrogatories in these case files.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF PORTLANDIA

NANCY CARPENTER, As Administratratix of the Estate of Charles Carpenter Plaintiff	
vs.	CIVIL ACTION NO. 08-6144
RANDALL DEE; PETER DEE, ULTIMATE AUTO, INC.; and CITY OF LOWELL, Defendants.	

RESPONSE OF DEFENDANT ULTIMATE AUTO, INC. TO PLAINTIFF'S REQUEST FOR PRODUCTION OF DOCUMENTS

1. Catalogue and specification sheet to be produced.

2. Manufacturer's brochure to be produced.

3. Registry of Motor Vehicle regulation to be produced.

4. The defendant has no such documents in his possession, custody or control other than the documents produced in response to requests no. 1 and 2.

5. The defendant has no such documents in his possession, custody or control.

6. The defendant has no such documents in his possession, custody or control.

7. The defendant has no such documents in his possession, custody or control.

8. The defendant, by its attorney, objects to this request on the grounds that it is vague and does not specify with particularity the documents sought.

9. Insurance policy to be produced.

10. The defendant has no such documents in his possession, custody or control.

11. The defendant has no such documents in his possession, custody or control.

By its Attorneys,

/s/ Herbert V. Waggen
Herbert V. Waggen
Edsel, Olds & Packard
111 Deisel Street
Hawthorne, Portlandia 99998

Dated: /d/

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF PORTLANDIA

NANCY CARPENTER, As Administratratix of the Estate of Charles Carpenter Plaintiff	
vs.	CIVIL ACTION NO. 08-6144
RANDALL DEE; PETER DEE, ULTIMATE AUTO, INC.; and CITY OF LOWELL, Defendants.	

ANSWERS OF DEFENDANT ULTIMATE AUTO, INC. TO PLAINTIFF'S INTERROGATORIES

1. Please identify yourself by stating your full name, residential address, business address, employer, occupation and job title.*

Adam Jenkins, 11 Sleater Lane, Kinneyville, Portlandia, President of Ultimate Auto, Inc.

2. Before proceeding further, please consult with all necessary persons, and review all necessary documents, to answer the remaining interrogatories. Have you done so?

Yes.

3. If you are a member of any trade associations, related in any way in whole or in part to the design, manufacture, sale, or use of automotive parts, which have the purpose or effect of modifying the height of vehicles, please identify all such organizations including: (a) name; (b) address; (c) inclusive dates of your membership; and (d) the name of any publications which you regularly receive from such organizations.

Specialty Equipment Manufacturers Associations.

4. Were you, or anyone employed by your company, aware of the existence of Portlandia Consolidated Laws ch. 90 section 7P. Unless the answer is in the unqualified negative, kindly state the name, residential address and position with your company of all persons who were so aware.

Yes. Cecil Sylvester.

* *Note*: The Local Rules of many courts require that answers to interrogatories also contain the questions being answered. This makes it easier for judges and lawyers to comprehend and use the answers.

5. If you expect to call any person as an expert witness at the trial of this case, kindly state (a) the name and address of each person whom you expect to call as an expert witness at trial; (b) the subject matter on which each person whom you expect to call as an expert witness at trial is expected to testify, and his qualifications as an expert in that area; (c) the substance of the facts and opinions to which each expert is expected to testify and a summary of the grounds for each such opinion; and (d) the formal education (including the college and post-graduate education) of each such expert, each job or position such person has held in his area of expertise and the dates of such employment, membership in professional societies of each such expert, and identify all publications of each such subject in his field of expertise.

Unknown at the present time.

6. With respect to any primary, or excess liability insurance applicable to the plaintiff's claim, please state the insurer, effective dates of the policy, and applicable coverage limits.

$500,000/$500,000 single limit bodily injury coverage, The Travelers Insurance Company, effective on the date of the loss alleged in the plaintiff's complaint

7. Please identify all automotive parts ever purchased by the defendant Randall Dee, at your company, including the exact description of such parts, date or purchase and purchase price.

It is unknown what, if any, automotive parts were ever purchased by Randall Dee from Ultimate Auto. This question is presently being investigated by my attorney in connection with discovery in this action.

8. If you provided Randall Dee with any oral or written warning or instruction, relating in any way to change in the driving characteristics of modified vehicles (including, but not limited to, an increased propensity to rollover, please state (a) the exact content of such warning; (b) the date; and (c) the person or persons who gave such warning or instruction.

It is unknown what, if any, instructions were ever provided to Randall Dee by Ultimate Auto. This question is presently being investigated by my attorney in this action.

9. Are you, or is anyone in your company, aware that Monster Tire's 38 inch "Monster Mudder" tires (hereinafter "the Monster Tires") if mounted on a 1986 Jeep CJ7 (with necessary modifications to allow the mounting of such tires) could alter the driving and handling characteristics of the vehicle? Unless the answer is in the unqualified negative, kindly state (a) when you first became aware of this; (b) the name, address and company position of all persons with such awareness; and (c) in as much detail as possible, please describe what characteristics you were aware could be affected.

The defendant, by his attorney, objects to this interrogatory on the grounds that it is not clear what modifications are included in the term "necessary."

Without waiving this objection the defendant states that both at, and after, the date of the accident, alleged in the plaintiff's complaint Adam Jenkins was aware that any modification to the center of gravity of a vehicle by the addition of tires could, depending on the vehicle, and other variables, affect the handling of the vehicle.

10. Are you, or is anyone in your company, aware that Rodeo Suspension kit lifts if mounted on a 1986 Jeep CJ7 could alter the driving and handling characteristics of the vehicle. Unless the answer is in the unqualified negative, kindly state (a) when you first became aware of this; (b) the name, address and company position of all persons with such awareness; and (c) in as much detail as possible, please describe what characteristics you were aware could be affected.

No.

11. If you have ever received any claim or lawsuit, relating in any way to a vehicle rolling over, after the installation of any parts (including, but not limited to suspension lift kits and tires) purchased at your company, please state as to each such claim or lawsuit (a) the name of the person or persons involved in such claim or lawsuit; (b) name of plaintiff's attorney, if any; (c) date of receipt of the claim or lawsuit; (d) date of the incident; (e) the current status of such claim or lawsuit; and (f) the court, caption and docket number of each such claim which resulted in litigation.

Not applicable.

12. Please identify the officers, directors, agent, servant or employee of the defendant with the most knowledge as to each of the following topics, including such individuals' full name, residential address, business address and position; (a) training of your company's sales personnel; (b) warnings or instructions issued to customers with regard to changes in handling or driving characteristics as a result of altering the height of a vehicle; and (c) the status of any claims or lawsuits described in Interrogatory No. 11 above.

Cecil Sylvester.

Signed under the pains and penalties of perjury

ULTIMATE AUTO, INC.
By: /s/ Adam Jenkins
Adam Jenkins