

ASSOCIATION OF AMERICAN LAW SCHOOLS

SECTION ON

CIVIL PROCEDURE

FALL 2002 NEWSLETTER

2003 ANNUAL MEETING PROGRAM

by James Pfander

Empirical Research and Civil Procedure: Past, Present and Future

Our section meeting at the annual AALS meeting will be held January 4, 2003, at 4:00 p.m. and will focus on empirical research.

Civil procedure has always had an empirical side. In developing and reviewing rules of procedure, drafters inevitably look to the experience of practitioners with current law and make some prediction about how proposed reforms will influence the behavior of attorneys and clients in future cases. Traditional forms of empirical research include the lawyerly review of the decided cases, for purposes of determining what the courts do in fact, and discussions with judges and practicing lawyers, many of whom weigh in on proposed amendments during the process of drafting and legislative oversight.

As the interdisciplinary move in law works its way through even this most practical domain, proceduralists find that empirical work has grown more rigorous, complex and sophisticated, and often draws on information other than the decided cases. Using methods borrowed from the social sciences, empirical researchers use survey research, experimental

data, and case studies to develop a richer portrait of practice and procedure in American courts. These new techniques shed light on many aspects of civil practice that anecdote, news story, and even the decided cases may obscure. We know a good deal more about jury practice, punitive damages, and treatment of corporate defendants than we once did, thanks in good measure to empirical research.

This year=s panel brings together some of the country=s best-known empirical scholars. Apart from presenting new research on civil practice in the American courts, the panelists will introduce their databases, and offer some

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Newsletter Editor: Howard Erichson

This newsletter is a forum for the exchange of information and ideas. Opinions expressed here do not represent the position of the section or of the Association of American Law Schools.

insights into research design. During the discussion that follows, we will explore some

nuts and bolts of empirical research and will consider what directions such work might take in the future. The *Notre Dame Law Review* has graciously agreed to publish this year's papers in its annual Federal Practice and Procedure issue.

Moderator: James E. Pfander, Illinois
 Presenters: Theodore Eisenberg, Cornell
 Marc Galanter, Wisconsin
 Valerie Hans, Delaware
 Brian Ostrom, NCSC
 Thomas Willging, FJC

There will be a business meeting before the program. The Executive Committee proposes to nominate the following for the 2003 Executive Committee:

Chair Judith Resnik, Yale
Chair-Elect Howard Erichson, Seton Hall
Past Chair James Pfander, Illinois
Exec. Comm. Nancy Marder, Chicago-Kent
Exec. Comm. Margaret Woo, Northeastern
Exec. Comm. Stephen Yeazell, UCLA

The executive committee terms of Ana-Maria Merico-Stephens, Steve Subrin, and Jay Tidmarsh expire this year. Many thanks to Ana-Maria, Steve, and Jay for their service.

CIVIL PROCEDURE LISTSERV

Ann Althouse does a wonderful service for procedure teachers and scholars by maintaining a civil procedure listserv. To subscribe, contact Ann at althouse@wisc.edu.

AALS CIVIL PROCEDURE CONFERENCE JUNE 17-20, 2003

by Richard Marcus

The Many Faces Of Civil Procedure

For the first time in nearly a decade, the AALS is holding a Conference on Civil Procedure. For the first time ever, this conference will be held in conjunction with another similar event – the AALS Conference on Torts. These events will be in New York City on June 17-20, 2003, and registration for either permits attendance at the events of both conferences. There are two joint plenaries and two joint luncheons involving the Civil Procedure and Torts participants.

The theme for the Civil Procedure conference – The Many Faces of Civil Procedure – is designed to provide multiple perspectives on contemporary civil procedure. We intend to take a fresh look at such foundational topics as personal jurisdiction and *Erie*, and also explore the impact of ADR and international procedure on our field. The joint sessions with the Torts people will focus on issues of aggregation and on discovery in the context of mass torts and products liability suits. This conference should benefit civil procedure teachers at all levels of experience.

The luncheon speakers are Judge Edward Becker (3d Cir.), Kenneth Feinberg, Esq., and Judge David Levi (E.D. Cal.). There is a long list of confirmed speakers for plenary sessions, including Lewis Grossman (American), Judith Resnik (Yale), Stephen Burbank (Penn), Geoffrey Hazard (Penn), Deborah Hensler (Stanford), Howard Erichson (Seton Hall), Richard Nagareda (Vanderbilt), Patrick Woolley (Texas), Edward Purcell (New York Law School), Wendy Perdue (Georgetown), Martin Redish (Northwestern), Allan Stein (Rutgers-Camden), Anthony Alfieri (Miami),

Hillary Sale (Iowa), Keith Wingate (Hastings), Margaret Woo (Northeastern), Carrie Menkel-Meadow (Georgetown), Jean Sternlight (Missouri-Columbia), John Leubsdorf (Rutgers-Newark), Anthony Sebok (Brooklyn), and George Shepherd (Emory). And there are multiple break-out sessions featuring many other participants.

For more information on the conference, see <http://aals.org/profdev/mid-year>.

