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LEXISNEXIS

2009 Up-Date Memorandum

This memorandum was prepared by Richard Freer and Wendy Perdue for the benefit of students and faculty. The closing date for materials was June 30, 2009. Permission is granted to distribute copies free of charge to students in classes using the casebook.

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NOTE ON CHANGES TO COMPUTATION OF TIME

Effective on December 1, 1009, absent Congressional action, the methods for computing time and various time limits in the Federal Rules will be changed. The Rules affected are:

- Civil Rules 6, 12, 14, 15, 23, 27, 32, 38, 50, 52, 53, 54, 55, 56, 59, 62, 65, 68, 71.1, 72, 81; Supplemental Rules B, C, and G; and Illustrative Civil Forms 3, 4, and 60; and

- Appellate Rules 4, 5, 6, 10, 12, 15, 19, 25, 26, 27, 28.1, 30, 31, 39, and 41;

- Bankruptcy Rules 1007, 1011, 1019, 1020, 2002, 2003, 2006, 2007, 2007.2, 2008, 2015, 2015.1, 2015.2, 2015.3, 2016, 3001, 3015, 3017, 3019, 3020, 4001, 4002, 4004, 6003, 6004, 6006, 6007, 7004, 7012, 8001, 8002, 8003, 8006, 8009, 8015, 8017, 9006, 9027, and 9033;

- Criminal Rules 5.1, 7, 12.1, 12.3, 29, 33, 34, 35, 41, 45, 47, 58, 59, and Rules 8 of the Rules Governing §§ 2254 and 2255 Cases.

The Rules Advisory Committee explained the reasons for the changes in the Committee Note to the proposed amendments to Fed. R. Civ. P. 6:

> . . . .
>
> **Subdivision (a)(1).** . . .
>
> Under former Rule 6(a), a period of 11 days or more was computed differently than a period of less than 11 days. Intermediate Saturdays, Sundays, and legal holidays were included in computing the longer periods, but excluded in computing the shorter periods. Former Rule 6(a) thus made computing deadlines unnecessarily complicated and led to counterintuitive results. For example, a 10-day period and a 14-day period that started on the same day usually ended on the same day — and the 10-day period not infrequently ended later than the 14-day period. . . .
>
> Under new subdivision (a)(1), all deadlines stated in days (no matter the length) are computed in the same way. The day of the event that triggers the deadline is not counted. All other days — including intermediate Saturdays, Sundays, and legal holidays — are counted, with only one exception: If the period ends on a Saturday, Sunday, or legal holiday, then the deadline falls on the next day that is not a Saturday, Sunday, or legal holiday. An illustration is provided below in the discussion of subdivision (a)(5). Subdivision (a)(3) addresses filing deadlines that expire on a day when the clerk's office is inaccessible.

. . . .

Periods previously expressed as less than 11 days will be shortened as a practical matter by the decision to count intermediate Saturdays, Sundays, and legal holidays in computing all periods. Many of those periods have been lengthened to compensate for the change. *See, e.g.*, Rule 14(a)(1).

Most of the 10-day periods were adjusted to meet the change in computation method by setting 14 days as the new period. A 14-day period corresponds to the most frequent result of a 10-day period under the former computation method — two Saturdays and two Sundays were excluded, giving 14 days in all. A 14-day period has an additional advantage. The final day falls on the same day of the week as the event that triggered the period — the 14th day after a Monday, for example, is a Monday. This advantage of using week-long periods led to adopting 7-day periods to replace some of the periods set at less than 10 days, and 21-day periods to replace 20-day periods. Thirty-day and longer periods, however, were generally retained without change.

Changes Made after Publication and Comment

. . . .

(2) Civil Rules Time Provisions

Many Civil Rules containing specific time periods shorter than 11 days were published for comment on amendments extending the time periods to account for the impact of changing to a computation method that includes every day, abandoning the former practice of excluding intermediate Saturdays, Sundays, and legal holidays. As set out below, it is recommended that all of the proposals be adopted as published except for Rules 50, 52, and 59. The proposals to extend the time for motions under Rules 50, 52, and 59 from 10 days to 30 days have been scaled back to a 28-day period. The 28-day period was chosen in coordination with the Appellate Rules Committee to recognize the inconveniences that would arise from adopting the same 30-day period as the deadline for filing notices of appeal in most civil actions.

. . . .

