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There's a Pennoyer in My Foyer: Civil Procedure According to Dr. Seuss

Elizabeth Chamblee Burch

University of Georgia School of Law, eburch@uga.edu

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THERE'S A PENNOYER IN MY FOYER

CIVIL PROCEDURE ACCORDING TO DR. SEUSS

Elizabeth Chamblee Burch

“**T**HE FEDERAL RULES OF CIVIL PROCEDURE.” In class, when I say this out loud, I say it quickly, like it’s one word – thefederalrulesofcivilproceure. And then I give The Look. Silence ensues. What I tell my students is this: Civil Procedure is thorny and convoluted, like learning a new language; you need me, desperately. What I don’t tell them is all that follows.

What follows are a few secret kernels of civil procedure wisdom courtesy of Dr. Seuss. They are so blindingly simple and elucidate policy in terms so basic that they threaten to ruin the whole lot of us civil procedure types. Gone are Latinate phrases like *subpoena ducus tecum*; gone is the mystery that shrouds *Pennoyer* and its ilk; gone is the bleary theory that is *Erie*. With a bit of hocus pocus and a dash of mumbo jumbo, this essay embarks on a clandestine caper through the court system, jurisdiction, *Erie*, pleading, discovery, and joinder. Just hearing those words again made you tense, didn’t they? But soon you’ll be jogging to joinder and jammin’ to jurisdiction. It’s civil procedure galore, as you’ve never felt it before.

Beth Burch is an assistant professor at the Florida State University College of Law.

I. THE COURT SYSTEM

Sometimes it's a good thing that Lady Justice wears a blindfold. Though it doesn't do much for her archery or pinochle skills, what she doesn't see might make her shudder: things like statutes full of nonsense, like lawyers, like law, like judges. We thus begin with a Seussian take on the iron triangle of civil procedure: the role of lawyers, judges, and juries.

A. On the Role of the Lawyers: The Zax

*"Look here, now!" the North-Going Zax said, "I say!
You are blocking my path. You are right in my way.
I'm a North-Going Zax and I always go north.
Get out of my way, now, let me go forth!"*

*"Who's in whose way?" snapped the South-Going Zax.
"I always go south, making south-going tracks.
So you're in MY way! And I ask you to move
And let me go south in my south-going groove."*

*Then the North-Going Zax puffed up his chest with pride.
"I never," he said, "take a step to one side.
And I'll prove to you that I won't change my ways
If I have to keep standing here fifty-nine days!"¹*

A handful of Zaxs taint the whole apple cart. You know the type. If you close your eyes, you can picture The Zax. The Zax might be: the vinegar-lipped partner you work for who yells that she's not paying you to be a potted plant; the student in your class who, with hand still raised, talks over the professor's answer to mention some English case from the 1800s involving a lion; or the guy who tried to have you arrested by the building's parking attendant for showing up to object to a deposition taking place without your client's being represented (you know who you are). But whoever it is, you can picture that Zax just as clear as day, which brings me to the modern day judge's role.

¹ DR. SEUSS, *The Zax*, in *THE SNEETCHES AND OTHER STORIES* 26, 28-31 (1961).

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B. On the Role of the Judge: If I Ran the Circus; If I Ran the Zoo

Judges weren't always TV stars like Judge Judy, Judge Mathis, Judge Joe Brown, Judge Wapner, or Judge Hatchett. Once upon a time, the word "judge" wasn't followed by the words "syndicated" or "compelling entertainment." Judges used to be ethereal old white men lacking any characteristic detail who wore black-black robes behind thick cherry partitions. They were disengaged and dispassionate arbiters who wore one hat. No longer; they're more like Bartholomew Cubbins:

Flupp! . . . *the sharp wind whisked off Bartholomew's hat.* Flupp Flupp . . . *two more flew off.* Flupp Flupp Flupp *flew another . . . and another.* ". . . 4 . . . 5 . . . 6 . . . 7" *Bartholomew kept counting as the hats came faster and faster.* . . .