SUPREME COURT DECISIONS

by Ana Maria Merico-Stephens

Punitive Damages Unavailable under the ADA and Rehabilitation Act. In *Barnes v. Gorman*, 122 S. Ct. 2097 (2002), the Supreme Court held that punitive damages may not be awarded in claims brought under §202 of the ADA and §504 of the Rehabilitation Act. The remedies available under these two provisions derive from those available under Title VI of the Civil Rights Act of 1964, which themselves have evolved through case law.

Gorman, a paraplegic, sued Kansas City police commissioners alleging violations of §202 of the Americans with Disabilities Act (ADA) and §504 of the Rehabilitation Act. He was injured in a police van that was not equipped to accommodate persons with spinal cord injuries. A jury awarded \$1 million in compensatory damages and \$1.2 million in punitive damages.

The Court reversed the award of punitive damages. Because no punitive damages are available under Title VI, neither are they available under the ADA and the Rehabilitation Act. The Court analogized the receipt of federal grants to a commercial contract, which should not be interpreted to include more than what the parties bargained for. A

specific remedy – such as punitive damages – should only be available if the grant recipient was on notice about the nature of its exposure to liability by accepting federal funds. This is not the case under Title VI or the two provisions involved in this case.

Jennifer Harbury's Case: Pleading Standards for *Bivens* Actions in Backwards-Looking Denial of Access Claims. In *Christopher v. Harbury*, 122 S. Ct. 2179 (2002), the Supreme Court held that a *Bivens* claim alleging a denial of access to courts is ancillary to an identifiable underlying claim for which a remedy must be available.

Harbury, the American widow of a murdered leader of the Mayan Resistance Forces in Guatemala, sued federal officials for multiple claims, including a *Bivens* claim for denial of access to courts. Harbury alleged that the federal government affirmatively misled her and concealed information that was critical to the location of her husband. She alleged that such conduct on the part of the federal government had “effectively prevented her from seeking emergency injunctive relief in time to save her husband’s life.”

The Court found her complaint legally insufficient because it did not identify the claim that she would have asserted in her lost opportunity to litigate. The point of any denial of access claim is to vindicate a separate right to seek judicial review. She also did not identify a remedy that she may receive and that is not available in some future litigation, which is an element of the claim. In these claims, the plaintiff must follow Rule 8(a) and plead the predicate underlying action as if it were presently pursued, in addition to describing the remedy available under the ancillary claim.

Under this standard Harbury’s complaint failed to state a claim upon which relief could

be granted. The Court stated that Harbury's tort claims survived the motion to dismiss, and if she successfully tried those, she could be awarded damages. The remedy Harbury would have sought, an order that could have saved her husband's life, is no longer available. Thus, she identified no remedy that could not be awarded in another suit.

No Private Rights of Action Against Private Entities under *Bivens*. In *Correctional Services Corporation v. Malesko*, 122 S. Ct. 515 (2001), the Supreme Court refused to extend *Bivens* actions against private entities under contracts with the federal government. In a 5-4 decision, the Court emphasized that *Bivens* suits are available for constitutional violations by federal officers and not agencies.

Malesko, an inmate in a halfway house run by Correctional Services Corporation (CSC) under contract with the Bureau of Prisons (BOP), had a heart condition that limited his ability to climb stairs. When a CSC employee refused to let him ride the elevator, he suffered a heart attack. He sued CSC and individuals for negligence under *Bivens*. The Court did not discuss what constitutional deprivation the plaintiff suffered, and assumed the *Bivens* claim was brought for a violation of the Eighth Amendment "deliberate indifference" standard.

The Court relied on *FDIC v. Meyer* (1994), to hold that a *Bivens* action may only be brought against an individual, not a corporate entity. The implied private right of action in *Bivens* was concerned with deterring individual officers' unconstitutional acts. The Court noted that "[i]n 30 years of *Bivens* jurisprudence we have extended its holding only twice, to provide an otherwise nonexistent cause of action against individual officers alleged to have acted unconstitutionally, or to

provide a cause of action for a plaintiff who lacked any alternative remedy for harms caused by an individual officer's unconstitutional conduct."

Unnamed Class Action Plaintiffs May Appeal Settlements Without Intervening. In *Devlin v. Scardelletti*, 122 S. Ct. 2005 (2002), the Supreme Court held that unnamed class members who properly objected to a class action settlement at a fairness hearing have the power to appeal without first intervening in the action.

The pension plan of the Transportation Communications International Union was not able to support a cost of living adjustment (COLA) structure that had been implemented. The trustees of the plan froze the COLA to active employees and subsequently eliminated the COLA for retired workers. The Plan petitioned for a declaratory judgment that elimination of the COLA was binding on all pension plan members, or, alternatively, that the original COLA structure was void.

Devlin, a retiree represented by the Union, moved to intervene in the class action but his motion was denied as untimely. The District Court heard objections to a proposed settlement, included those of Devlin, but approved the settlement. Devlin appealed.