CHAPTER 4: SUBJECT MATTER JURISDICTION
PART C, SECTION 6
REMOVAL JURISDICTION

At the end of note 2 on pages 232-233, please insert:

This may no longer be true. The majority sentiment seems to have shifted, and to have rejected the approach in *Noble.* Indeed, *Noble* would come out differently today. In *Bailey v. Janssen Pharmaceutica, Inc.,* 536 F.3d 1202, 1205-1208 (11th Cir. 2008), the Eleventh Circuit (which is the Court of Appeals for the court that decided *Noble*) concluded that the second defendant should have the chance to cajole the first defendant into removing the case. The Eleventh Circuit and other courts adopting this "second-filed" rule conclude that it is basically unfair to have the first defendant's inaction bar the later-joined defendant.

CHAPTER 7: PLEADINGS
PART C, SECTION 1
THE COMPLAINT

At page 310, following the Notes and Questions, please insert the following:

Note on *Iqbal*

The Court revisited *Twombly* in *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009). Many observers viewed the Court's decision to grant certiorari in *Iqbal* as an opportunity to clarify and restrict some of the questionable implications of *Twombly*. Instead, in a fractured five-to-four decision, the majority of the Court strongly reaffirmed and arguably expanded *Twombly's* main themes.

The plaintiff in *Iqbal* was a Muslim citizen of Pakistan. He alleged that after the terrorist attacks of September 11, 2001, federal officials arrested and detained him under restrictive conditions. Two of the defendants were John Ashcroft, the former Attorney General of the United States, and Robert Mueller, the Director of the FBI. Iqbal attempted to allege a claim for violation of his constitutional rights under *Bivens v. Six Unknown Federal Narcotics Agents,* 403 U.S. 388 (1971). Specifically, Iqbal alleged that Ashcroft and Mueller violated the First and Fifth Amendments by adopting policies that led to his designation as a person "of high interest" and subjected him to harsh conditions of confinement on account of his race, religion, or national origin.

Ashcroft and Mueller moved to dismiss the complaint on the ground that it failed sufficiently to allege that their conduct violated Iqbal's clearly established constitutional rights, and they therefore were entitled to immunity from suit. The district court and the Second Circuit rejected the defendants' arguments and upheld the complaint.

The Supreme Court reversed, and held that the complaint failed to state a claim. Justice Kennedy wrote the majority opinion, in which he was joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito. In applying *Twombly,* the majority noted, a court must first identify the elements of a viable claim. In actions alleging unconstitutional discrimination by government officials, those officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*. Rather, the plaintiff must allege that each defendant official's own actions have 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. . . . 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 decision maker's undertaking a course of action "'because of,' not merely 'in

> spite of,' [the action's] adverse effects upon an identifiable group." *Ibid.* 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.

Id. at 1948-1949.

The majority then concluded that Iqbal's allegations against Ashcroft and Mueller were insufficient under *Twombly*:

> 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. . . . Rule 8 marks a notable and generous departure from the hyper-technical, 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. . . .
>
> . . .
>
> 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. . . . 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, *Twombly,* 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 [Metropolitan Detention Center in Brooklyn]. Respondent's constitutional claims against petitioners rest solely on their ostensible "policy of holding post-September-11th detainees" in the ADMAX SHU [Administrative Maximum Special Housing Unit, in which detainees are in 23-hour-a-day lockdown] 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. . . .

. . .

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

. . .

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.

. . .

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 ("It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through careful case management given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side.").

. . .

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.

. . .

> 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. . . .

Justice Souter, who had written the majority opinion in *Twombly,* dissented, joined by Justices Stevens, Breyer, and Ginsburg. To them, *Twombly* was distinguishable because that case involved allegations of antitrust conspiracy based on parallel conduct, and such conduct was just as consistent with lawful business behavior as with conspiracy. Here in contrast, "the allegations of the complaint are neither confined to naked legal conclusions nor consistent with legal conduct." *Id.* at 1960.

Questions

1. Is *Iqbal* consistent with *Erickson* (discussed in Note 5 above)? After all, *Erickson* also engaged deprivation of constitutional rights – but successfully alleged. Why the different result in *Iqbal*?

2. In his dissent in *Twombly,* Justice Stevens reviewed the efforts of the drafters of the Federal Rules to rid federal pleading of the distinction between allegations of "conclusions" and allegations of "facts." See pages 305-306 of the casebook. Has *Iqbal* resurrected that distinction?