"I'm sorry, Your Majesty," explained Bartholomew. "My head can't come off with my hat on. . . . It's against the rules."

"So it can't," said the King, leaning back wearily. "Now how many hats does that make altogether?"

"The executioner knocked off 13 . . . and I left 178 more on the dungeon steps," answered Bartholomew.²

Judges nowadays wear many hats. They're managers, mediators, inquisitors, investigators, facilitators, negotiators, administrators, fact finders, transaction blessers, and extra-judicial legislators.³ There are more: ringmasters, zookeepers, innovators, and inventors. Add television stars if you must. Judges still don flowy black robes and many sit behind particle-board-cherry-veneer, but their faces are female, male, black, white, Hispanic, Asian, you name it. They are always too liberal, too conservative, too activist, too passive, too empathetic, too authoritarian. They are the envy of Circus McGurkus, who dreams of creating "The World's Greatest Show on the face of the earth,"⁴ and young Gerald McGrew, who would like to run the zoo.⁵ They gird the Zax and recruit the pale green pants.

² DR. SEUSS, *THE 500 HATS OF BARTHOLOMEW CUBBINS* 17 (1938).

³ See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 379 (1982).

⁴ DR. SEUSS, *IF I RAN THE CIRCUS* 5 (1956).

⁵ DR. SEUSS, *IF I RAN THE ZOO* (1950).

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C. On the Role of the Jury: What Was I Scared Of?

Unless you venture out in red sharkskin pleather suits, pale green pants with nobody inside them are spooky. And they typify the jury's role in our sacred civil system.

*Then I was deep within the woods
When, suddenly, I spied them.
I saw a pair of pale green pants
With nobody inside them!*

...

*And then they moved? Those empty pants!
They kind of started jumping.
And then my heart, I must admit,
It kind of started thumping.*

*So I got out. I got out fast
As fast as I could go, sir.
I wasn't scared. But pants like that
I did not care for. No, sir.⁶*

There aren't many jury trials anymore. But litigation happens in their shadow. Lawyers settle on the eve of trial, fearful of the pale green pants with nobody inside them. Should such a rarity actually occur, time stops. Your World becomes The Trial. You sit by your office phone and wait for The Call from The Partner. (Note that you are never actually involved in The Trial. Trials are for only "seasoned" litigators, those who have wizened while waiting for their turn to set foot in a courtroom.)

The Call will come while you're waiting for your pizza to arrive; immediate research will follow. Your pizza will congeal. You'll be expected to cite and explain *Erie's* intricacies on a moment's notice because somehow during eight years of litigation no one noticed that federal law mightn't govern and now they're arguing about jury instructions and it just came up and state law would change everything and we could lose and we need the answer now, now, now. You'll imagine what it feels like for your hair to be on fire or

⁶ DR. SEUSS, *What Was I Scared Of?*, in *THE SNEETCHES AND OTHER STORIES*, *supra* note 1, at 42, 44, 46.

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for someone to impale your eye with a pencil or stapler. You'll wonder how long you'd get to stay out of work for a stunt like that. Breathe. You pick up the phone to call your old civil procedure professor, but remember him only as Professor Hang'em and curse your frog brain. And that is what you should fear about the pale green pants with nobody inside them.

II. PERSONAL JURISDICTION

We move now from systemic concerns to a jaunt through prominent civil procedure doctrines such as personal jurisdiction, *Erie*, pleading, discovery, and joinder. We begin with the story of Peter T. Hooper, an infamous egg thief. Let's pretend you represent a fine family of birds living out in the country where you'd like to sue (given the potential jury pool of fine feathered friends). In preparing your complaint, you happen upon Mr. Hooper's confession:

*So I drove to the country, quite rather far out,
And I studied the birds that were flitting about.
I looked with great care at a Mop-Noodled Finch.
I looked at a Beagle-Beaked-Bald-Headed Grinch.
And, also, I looked at a Shade-Roosting Quail
Who was roosting right under a Lass-a-lack's tail.
And I looked at a Spritz and a Flannel-Wing Jay.
But I just didn't stop. I kept right on my way
'Cause they didn't have eggs. They weren't laying that day.*