The Court held that Devlin was a "party" for purposes of appealing the judgment. He was adversely affected by the settlement and did not need to intervene to appeal the final decision of the trial court. The Court explained that it had never imposed a restriction on the right to appeal to named parties only. Moreover, it pointed out that there is no statute that directly identifies who may appeal from a class action settlement approval. The Court found that, when an action finally disposes of a party's claim notwithstanding the party's objections, the party must have the right to appeal. The

Court restricted this right to those unnamed class members who object at a fairness hearing.

The EEOC and Arbitration. In *Equal Employment Opportunity Commission v. Waffle House, Inc.*, 122 S. Ct. 754 (2002), the Supreme Court held that, in an ADA enforcement action, the EEOC is not barred by an employer-employee arbitration agreement from seeking victim-specific judicial relief.

Eric Baker was fired from his job at Waffle House after he had a seizure at work. The EEOC sued Waffle House in Baker's behalf for violations of the ADA. Baker was not a party to the suit. Waffle House moved to dismiss, or to stay the suit and compel arbitration, since Baker had signed an agreement requiring employment disputes to be settled by arbitration.

Since Baker was not a party to the suit, the Court recognized that the EEOC was in command of the case. Relying on the statutory language of the ADA, the Court found that the EEOC had "the authority to evaluate the strength of the public interest at stake and to determine whether public resources should be committed to the recovery of victim-specific relief." Since the EEOC was not a party to the employer-employee arbitration agreement, and since nothing in the FAA compels the EEOC to seek arbitration, the Court found that the EEOC is not obligated to relinquish its authority to pursue victim-specific judicial relief.

Who is a "citizen or subject" under Section 1332's Alienage Jurisdiction Provision? In *JP Morgan Chase Bank v. Traffic Stream (BVI) Infrastructure Limited*, 122 S. Ct. 2054 (2002), the Supreme Court held that a British Virgin Islands (BVI) corporation is a "citizen[n] or subjec[t] of a foreign state" for

the purposes of alienage diversity jurisdiction, 28 U.S.C. § 1332(a)(2).

Chase sued Traffic Stream in federal court for defaulting on its loan obligations. The district court denied defendant's motion to dismiss for lack of subject matter jurisdiction under §1332(a)(2) and granted summary judgment for Chase.

In *Steamship Co. v. Tugman* (1882), the Court held that a "corporation of a foreign State is, for purposes of jurisdiction in the courts of the United States, to be deemed, constructively, a citizen or subject of such State." Here, the two issues before the Court were whether BVI is a "foreign state," and whether corporations organized under the laws of BVI are "citizens or subjects," within the meaning of §1332(a)(2).

The Court recognized that the ultimate political authority for a BVI company is the United Kingdom, clearly a "foreign state." The Court found that the relationship between a BVI company and the authority of the United Kingdom is well within the range of the original purpose of Article III of the Constitution and §1332. The fact that BVI is not formally recognized by the Executive Branch as an independent foreign state is beside the point of the alienage jurisdiction statute. The Governments of the United Kingdom and BVI agree with this position, and a contrary finding could affect investment opportunities in BVI.

Traffic Stream argued that BVI residents are not "citizens or subjects" of the United Kingdom, but rather are "nationals." The Court found this to be irrelevant because the jurisdictional analysis is not governed by the laws of the United Kingdom. The Court held that "nationals" fall within the subject matter jurisdiction of the federal courts.

A State Waives its Sovereign Immunity By

Voluntarily Removing to Federal Court. In an interesting twist in the Court's Eleventh Amendment jurisprudence, the Court held in *Lapides v. Board of Regents of the University System of Georgia*, 122 S. Ct. 1640 (2002), that a State waives its Eleventh Amendment immunity when it voluntarily removes a case to federal court. This holding is limited to cases in which the state has explicitly waived its sovereign immunity under state law for the same claim that was removed.

Professor Lapides sued the Georgia Board of Regents (the State) and certain university officials alleging a deprivation of his constitutional rights. Lapides claimed that university officials placed records of sexual harassment allegations in his personnel file, which damaged his reputation. The defendants joined in removing the case to the District Court, and then moved for dismissal on sovereign immunity grounds.

The Supreme Court held that the State's affirmative litigation conduct waived its immunity. The Court explained that "where a State voluntarily becomes a part to a cause and submits its rights for judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment." *Gunter v. Atlantic Coast Line R. Co.* (1906).

Does Section 1367(d) Apply to State Defendants? In *Raygor v. Regents of the Univ. of Minnesota*, 122 S. Ct. 999 (2002), the Supreme Court held that the supplemental jurisdiction statute does not apply to state entities and subsection (d) does not toll the limitations period for state law claims asserted against unconsenting states.

Raygor and Goodchild, employees of the University of Minnesota, sued the university in federal district court under the federal Age Discrimination in Employment Act (ADEA)

and the state civil rights statute. The state law claims were supplemental to the federal claim under 28 U.S.C. §1367(a). These claims were dismissed without prejudice on Eleventh Amendment grounds, and the plaintiffs re-filed them in state court. The State moved to dismiss, claiming that the statute of limitations period had passed, and that section 1367(d) did not toll the limitations period. Defendant argued that the federal court never had subject matter jurisdiction over the ADEA claims, and thus section 1367(d) never applied. The Minnesota Supreme Court held that 1367(d)'s tolling provision is unconstitutional when applied to state law claims against non-consenting state defendants.