3. How does the majority deal with the fact that Rule 9(b) expressly allows allegations of state of mind to be made generally?

4. Does *Iqbal*, for all practical purposes, make it impossible to state a claim for unconstitutionally motivated conduct by government officials? It not, what must a plaintiff alleging such a complaint include in the complaint that was not included in *Iqbal*?

CHAPTER 11: THE PRECLUSION DOCTRINES
PART C SECTION 6
AGAINST WHOM CAN ISSUE PRECLUSION BE ASSERTED?

In lieu of Notes 3 through 10 at pages 622-624, please insert:

The Supreme Court sounded the death knell of virtual representation in *Taylor v. Sturgell,* 128 S.Ct. 2161 (2008). Although the case involved claim preclusion, its discussion of against whom a judgment may be enforced is relevant in issue preclusion as well. In *Taylor,* Herrick, an antique aviation enthusiast, sought release of technical documents from the Federal Aviation Administration (FAA). He wanted the documents to help him restore such a plane to its original condition. After the FAA the request on the basis that they constituted trade secrets. Herrick then sued the FAA and lost on summary judgment.

Less than a month later, Taylor, who is a friend of Herrick and also an aircraft enthusiast, sought the same documents from the FAA. Ultimately, Taylor sued the agency. The corporation that succeeded to the interests of the airplane's manufacturer intervened and sought to block release of the documents. The lower courts held that Taylor's suit was barred by claim preclusion. Although Taylor was not a party in Herrick's suit, the courts applied virtual representation to hold that Taylor was bound by the judgment in Herrick's case. The district court adopted the Eighth Circuit's test from *Tyus,* which is discussed in Note 2 at page 622 of the Casebook. On appeal, the District of Columbia Circuit fashioned its own test for virtual representation.

The Supreme Court reversed. First, it reviewed the lower courts' reasoning.

> The Eighth Circuit's seven-factor test for virtual representation, adopted by the District Court in Taylor's case, requires an "identity of interests" between the person to be bound and a party to the judgment. Six additional factors counsel in favor of virtual representation under the Eighth Circuit's test, but are not prerequisites: (1) a "close relationship" between the present party and a party to the judgment alleged to be preclusive; (2) "participation in the prior litigation" by the present party; (3) the present party's "apparent acquiescence" to the preclusive effect of the judgment; (4) "deliberat[e] maneuver[ing]" to avoid the effect of the judgment; (5) adequate representation of the present party by a party to the prior adjudication; and (6) a suit raising a "public law" rather than a "private law" issue. These factors, the D. C. District Court observed, "constitute a fluid test with imprecise boundaries" and call for "a broad, case-by-case inquiry."
>
> The record before the District Court in Taylor's suit revealed the following facts about the relationship between Taylor and Herrick: Taylor is the president of the Antique Aircraft Association, an organization to which Herrick belongs; the two men are "close associate[s]"; Herrick asked Taylor to help restore Herrick's F-45, though they had no contract or agreement for Taylor's participation in the restoration; Taylor was represented by the lawyer who represented Herrick in the earlier

litigation; and Herrick apparently gave Taylor documents that Herrick had obtained from the FAA during discovery in his suit.

Fairchild and the FAA conceded that Taylor had not participated in Herrick's suit. App. to Pet. for Cert. 32a. The D. C. District Court determined, however, that Herrick ranked as Taylor's virtual representative because the facts fit each of the other six indicators on the Eighth Circuit's list. Accordingly, the District Court held Taylor's suit, seeking the same documents Herrick had requested, barred by the judgment against Herrick.

The D.C. Circuit affirmed. It observed, first, that other Circuits "vary widely" in their approaches to virtual representation. *Taylor* v. *Blakey*, 490 F.3d 965, 971 (2007). In this regard, the D. C. Circuit contrasted the multifactor balancing test applied by the Eighth Circuit and the D. C. District Court with the Fourth Circuit's narrower approach, which "treats a party as a virtual representative only if the party is 'accountable to the nonparties who file a subsequent suit' and has 'the tacit approval of the court' to act on the nonpart[ies'] behalf." *Ibid.* (quoting *Klugh* v. *United States*, 818 F.2d 294, 300 (CA4 1987)).