*Then, suddenly . . . Boy! Up that hill a short space . . .
Birds! They were laying all over the place!*

*. . .
I picked out the eggs in a most careful way.
I only picked those that I knew were Grade-A.⁷*

Ha! You laugh in delight, you'll get specific jurisdiction without much of a fight.⁸ The thievery arises from Mr. Hooper's contact with the desired country forum. And he'll feel quite bereft when he learns of your lawsuit for civil theft.

⁷ DR. SEUSS, SCRAMBLED EGGS SUPER 10, 12-15 (1953).

⁸ See *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220 (1957).

But suppose you learn that Mr. Hooper will be venturing out to Mt. Strookoo to capture the egg of a Mt. Strookoo Cuckoo.⁹ Mt. Strookoo is renowned for its generous juries and you'd love to sue there instead. But all you can recall about this possibility is some jibber jabber over *Burnham*.¹⁰

Don't despair. Instead, picture this: a rousing game of chicken between Justice Scalia and Justice Brennan in *Burnham v. Superior Court*.¹¹ Engines rev. (This will go faster if you stop rolling your eyes.) Since you must know, both swerve – a plurality opinion: they couldn't agree on *Pennoyer's* legacy.¹² Scalia thought *Pennoyer* lived on. After all, serving process in the forum was one of the traditional bases for in personam jurisdiction, plus *International Shoe's* minimum contacts test applies only when the defendant isn't present in the forum.¹³ But Justice Brennan thought *Shaffer v. Heitner* meant what it said and said what it meant when it claimed *International Shoe's* minimum contacts test applied 100% – to all assertions of personal jurisdiction, even those in old *Pennoyer*.¹⁴ Unless you're stuck in a civil procedure nightmare, the result will be the same. The bottom line is this: if you serve Mr. Hooper while he's out plundering the Mt. Strookoo Cuckoo then it's a shoo-in case for *general* in personam jurisdiction. (You don't have to serve him personally; process serving is now a cottage industry. But you do have to convince someone to venture up Mt. Strookoo's steep crags and jags to serve him there.)

III. WEIRD ERIE

Truth be told, convincing a process server to journey to Mt. Strookoo is easy compared with some things. So, I'm going to say this out loud, just once: *Erie* is hard. Even for Dr. Seuss. After all, he's not a miracle-worker. He can't just touch us with a magic

⁹ DR. SEUSS, *supra* note 7, at 30-32.

¹⁰ *Burnham v. Superior Court*, 495 U.S. 604 (1990).

¹¹ *Id.* at 604.

¹² *Pennoyer v. Neff*, 95 U.S. 714 (1877).

¹³ *International Shoe v. Washington*, 316 U.S. 310, 316 (1945).

¹⁴ *Shaffer v. Heitner*, 433 U.S. 186 (1977).

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wand like Glinda the Good and turn on the light. I discovered this dark truth about *Erie* my first year teaching civil procedure. It was the week before Thanksgiving, back when there were two entire semesters devoted to the subject and we all had a lot to be thankful about. But I still had to teach *Hanna v. Plumer*.¹⁵ This discovery was unsettling, like seeing Bob Dole in Viagra ads. Students were fidgety. Evaluations forthcoming. Dr. Seuss, please forgive me:

*How Chief Justice Warren Stole Thanksgiving*¹⁶

Every 1L in Birmingham¹⁷
Liked Thanksgiving a lot . . .
But Justice Warren,
Who lived far North of Birmingham,
Did NOT!

In fact, he hated the whole final exam season!
Now, please don't ask why. No one quite knows the reason.

It could be that *Guaranty Trust* wasn't determining the outcome just right.
It could be, perhaps, that *Erie's* Tenth Amendment constraints felt a little
too tight.