The Supreme Court affirmed on statutory grounds. Consistent with *Blatchford v. Native Village of Noatak* (1991), the Court held that the grant of federal jurisdiction under 1367(a) does not extend to state law claims against non-consenting state defendants.

The Court held that, in the absence of a clear statement by Congress to abrogate the sovereign immunity of the states for supplemental claims, section 1367 did not apply to states. Because 1367(a) did not apply, there was no need to address the constitutionality of 1367(d). In foreboding dicta, however, the majority reasoned that allowing 1367(d) to extend the period of time in which a state is amenable to suit in state court raises doubts about the provision's constitutionality.

Notice Pleading is Still Notice Pleading. In *Swierkiewicz v. Sorema*, 122 S. Ct. 992 (2002), the Supreme Court held that there is no heightened pleading standard for employment discrimination suits; the complaint need not establish a prima facie case.

Swierkiewicz, a 53-year-old US citizen born in Hungary, sued his former employer alleging he was fired in violation of Title VII

and the ADEA. The district court dismissed the complaint for failure to plead a prima facie case of discrimination. The Second Circuit affirmed and the Supreme Court reversed.

The Court held that under Rule 8(a)(2), a discrimination complaint need only contain “a short and plain statement of the claim showing that the pleader is entitled to relief,” to survive a Rule 12(b)(6) motion to dismiss. Although the Court had set forth a framework for establishing a *prima facie* case of discrimination in *McDonnell Douglas Corp. v. Green* (1973), that standard was evidentiary and need not apply to pleading. The Court emphasized that the federal rules do not require heightened pleading for employment discrimination cases, overruling several Courts of Appeals.

Federal Court Jurisdiction over a Public Service Commission Under *Ex Parte Young*. In *Verizon Maryland, Inc. v. Public Service Commission of Maryland*, 122 S. Ct. 1753 (2002), the Court held that a district court has jurisdiction over a telecommunication carrier’s claim that a state utility commission’s order requiring reciprocal compensation for telephone calls to Internet Service Providers violates the Telecommunications Act of 1996.

Verizon is the local exchange carrier (LEC) in Maryland. The Telecommunications Act requires that the incumbent LEC provide interconnections to its existing networks when a new carrier seeks access to the market. The LEC and new carrier must reach reciprocal compensation agreements for transporting and terminating the calls of each other’s customers. These agreements are then to be approved by the state utility commission.

A new carrier, MCI WorldCom, sought entry into the Maryland market, and Verizon negotiated a reciprocal compensation agreement with MCI. After the Maryland Public

Service Commission approved the agreement, Verizon informed MCI that it would not pay reciprocal compensation for calls made by Verizon’s customers to local access numbers of Internet Service Providers (ISPs), reasoning that ISP traffic is not “local traffic” subject to the reciprocal compensation agreement.

MCI filed a complaint with the Public Service Commission, which ordered Verizon to pay for ISP calls. Verizon sought an injunction prohibiting enforcement of the order, claiming that it violated the Telecommunications Act. The district court dismissed the claim. The Fourth Circuit affirmed, holding that the Act did not provide a basis for jurisdiction over the claims, and that the PSC had not waived its Eleventh Amendment immunity. The Supreme Court reversed.

The Court held that Verizon’s claim was a typical *Ex Parte Young* claim, in which the Eleventh Amendment was not implicated. The jurisdiction of the federal court was clear since Verizon sought prospective, injunctive relief. Moreover, the federal courts had to have a means to ensure the Maryland Public Service Commission’s compliance with federal law. The Court held that, although the 1996 Act does not confer jurisdiction on the federal courts, it does not divest them of their authority under §1331 either.

Sovereign Immunity Extends to Article I tribunals. In *Federal Maritime Commission v. S. C. State Port Authority*, 122 S. Ct. 1864 (2002), the Supreme Court held that the doctrine of sovereign immunity extended to bar an action against an arm of the state brought in the Federal Maritime Commission.

A gambling vessel fighting with the South Carolina Ports Authority filed a complaint in the FMC for violations of the Shipping Act of 1984. Specifically, the vessel claimed that the SCPA discriminated against it unreasonably

by refusing to grant it a right to berth the ship in its port. The defendant immediately filed a motion to dismiss on sovereign immunity grounds and the ALJ agreed, as did the Supreme Court.

The Court rejected the argument that the proceeding before the commission was not a “lawsuit” as contemplated by the Eleventh Amendment. Rather, quoting the Eleventh Circuit’s charming language, the Court explained that if it “walks, talks, and squawks like a lawsuit,” then sovereign immunity precludes it even in an executive branch tribunal.

OTHER COURT DECISIONS

by Howard M. Erichson

The past year has seen many noteworthy civil procedure decisions in the state courts and lower federal courts. A few of the more interesting are summarized here. Cyberspace personal jurisdiction issues continue to percolate. Federal subject matter jurisdiction issues have been litigated vigorously, often on motions to remand after removal as defendants struggle to avoid plaintiffs’ chosen state forums. The prize for the most ambitious procedure decision of the year goes to Judge Weinstein’s certification of a nationwide mandatory punitive damages class action in the tobacco litigation.