Rejecting both of these approaches, the D.C. Circuit announced its own five-factor test. The first two factors--"identity of interests" and "adequate representation"--are necessary but not sufficient for virtual representation. 490 F.3d at 971-972. In addition, at least one of three other factors must be established: "a close relationship between the present party and his putative representative," "substantial participation by the present party in the first case," or "tactical maneuvering on the part of the present party to avoid preclusion by the prior judgment."

Applying this test to the record in Taylor's case, the D. C. Circuit found both of the necessary conditions for virtual representation well met. As to identity of interests, the court emphasized that Taylor and Herrick sought the same result--release of the F-45 documents. Moreover, the D. C. Circuit observed, Herrick owned an F-45 airplane, and therefore had "if anything, a stronger incentive to litigate" than Taylor, who had only a "general interest in public disclosure and the preservation of antique aircraft heritage." *Id.*, at 973.

Turning to adequacy of representation, the D. C. Circuit acknowledged that some other Circuits regard notice of a prior suit as essential to a determination that a nonparty was adequately represented in that suit. See *id.*, at 973-974 (citing *Perez* v. *Volvo Car Corp.*, 247 F.3d 303, 312 (CA1 2001), and *Tice* v. *American Airlines, Inc.*, 162 F.3d 966, 973 (CA7 1998)). Disagreeing with these courts, the D. C. Circuit deemed notice an "important" but not an indispensable element in the adequacy inquiry. The court then concluded that Herrick had adequately represented Taylor even though Taylor had received no notice of Herrick's suit. For this conclusion, the appeals court relied on Herrick's "strong incentive to litigate" and Taylor's later engagement of the same attorney, which indicated to the court Taylor's satisfaction with that attorney's performance in Herrick's case. See 490 F.3d at 974-975.

The D.C. Circuit also found its "close relationship" criterion met, for Herrick had "asked Taylor to assist him in restoring his F-45" and "provided information to

> Taylor that Herrick had obtained through discovery"; furthermore, Taylor "did not oppose Fairchild's characterization of Herrick as his 'close associate.'" *Id.*, at 975. Because the three above-described factors sufficed to establish virtual representation under the D. C. Circuit's five-factor test, the appeals court left open the question whether Taylor had engaged in "tactical maneuvering." See *id.*, at 976 (calling the facts bearing on tactical maneuvering "ambigu[ous]")
>
> We granted certiorari to resolve the disagreement among the Circuits over the permissibility and scope of preclusion based on "virtual representation."[3]

Id. at 2169-2170.

The Court then summarized the circumstances in which a non-party may be bound by a judgment.

> Though hardly in doubt, the rule against nonparty preclusion is subject to exceptions. For present purposes, the recognized exceptions can be grouped into six categories.
>
> First, "[a] person who agrees to be bound by the determination of issues in an action between others is bound in accordance with the terms of his agreement." 1 Restatement (Second) of Judgments § 40 (1980) (hereinafter Restatement). For example, "if separate actions involving the same transaction are brought by different plaintiffs against the same defendant, all the parties to all the actions may agree that the question of the defendant's liability will be definitely determined, one way or the other, in a 'test case.'" D. Shapiro, Civil Procedure: Preclusion in Civil Actions 77-78 (2001) (hereinafter Shapiro). See also *California* v. *Texas*, 459 U.S. 1096, 1097 (1983) (dismissing certain defendants from a suit based on a stipulation "that each of said defendants . . . will be bound by a final judgment of this Court" on a specified issue).
>
> Second, nonparty preclusion may be justified based on a variety of pre-existing "substantive legal relationship[s]" between the person to be bound and a party to the judgment. Shapiro 78. See also *Richards*, 517 U.S., at 798. Qualifying relationships include, but are not limited to, preceding and succeeding owners of property, bailee and bailor, and assignee and assignor. See 2 Restatement §§ 43-44,

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[3] The Ninth Circuit applies a five-factor test similar to the D. C. Circuit's. See *Kourtis* v. *Cameron*, 419 F.3d 989, 996 (2005). The Fifth, Sixth, and Eleventh Circuits, like the Fourth Circuit, have constrained the reach of virtual representation by requiring, *inter alia*, the existence of a legal relationship between the nonparty to be bound and the putative representative. See *Pollard* v. *Cockrell*, 578 F.2d 1002, 1008 (CA5 1978); *Becherer* v. *Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 193 F.3d 415, 424 (CA6 1999); *EEOC* v. *Pemco Aeroplex, Inc.*, 383 F.3d 1280, 1289 (CA11 2004). The Seventh Circuit, in contrast, has rejected the doctrine of virtual representation altogether. See *Perry* v. *Globe Auto Recycling, Inc.*, 227 F.3d 950, 953 (2000).