But I think that the most likely reason of all
May be that *Guaranty Trust* set the feds up for a fall
and Chief Justice Warren didn't like that a'tall.

But, whatever the reason,
The outcome or the fall,

He stood there on Thanksgiving Eve, hating the 1L's,
Staring down from his bench with a sour, Grinchy frown
At the warm lighted windows below in their town.

For he knew every 1L down in Birmingham beneath
Was busy now studying, done writing their briefs.
"And they're studying contracts!" he snarled with a sneer.

"Next week are exams! They're practically here!"
Then he growled, with his grinch fingers nervously drumming,

¹⁵ 380 U.S. 460 (1965).

¹⁶ Adapted from DR. SEUSS, *HOW THE GRINCH STOLE CHRISTMAS* (1957).

¹⁷ My first year of teaching was at Cumberland School of Law, in Birmingham, Alabama.

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“I MUST find a way to keep Thanksgiving from coming!”
For next week he knew
the 1L’s would return to *International Shoe!*
And then! Oh, the minimum contacts! Oh, the minimum contacts! Con-
tacts! Contacts! Contacts!

And THEN
They’d do something he liked least of all!
Every 1L down in Birmingham, the tall and the small,
Would go home to their families, with cars still a running.
And the 1L’s would start studying!
They’d study torts!
AND they’d study torts, TORTS! TORTS! TORTS! TORTS!
And the more Justice Warren thought of studying torts
The more he thought, “I must stop this whole thing!
. . . But HOW?”
Then he got an idea!
An awful idea!

JUSTICE WARREN
GOT A WONDERFUL, AWFUL IDEA!

“I know just what to do!” Justice Warren laughed in his throat.
And he made a quick reference to *Erie* and *Byrd*.
And he chuckled, and clucked, “What a great Justice trick!
With this pen and this paper, I’ll change precedent!
And I’ll confuse and befuddle until their puzzlers are sore!
And they’ll all beg ‘please stop’ we love civ pro no more!”
“All I need is a state law and an outcome to determine . . .”
Justice Warren looked around.
But since dominant state laws were becoming scarce, there were none to
be found.

Did that stop crafty old Justice Warren?
Of course not, he simply said,
“If I can’t use state law, I’ll use federal rules instead!”

THEN
He ignored *Guaranty Trust*
He’d no use for ol’ Frankfurter
“I’ve no need for young Brennan’s opinion in *Byrd*
Why form and mode that just sounds absurd.”

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“We’ve got a federal constitution my dear,
So long as that’s there, feds have nothing to fear.”

“You see, *Guaranty Trust* has a fundamental flaw . . .
When a Federal Rule applies, you don’t use *Erie* at all!
When a rule is arguably procedural, wonderfully, awfully, arguably pro-
cedural, you stop there.”

And he hitched up the Supremacy Clause and said, “Giddyap!”

And he huffed and he puffed and wrote *Hanna* up.

“I won’t enlarge or amend any substantive right

No, no, no, the federal courts don’t need to fight.

Now that we’ve got *Hanna*, when there’s no federal directive

The federal courts can take an *Erie* elective.

Federal service of process is easy

You can send it by mail or use someone sleazy.”

Then he said “good enough,” “I must hand this case down
before the 1L’s can possibly leave town.”

But the 1L’s were too quick and too smart, they were more than pre-
pared.

They knew *Erie* and *Byrd* and all that was there.

Hand *Hanna* down they said with flair!

Forget torts! Forget contracts and crim law to boot!

Just give us the case you stodgy old coot!

And they studied, and they studied, studied, studied, studied!

Meanwhile, Justice Warren packed up his briefs,

He stole their gold shoe! Their Greyhound bus! And their Burger King
Crown!¹⁸

He almost got their home cookin’ pot before he skipped town.¹⁹

“Pooh-pooh to the 1L’s!” he was grinch-ish-ly humming.

“They’re finding out now that no Thanksgiving is coming!”

“They’re just waking up! I know just what they’ll do!”

“The 1L’s down in Birmingham will all cry BOO-HOO!”