Arbitration. On remand from the Supreme Court in *Circuit City Stores v. Adams*, 279 F.3d 889 (9th Cir. 2002), the Ninth Circuit held the Circuit City arbitration agreement invalid under California law. The arbitration agreement, the court held, was both procedurally and substantively unconscionable.

Class Actions. The Seventh Circuit, in *In re*

Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 288 F.3d 1012 (7th Cir. 2002), decertified two Rule 23(b)(3) nationwide consumer class actions involving Ford Explorer SUVs and Firestone tires. Judge Frank Easterbrook emphasized the manageability problems created by the applicability of different state laws, but opined that the litigation would be unmanageable even on a statewide basis.

In the tobacco litigation, Judge Jack Weinstein certified a nationwide mandatory punitive damages class action under Rule 23(b)(1)(B). *In re Simon II Litigation*, 2002 WL 31375510 (E.D.N.Y. Sept. 19, 2002). Using a limited punishment theory rather than the classic limited fund theory addressed by the Supreme Court in *Ortiz v. Fibreboard* (1999), Judge Weinstein offered a thorough and provocative analysis of the problem of multiple punitive damages in mass litigation.

Discovery. A growing number of cases apply the revised language in Rule 26(b)(1) concerning the scope of discovery, reading “relevant to the claim or defense of any party” somewhat more narrowly than the former standard of “relevant to the subject matter involved in the pending action.” Two examples of the genre, both unpublished opinions by magistrate judges, are *Hawthorne Land Co. v. Occidental Chemical Corp.*, 2002 WL 1976931 (E.D. La. Aug. 23, 2002) and *Johnson Matthey, Inc. v. Research Corp.*, 2002 WL 31235717 (S.D.N.Y. Oct. 3, 2002).

Personal Jurisdiction. The past year saw a number of interesting territorial jurisdiction cases, some presenting variations on now-familiar cyberspace jurisdiction problems.

Perhaps the most interesting case in terms of jurisdictional analysis is *Griffis v. Luban*, 646 N.W.2d 527 (Minn. 2002). Interpreting *Calder v. Jones*, the Minnesota Supreme

Court held that Alabama lacked personal jurisdiction over a Minnesota defendant who allegedly defamed an Alabama citizen on an internet newsgroup. Although the plaintiff felt the brunt of the harm in Alabama, the court found that the defendant did not expressly aim the conduct at Alabama.

In rem jurisdiction has proved useful in disputes over internet domain names, particularly against foreign corporations not amenable to in personam jurisdiction in the U.S. In *Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214 (4th Cir. 2002) and *Porsche Cars North America, Inc. v. Porsche.net*, 302 F.3d 248 (4th Cir. 2002), the Fourth Circuit upheld and applied the in rem provision of the Anti-Cybersquatting Consumer Protection Act of 1999, which provides jurisdiction over internet domain names in the state where the domain names are registered.

Service by e-mail was upheld in *Rio Properties v. Rio Int'l Interlink*, 284 F.3d 1007 (9th Cir. 2002). After unsuccessful attempts to serve the defendant, a Costa Rican website gambling operation, the plaintiff asked the court for authority under Rule 4(f)(3) to serve by alternative means. The court authorized service by e-mail to the defendant, and by mail to the defendant's U.S. lawyer.

In a non-cyberspace case, the Texas Supreme Court resolved a question on the appellate standard of review under Texas law by holding that special appearance denials are reviewed de novo rather than by an abuse of discretion standard. *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789 (Tex. 2002). The court went on to hold that the foreign subsidiary in the case was neither subject to general jurisdiction nor its parent's alter ego for purposes of personal jurisdiction.

Sanctions. In a Rule 11 case notable mostly for the size of the sanction, the Eleventh

Circuit largely upheld a sanction of \$520,000 on plaintiffs and their attorneys for alleging without factual basis that a prospectus was misleading. *Oxford Asset Management, Ltd. v. Jaharis*, 297 F.3d 1182 (11th Cir. 2002). The district court applied the Private Securities Litigation Reform Act's mandatory Rule 11 review, with its presumptive award of fees and costs. The court of appeals upheld the sanction but remanded for a reduction to account for fees incurred defending the non-frivolous portion of the complaint.

Subject Matter Jurisdiction. The Ninth Circuit, in *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163 (9th Cir. 2002), finally rejected that circuit's 1977 holding in *Ayala v. United States* that pendent party jurisdiction was unconstitutional, thus removing that obstacle to the use of supplemental jurisdiction over added parties under section 1367.

A decision by the MDL judge in the fepfen mass tort litigation is fascinating not only for its decision on removal jurisdiction and fraudulent joinder, but also for its description of strategies used by lawyers to try to defeat removal. In *Anderson v. American Home Prods.*, 220 F. Supp. 2d 414 (E.D. Pa. 2002), the court denied a motion to remand after removal from the Louisiana state court, despite the presence of non-diverse and in-state defendants, and despite the lack of unanimity among the defendants concerning removal. The court found that the local and non-diverse defendants were fraudulently joined, and that the non-consenting defendants were fraudulently joined because of plaintiffs' agreements not to pursue judgments against those defendants in return for the defendants' refusal to consent to removal.