> 52, 55. These exceptions originated "as much from the needs of property law as from the values of preclusion by judgment." 18A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4448, p 329 (2d ed. 2002).[8]
>
> Third, we have confirmed that, "in certain limited circumstances," a nonparty may be bound by a judgment because she was "adequately represented by someone with the same interests who [wa]s a party" to the suit. *Richards*, 517 U.S., at 798 . Representative suits with preclusive effect on nonparties include properly conducted class actions, see *Martin*, 490 U.S., at 762, n. 2 (citing Fed. Rule Civ. Proc. 23), and suits brought by trustees, guardians, and other fiduciaries, see *Sea-Land Services, Inc.* v. *Gaudet*, 414 U.S. 573, 593.
>
> Fourth, a nonparty is bound by a judgment if she "assume[d] control" over the litigation in which that judgment was rendered. *Montana*, 440 U.S., at 154. Because such a person has had "the opportunity to present proofs and argument," he has already "had his day in court" even though he was not a formal party to the litigation.
>
> Fifth, a party bound by a judgment may not avoid its preclusive force by relitigating through a proxy. Preclusion is thus in order when a person who did not participate in a litigation later brings suit as the designated representative of a person who was a party to the prior adjudication. See *Chicago, R. I. & P. R. Co.* v. *Schendel*, 270 U.S. 611, 620, 623. And although our decisions have not addressed the issue directly, it also seems clear that preclusion is appropriate when a nonparty later brings suit as an agent for a party who is bound by a judgment.
>
> Sixth, in certain circumstances a special statutory scheme may "expressly foreclos[e] successive litigation by nonlitigants . . . if the scheme is otherwise consistent with due process." *Martin*, 490 U.S., at 762, n. 2. Examples of such schemes include bankruptcy and probate proceedings, and *quo warranto* actions or other suits that, "under [the governing] law, [may] be brought only on behalf of the public at large," *Richards*, 517 U.S., at 804.

Id. at 2172-2173.

The Court found that none of these exceptions applied, and thus concluded that Taylor's suit against the FAA could proceed.

[8] The substantive legal relationships justifying preclusion are sometimes collectively referred to as "privity." See, *e.g., Richards v. Jefferson County*, 517 U.S. 793, 798 (1996); 2 Restatement § 62, Comment *a.* The term "privity," however, has also come to be used more broadly, as a way to express the conclusion that nonparty preclusion is appropriate on any ground. To ward off confusion, we avoid using the term "privity" in this opinion.

CHAPTER 12: SCOPE OF LITIGATION – JOINDER AND SUPPLEMENTAL JURISDICTION

PART F, SECTION 2. NECESSARY AND INDISPENSABLE PARTIES

At page 702, please insert:

7. In *Republic of Philippines v. Pimentel,*128 S.Ct. 2180 (2008), the Supreme Court applied Rule 19(b) to compel dismissal in an interesting context. The case was an interpleader action. As we will study in Chapter 13, interpleader allows one holding money or other property to join all potential claimants to the property. *Pimentel* involved billions of dollars in assets stolen from various sources by the late ruler of the Philippines, Ferdinand Marcos. A corporation founded by Marcos held the assets and instituted interpleader in federal court in California, in an effort to return them to their rightful owners.

Thousands of claimants were joined. Two claimants – the Republic of the Philippines and a commission created by it – could not be joined, however, because of sovereign immunity. The Court concluded that the interpleader proceeding could not proceed without these two claimants, and that it had to be dismissed under Rule 12(b)(7). First, the Philippines and its commission were necessary under Rule 19(a)(1)(B)(i). If they did not participate, the assets to which they were entitled would be distributed to others. Second, under Rule 19(b), the Court confirmed that judges routinely must consider the merits of claims and defenses. Rule 19(b), after all, requires a court to assess whether it is likely that a party or absentee will be harmed by nonjoinder. The lower courts had done so and had concluded that the claims by the Philippines and its commission were frivolous. The Court disagreed. In equity and good conscience, the interpleader case had to be dismissed, at least in part to allow a sovereign nation to determine in its own courts who owns the assets absconded by its former leader.