¹⁸ My first-year students occasionally encounter these “props” representing *International Shoe Co. v. Washington* (gold shoe), *Shaffer v. Heitner* (greyhound bus), and *Rudzewicz v. Burger King* (crown).

¹⁹ The home-cookin’ pot represents diversity of citizenship jurisdiction.

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“That’s a noise,” grinned Justice Warren,
“That I simply must hear!”
So he paused. And Justice Warren put a hand to his ear.
And he did hear a sound rising over the snow.
It started in low. Then it started to grow . . .
But the sound wasn’t sad!
Why, this sound sounded merry!
It couldn’t be so!
But it WAS merry! VERY!
What he saw was a shocking surprise!
Every 1L down in Birmingham, the tall and the small,
understood *Hanna*! Without much precedence at all!
He HADN’T stopped Thanksgiving from coming!
IT CAME!
Somehow or other, it came just the same!

I know, sacrilege right? But what else was I to do? I’m sure I still ruined their Thanksgivings, but with flair.

IV. PLEADING

If anything will redeem us now, it must be pleading. Not apologizing, mind you, but pleading as in drafting a complaint. What could be easier than that? Many of us (not me, of course) complain so much that we could ooze them like politicians do charm. But legal complaints have a touch of formality to them. And who better to instruct us on formalism than Horton the Elephant.

A. Notice Pleading in the Conley v. Gibson²⁰ Era: Horton Hears a Who

*So Horton stopped splashing. He looked toward the sound.
“That’s funny,” thought Horton. “There’s no one around.”
Then he heard it again! Just a very faint yelp.
As if some tiny person were calling for help.
“I’ll help you,” said Horton. “But who are you? Where?”
He looked and he looked. He could see nothing there
But a small speck of dust blowing past through the air.*

²⁰ 355 U.S. 41 (1957).

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*“I say!” murmured Horton. “I’ve never heard tell
Of a small speck of dust that is able to yell.
So you know what I think? . . . Why, I think that there must
Be someone on top of that small speck of dust!
Some sort of a creature of very small size,
too small to be seen by an elephant’s eyes . . .
“. . . some poor little person who’s shaking with fear
That he’ll blow in the pool! He has no way to steer!
I’ll just have to save him. Because, after all,
A person’s a person, no matter how small.”²¹*

I know, the “formalism” wind-up seems like a fib now. You’re right, Rule 8 just requires “a short and plain statement of the claim.”²² And it used to be that simple. Toss in an allegation about federal jurisdiction and a request for relief and that was it. Except that now “it” is no more and the fib was not a lie. Yet, the old rule hasn’t been amended in the least; it’s still the same in its glorious simplicity.²³ You see, the thing is that the Supreme Court and lower courts can’t change The Rules by judicial fiat – the Court said so itself²⁴ – except when it does, which is what it just did in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*.²⁵ Make sense? You’re not alone. This brings me to:

B. Plausibility Pleading Post-Twombly & Iqbal: Horton Hears a Who, Part II

*But, just as he spoke to the Mayor of the speck,
Three big jungle monkeys climbed up Horton’s neck!
The Wickersham Brothers came shouting, “What rot!
This elephant’s talking to Whos who are not!
There aren’t any Whos! And they don’t have a Mayor!
And we’re going to stop all this nonsense! So there!”*

²¹ DR. SEUSS, HORTON HEARS A WHO 3-6 (1954).

²² FED. R. CIV. P. 8(a).

²³ *Id.*

²⁴ *Leatherman v. Tarrant Co.*, 508 U.S. 223 (1993).

²⁵ See *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

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...
“And, as for your dust speck . . . hah! That we shall boil
In a hot steaming kettle of Beezle-Nut oil!

“Boil it? . . .” gasped Horton!
“Oh, that you can’t do!
It’s all full of persons!
They’ll prove it to you!”