STATUTORY DEVELOPMENTS

by James Pfander

In a year dominated by terrorism and war-related legislation, Congress did little to move a domestic agenda. In perhaps the most closely watched area for civil proceduralists — that of class action jurisdictional reform — no bills were adopted. To be sure, HR 2341, the Class Action Fairness Act, versions of which have been reported in the past by the Senate Judiciary Committee, passed the House by a vote of 233-190 on March 13, 2002. But it failed to move in the Senate Judiciary Committee. All that might change in the new Congress, with the Republicans having regained control of the Senate. Meanwhile, Congress did adopt a version of multiparty, multiforum legislation as part of the appropriation bill for the Department of Justice. This brief summary will sketch the somewhat confusing terms of the Multiparty Multiforum Trial Jurisdiction Act of 2002 and will describe some of the elements of the proposed class action reform legislation.

A. Multiparty Multiforum. Proposals to expand federal jurisdiction to address multiparty, multiforum litigation have been kicking around for a generation or more, and have assumed a variety of different guises. In general, the proposals seek to address problems of multiplicity that stem from limits on state court jurisdiction, which make consolidated treatment of dispersed, multiparty litigation quite difficult to achieve. Proponents of jurisdictional expansion seek to provide a single federal forum in which parties may resolve complex disputes with ties to a number of different states. For a summary, see Thomas D. Rowe & Kenneth D. Sibley, *Beyond Diversity: Federal Multiparty Multiforum Jurisdiction*, 135 U. Penn. L. Rev. 7 (1986).

The Multiparty Multiforum Trial Jurisdic-

tion Act of 2002 appears to have been put together somewhat at the last second for inclusion in this year's DOJ appropriation bill. It seems to include several drafting glitches that make its likely operation hard to predict. The overview that follows will sketch the high points of the statute, and try to identify a few of its oddities and inconsistencies.

The Act applies to mass disasters or "accidents" where 75 natural persons have died in a single accident at a discrete location. (Choice of 75 deaths as the trigger suggests that the concerns of the airline industry may have motivated the legislation's adoption, a suggestion that the conference committee report appears to confirm.) The Act proceeds on the basis of minimal diversity of citizenship between opposing parties, authorizing federal courts to hear disputes on such a basis when the following jurisdictional triggers have been satisfied:

- (1) the claims arise from a "single accident, where at least 75 natural persons have died in the accident at a discrete location"; and
- (2) defendants reside either in a State different from that in which a "substantial part of the accident took place"; or two or more defendants "reside in different States"; or substantial parts of the accident occurred in two or more States. (The Act defines corporate residence as including its state of citizenship, as well as any state in which it has qualified to do business or is doing business; the Act thus virtually assures that the test of dispersed "residence" will be met, especially in the airline disasters that the drafters of the Act apparently expected to address.)

When both the 75-death threshold and the

required dispersion of defendants or events have been met, the district courts may exercise jurisdiction of “any civil action” on the basis of minimal diversity between opposing parties. The statute thus appears to reach both wrongful death and personal injury claims and property damage claims; the current jurisdictional threshold of \$75,000 does not apply so long as the claim arises from a single accident where the requisite number of deaths have occurred. Nor does the Act limit the claims to those asserting personal injury or tangible property damage. Insurance litigation growing out of an airline disaster would naturally flow into federal court under the Act. Once a pending action satisfies the jurisdictional requirements, additional parties may intervene as plaintiffs so long as their claims arise from the same accident. Even minimal diversity would not be required as to these intervening claimants.

The Act includes a variety of familiar provisions to simplify the task of consolidating and adjudicating cases from around the country. Thus, the Act provides for nationwide service of process (and service outside the nation in accordance with otherwise applicable law). Similarly, the Act provides that the court may, upon good cause shown, permit the parties to subpoena witnesses to attend a hearing or trial anywhere in the United States. Relaxed venue requirements make venue appropriate in any district in which any defendant resides, or where a substantial part of the accident took place.

The Act bristles with drafting problems. The Act seems to assume that claims arising from a qualifying accident will routinely be transferred for consolidated treatment through the Judicial Panel on Multidistrict Litigation (JPML). But despite the reference in its title to “Trial Jurisdiction,” the Act does not contain a provision that expressly overrules

the *Lexecon* decision by making provision for the trial of cases consolidated in a federal court upon transfer or assignment from the JPML. Under *Lexecon*, the federal court, upon assignment from the JPML, may conduct coordinated pre-trial proceedings, but cannot accept transfer of the case for trial on the merits. Cases that are not settled or adjudicated pretrial must return to their state or district court of origin for trial. Without reversing that decision explicitly, the Act seems to assume (in its removal provisions) that a consolidated trial of damages in the transferee federal court may occur after consolidation.