...
“This,” cried the Mayor, “is your town’s darkest hour!
The time for all Whos who have blood that is red
To come to the aid of their country!” he said.
“We’ve GOT to make noises in greater amounts!
So, open your mouth, lad! For every voice counts!”
Thus he spoke as he climbed. When they got to the top,
The lad cleared his throat and he shouted out, “YOPP!”

And that Yopp . . .
That one small, extra Yopp put it over!
Finally, at last! From that speck on that clover
Their voices were heard! They rang out clear and clean.
And the elephant smiled. “Do you see what I mean? . . .
They’ve proved they ARE persons, no matter how small.
And their whole world was saved by the Smallest of All!”²⁶

No one quite knows what “plausibility” is, but after *Twombly* and *Iqbal* that’s what you need to plead. It might be a yopp. It isn’t putting the defendant on notice and it isn’t *Conley v. Gibson*.²⁷ Merriam-Webster offers some interesting variations, noting that the word comes from Latin “plausibilis,” meaning worthy of applause. Well, that would certainly fit in with the circus theme and yet you just don’t see many judges clapping when they receive a Complaint. Or maybe it’s just that the chamber walls are so thick that you can’t hear glee. Other definitions include quite a spectrum: from “superficially fair, reasonable, or valuable but often specious” to “appearing worthy of belief.”²⁸ Strangely, a yopp might meet both defini-

²⁶ DR. SEUSS, *supra* note 21, at 22, 38, 56.

²⁷ 355 U.S. 41 (1957).

²⁸ Merriam-Webster’s Online Dictionary, www.merriam-webster.com/dictionary

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tions. Yep, it's a yopp. You see, that collectively uttered noise of an entire Who city plus a yopp brought them into existence, into recognition. It represents strategic policy choices about who gets heard (pun intended).

V. DISCOVERY

If you yopp, then you'll make it through a *Marvin K. Mooney Will You Please Go Now!*²⁹ motion to dismiss and on to discovery. A lot of discovery is about:

*Waiting for the fish to bite
or waiting for wind to fly a kite
or waiting around for Friday night
or waiting, perhaps, for their Uncle Jake
or a pot to boil, or a Better Break
or a string of pearls, or a pair of pants
or a wig with curls, or Another Chance.*³⁰

When it's not about waiting, it's about a snide field, which is kind of like a snipe hunt, except that snide is real.

*I had to do an errand,
Had to pick a peck of Snide
In a dark and gloomy Snide-field
That was almost nine miles wide.*³¹

It's true. There are warehouses full of document gangs hunting for Snide. Oh sure, Snide must be produced as it is "kept in the usual course of business."³² But Snide-picking is a messy, messy business. I do not know this as fact, but I suspect that Snide bushes have thorns, like paper cuts. Some Snide is electronic. So, instead of paper cuts and hot documents mired in blood and curled from sweat, your corneas will rupture. Okay, maybe corneas don't rup-

/plausible (last visited July 16, 2009).

²⁹ DR. SEUSS, MARVIN K. MOONEY WILL YOU PLEASE GO NOW! (1972).

³⁰ DR. SEUSS, OH, THE PLACES YOU'LL GO! 24-25 (1990).

³¹ DR. SEUSS, *What Was I Scared Of?*, in THE SNEETCHES AND OTHER STORIES, *supra* note 1, at 42, 54.

³² FED. R. CIV. P. 34(b)(2)(E).

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ture, they detach, but whatever they do, bring Visine not band-aids.

Not all discovery is like this. Depositions might include prurient details of people's secret lives. For instance, I saw a three-hundred-pound-grown-up man who'd once been convicted of manslaughter cry, I heard about a prominent family's secret orgies, and I was momentarily silenced by the presence of 24 gargoyles in an attorney's office. Plus, there was the thing with the building's parking attendant and the attorney who shall-not-be-named. All incidents except the one with the gargoyles were somehow relevant to claims or defenses.³³ But not all depositions are that fascinating; instead, one might go like this:

*Do you like
green eggs and ham?
I do not like them, Sam-I-am.
I do not like green eggs and ham.
. . . .
Would you? Could you? in a car?
Eat them! Eat them! Here they are.
I would not, could not, in a car.
You may like them. You will see.
You may like them in a tree!
I would not, could not in a tree.
Not in a car! You let me be.
. . . .
I do not like green eggs and ham.
I do not like them, Sam-I-am.³⁴*

Repetition in the deposition is common, but not good. You will have to re-read every unkind “er” or “umm” that you stammer. On the other hand, occasionally mumbling words like “banana stand” or “purple people eater” may make long nights of deposition reading more joyous. Still, even those nights pale when compared with an admission:

³³ FED. R. CIV. P. 26(b)(1).

³⁴ DR. SEUSS, GREEN EGGS AND HAM 10-11, 26-31 (1960).

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Sam!

If you will let me be,

I will try them.

You will see.

Say!

I like green eggs and ham!

I do! I like them, Sam-I-am!

And I would eat them in a boat.

*And I would eat them with a goat . . .*³⁵

Whether your name is Sam or Pam or Buffalo Bam, admissions will give you a special thrill. Staring into the pale green pants is a little less startling with a few of these under your snakeskin belt. Admissions mean just that, whatever it is has been admitted and you don't even have to offer proof.³⁶

VI. JOINDER

Growing up every year, we watched the Okra Strut. It was a normal parade, whatever you might think, with pretty future Miss Americas throwing out candy, not okra. Now, you may be wondering what this has to do with joinder, and the answer is everything. Joinder is just like the Okra Strut; it is a parade of parties with people tossing out claims like candy. What's different is this: unlike candy, litigants on the other side of the case do not receive claims joyously. In fact, they can be downright hostile like the Zooks and the Yooks in their bitter battle over butter.

A. Rule 13 Counter-Claims and Cross-Claims: The Butter Battle

*With my broken-off switch, with my head hung in shame,
to the Chief Yookeroo in great sorrow I came.*

*But our Leader just smiled. He said, "You're not to blame.
And those Zooks will be sorry they started this game."*

...

³⁵ *Id.* at 54-59.

³⁶ FED. R. CIV. P. 36(a)(4).

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*I was racing pell-mell
when I heard a voice yell,
“If you sprinkle us Zooks,
you’ll get sprinkled as well!*

*VanItch had a Sputter exactly like mine!
And he yelled, “My Blue-Gooer is working just fine!
And I’m here to say that if Yooks can goo Zooks,
you’d better forget it. ‘Cause Zooks can goo Yooks!”*

*I flew right back home
and, as you may have guessed,
I was downright despondent,
disturbed,
and depressed.³⁷*

Have you ever been surprised by a Yook who banded a counterclaim your way? Your Zook client didn’t tell you about The Other Thing That Happened you say? “Was it of import?,” your client asks before you start to stutter. You want to retort, “Of course it was, you simp, now tell me about the butter.” Instead, you slink back to your office and cry where your dreams of fame slowly die. You thought opposing counsel would be eating crows, but usually that’s just not how it goes.

B. Rule 14 Impleader: Yertle, the Turtle

Once you’re hit with a counterclaim, you too become a defending party. This means you might be able to implead someone else – if you’re to blame, surely she is too. You’re like King Yertle.

*So Yertle, the Turtle King, lifted his hand
And Yertle, the Turtle King, gave a command.
He ordered nine turtles to swim to his stone
And, using these turtles, he built a new throne.
He made each turtle stand on another one’s back
And he piled them all up in a nine-turtle stack.
And then Yertle climbed up. He sat down on the pile.
What a wonderful view! He could see ’most a mile!³⁸*

³⁷ DR. SEUSS, THE BUTTER BATTLE BOOK (1981).

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If you must know, nine is an exaggeration. The impleader record, so far as I know, is five.³⁹ Go ahead – look if you must. You’re right, the requirements are easy enough that we could all envision thousands of turtles or parties piling on, clamoring in, moaning that they too are defending parties and oh yes, “I’m also owed indemnity or contribution for this same big mess.” But the record is five.