One can probably best understand the anomalies in the Act by comparing its terms with those of HR 860, an earlier form of multiparty legislation that passed the House in March 2001. HR 860 included a variety of provisions, some of which have been carried over into, and some dropped from, the new legislation. Most importantly, HR 860 would have expressly amended section 1407 (the law governing transfer through the JPML) to add a new section (j). Section 1407(j) would have bifurcated the determination of three features of mass disaster litigation: liability, compensatory damages and punitive damages. As for the determination of liability and punitive damages, HR 860 would have authorized the transferee district court (upon receipt of transferred and consolidated cases from the JPML) to “retain the actions so transferred for [such] determination[s].” It thus seemed to have contemplated routine handling of such matters by the transferee federal district court. As for the determination of the *amount* of compensatory damages, following a determination of liability, HR 860 seemed to have envisioned routine handling of those matters by the state or federal court in which the actions were first filed. HR 860 thus would

have provided for the district court to remand the action for the determination of the *amount* of compensatory damages, except where the court chose to retain the action in the interest of justice and for the convenience of the parties. Complementary removal provisions would have enabled the defendants to remove related actions for treatment on a consolidated basis with any actions filed in federal court.

The Act of 2002 includes the removal provisions, and their references to section 1407(j), but it fails to enact any amendment to section 1407 itself. One thus finds a perplexing reference in the removal provisions to liability determinations in the transferee court under 1407(j), but 1407(j) itself does not appear anywhere in the Act (or elsewhere in federal law). Equally perplexing (and very much in contrast to the accompanying report of the Conference committee), the Act of 2002 contains no reference in the removal provisions to the determination of punitive damages by the transferee court. It thus becomes quite difficult to ascertain precisely how cases, removed and consolidated for pretrial proceedings, would be handled under the 2002 Act. Cases that begin in federal court and are transferred under 1407 would still be subject to current law, which forbids transfer for trial. Meanwhile, cases that happened to begin in state court, and were removed to federal court, would confront the anomalous references in the removal provisions to the phantom terms of the unenacted section 1407(j), and an accompanying provision that seems to contemplate that removed actions will be subjected to liability determinations in the transferee court.

One other anomaly in the Act of 2002 is its definition of the term “injury” which makes sense only as a provision mistakenly carried over from its predecessor, HR 860. The earlier bill had defined the jurisdictional

trigger to include the death or injury of 25 persons at a discrete location, and specified that each injury must exceed \$150,000. Then, a definition specified that injury was to mean physical harm to a natural person, and damage to tangible property, but only if physical harm exists. The Act of 2002 includes this definition, but it has eliminated the possibility of jurisdiction based upon injury. (As noted above, the jurisdictional provision speaks of civil actions arising from an accident where 75 natural persons have died, and omits any reference to jurisdiction in the case of injuries.) The Act’s injury definition thus fails to explicate any apparently relevant language in the jurisdictional provisions of the law.

B. Class Action Reform. HR 2341, the Class Action Fairness Act, did not become law in 2002, but it remains the leading proposed reform measure to deal with the problem of large, multi-state class actions. HR 2341 would have amended section 1332 of title 28 to grant the district courts original jurisdiction over any civil action where the matter in controversy exceeds \$2 million (exclusive of interest and costs) and is a class action in which: (1) any member of a class of plaintiffs is a citizen of a state different from any defendant; (2) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a state; or (3) any member of a class of plaintiffs is a citizen of a state and any defendant is a foreign state or a citizen or subject of a foreign state. The bills also would have provided that in any class action, the claims of the class members will be aggregated to determine whether the matter in controversy exceeds the \$2 million amount.

The bill would also have treated as a class action: (1) a civil action where the named plaintiff purports to act for the interests of its

members (who are not named parties to the action) or for the interests of the general public, and seeks damages, restitution, disgorgement, or any other form of monetary relief; or (2) a civil action where the monetary relief claims are proposed to be tried jointly in any respect with the claims of 100 or more persons on the ground that the claims involve common questions of law or fact.

A district court would have been required to dismiss any civil action that is subject to its jurisdiction if the court determines the action could not proceed as a class action based on a failure to satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure. A dismissal would not have prohibited a plaintiff, however, from filing an amended class action in federal or state court. Any such action filed in state court could have been removed to federal court if it was an action over which the district courts have original jurisdiction.

HR 2341 further provided that the federal courts shall not have original jurisdiction over any civil action in which: (1)(a) the substantial majority of the members of the proposed plaintiff class and the primary defendants are citizens of the state in which the action was originally filed; and (b) the claims asserted will be governed primarily by the laws of that state; (2) the primary defendants are states, state officials, or other governmental entities against whom the district court may be foreclosed from ordering relief; or (3) the number of proposed plaintiff class members is less than 100. Also, class action cases brought by shareholders raising claims of corporate governance (*e.g.*, where suits are based on such conduct as claims of misrepresentations in proxy solicitations) and claims concerning certain securities would have been excluded from the scope of the bills.