C. Rule 23 Class Actions: The Sneetches

Although five parties seem like a lot in impleader, it’s not even enough to sneeze at in a class action. Class actions lump together all kinds of characters – people who sound like Eeyore, look like Mr. Rogers, and smell like old church ladies – but all claim to have something in common. It might be: the same employer, same drug, same bone screw, same peanut butter brand, same housing insulation, same this, same that. There are some similarities and some differences, much like the Sneetches:

*Now, the Star-Belly Sneetches
Had bellies with stars.
The Plain-Belly Sneetches
Had none upon thars.⁴⁰*

Class actions and subclassing sort issues and interests, like the coin machine at the grocery store (except more expensive). But the process is sometimes like searching for matching socks in the dryer, not picking up neatly packaged quarters. Part of the problem is that the plaintiffs’ lawyers initiate this sorting process and they’re more interested in lumping than sorting. Call them Sylvester McMonkey McBean.

*“My name is Sylvester McMonkey McBean.
And I’ve heard of your troubles. I’ve heard you’re unhappy.
But I can fix that. I’m the Fix-it-Up Chappie.”*

³⁸ DR. SEUSS, *YERTLE THE TURTLE AND OTHER STORIES* 7 (1958).

³⁹ *Bevemet Metais, Ltd., v. Gallie Corp.*, 3 F.R.D. 352 (S.D.N.Y. 1942).

⁴⁰ DR. SEUSS, *The Sneetches*, in *THE SNEETCHES AND OTHER STORIES*, *supra* note 1, at 2.

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. . . .
Then, quickly, Sylvester McMonkey McBean
Put together a very peculiar machine.
And he said, “You want stars like a Star-Belly Sneetch . . . ?
My friends, you can have them for three dollars each!”
. . . .
All the rest of that day, on those wild screaming beaches,
The Fix-it-Up Chappie kept fixing up Sneetches.
Off again! On again!
In again! Out again!
Through the machines they raced round and about again,
Changing their stars every minute or two.
. . . .
Then, when every last cent
Of their money was spent,
The Fix-it-Up Chappie packed up
And he went.⁴¹

Some claim that the story ends there, that Sylvester McMonkey McBean is no different from Dog the Bounty Hunter. Poppycock:

*I’m quite happy to say
That the Sneetches got really quite smart on that day,
The day they decided that Sneetches are Sneetches
And no kind of Sneetch is the best on the Beaches.
That day, all the Sneetches forgot about stars
And whether they had one, or not, upon thars.*⁴²

Class actions – even in all their weighty imperfections – can evoke social change.⁴³ Sometimes they even deter and compensate. And with that, we’ve come to the end. But wait – I know, I know, you don’t have to pretend; I saw your elbow thumping, your left foot pumping, and your eyelid twitching. You were jamming to joinder, having some fun, and now I’m suggesting that we’re all

⁴¹ *Id.* at 8, 9, 20, 21.

⁴² *Id.* at 23.

⁴³ Granted, it’s complicated. If you’re interested, read *SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORTS* (Timothy D. Lytton, ed. 2005) and Elizabeth Chamblee Burch, *CFAA’s Impact on Litigation as a Public Good*, 29 *CARDOZO L. REV.* 2517 (2008).

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done. Maybe later we can talk about Gertrude McFuzz, Thing 1 or Thing 2, or a trip to the zoo, but that will all have to be in part two.

CONCLUSION

If you are in my class and you are reading this, shame on you. And you should know that everything in the foregoing paragraphs is One Big Fat Lie. Disregard it. Civil procedure must be hard, as a professor must be priggish.

For the rest of you, civil procedure according to Dr. Seuss is a beautiful glossy picture. Admittedly, it's like one of those glossy Cosmo pictures that airbrushes out the wrinkles, unibrows, and blemishes that those models surely must have. But I trust that you'll discover the warts soon enough. For now, bask in the glow of clarity and memorize your civil procedure professor's real name.