The bill also would have added a new section to title 28 to permit the removal of a class action to federal court by any defendant without the consent of all defendants, or by any plaintiff class member who is not a named or representative class member without the consent of all members of such class. A case could be removed before or after certification. HR 2341 would have prohibited an unnamed plaintiff class member from removing an action until after the class has been certified, and would make inapplicable to the removal of a class action the current provision requiring suits based on diversity jurisdiction to be removed within one year of commencement. The bill also would have amended section 1447 to permit an appeal of a district court order to remand the action. (Under current law an order remanding a case to state court is usually not reviewable on appeal, except civil rights cases removed pursuant to section 1443.)

DEVELOPMENTS IN THE FEDERAL RULES OF CIVIL PROCEDURE

AMENDMENTS TO RULE 23

by Judith Resnik

After many drafts and several years of reviewing various proposals, the Advisory Committee on Civil Rules forwarded Rule 23 revisions to the Standing Committee, which in September 2002 sent them on to the Supreme Court. If promulgated next spring, the provisions would be effective in December 2003.

The new rules affect certification and settlement. While significant changes have been put into place, some of the more basic structural proposals – such as revision of the tri-part division of class actions (with b(1)(2)(3) classes) or rejection of the *Eisen* notice rule – have not been made. (The relationship between current rule drafting and Supreme Court case law is one for proceduralists to probe. Some commentators see the revisions as those that drafters believed that the Court would likely be willing to send on to Congress.)

As to the substance of the changes, the revisions give judges a bit more time for certifying classes. See 23(c)(1)(A): “at an early practicable time” is substituted for “as soon as practicable.” The change accommodates those urging somewhat more inquiry at the time of certification, including more focus on the possibility of subclasses and (see below) on the role of attorneys but attempts not to address the question of how much of a “merits inquiry” to undertake.

Further, more detailed requirements for the content of notice, required for b(3) classes, is set forth. See Rule 23(c)(2)(B), addressing the need to provide notice in “plain, easily understood language,” and listing more of the content. In addition, under 23(c)(2)(A), the

Rule makes mention of trial judges’ discretionary authority to require notice in b(1) and b(2) classes – although without the details as to its content or the method of communication. Note that the words – “best notice practicable under the circumstances” – remain a part of the rule.

Two new provisions – Rule 23(g) and 23(h) – are included: one on appointment of attorney fees and the other on fee awards. Both evidence the degree to which a) the paradigm of class actions has shifted away from civil rights and environmental cases seeking injunctions and towards those mass tort, securities, and consumer cases in which money damages are sought and lawyers compete for cases, and b) judges believe that they should increase their superintendence over class actions.

At hearings on these provisions last year, concerns were raised about the necessity and propriety of judicial appointment of counsel in all class actions. In civil rights actions, the problem often is not competition for counsel but too few lawyers able and willing to serve.

Some argued that the proposal gave judges too much authority, pointed to the absence of discussion in the rule for input from named plaintiffs, and urged that the model of “lead plaintiff” in the Private Securities Litigation Reform Act ought to be used. But supporters noted the degree to which, under the Manual for Complex Litigation, in practice judges selected lead counsel in cases in which competition existed. The redrafted rule responded in part to such concerns, some in the text and some in the notes.

As to fees, the proposal clarifies judicial authority to address questions of fees at the time of appointment but does not take a position on the method of payment required, which range from “lodestar” to “percentage of the fund” to the very occasional “auction” with bids. The text of 23(g)(ii) provides that

courts can “direct potential counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs.” In contrast, the Third Circuit Task Force on the Selection of Class Counsel and several law professors have now recorded concern and/or opposition to trial judges’ use of auctions.

Moving to 23(e), the proposed text significantly expands the discussion of settlement provisions, mostly to codify the case law on fairness hearings, including the “fair, reasonable, and adequate” standard of review. The proposal includes a few innovations. Rule 23(e)(2) would provide that “the parties seeking approval . . . must file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.” This text addresses the problem of “side settlements” that may illuminate the quality of the underlying agreement.

Further, under 23(e)(3), courts are expressly authorized to refuse to approve settlements that do not afford a “new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.” This second opt-out provision has strong supporters (arguing that information is often too scarce at the first opportunity to opt out), and strong critics (arguing that mandatory classes are essential to inter-litigant equity and resolution).

Revised 23(e)(4) identifies the role of objectors by authorizing any class member to do so but also cabins the incentives to file by imposing the requirement that objections can only be withdrawn “with the court’s approval.” Here the goals were both to welcome the information objectors can bring but to discourage those objecting in the hopes of being “bought off.” The revisions to 23(e) as

a set encourage greater judicial supervision of the substance of settlements.

The Advisory Committee Notes and report (available online as well) give greater detail on the goals and decisions. The new provisions are generally couched in discretionary terms, thereby following the model of many other rules that locate power with trial judges to make decisions appropriate to a particular case. Given that appellate oversight of class actions increased through the Rule 23(f) discretionary appeal provision, the question that case law will no doubt debate (if the new rules go into effect) is the scope of trial court discretion.

Note that extant statutes, including the PSLRA, modify class action processes, and that legislation (the “Class Action Fairness Act”) is pending that would affect both the availability and process for a subset of class actions. In short, this aspect of litigation has drawn popular, political, and academic attention. The writings on class actions and these revisions are voluminous, as we in the academy puzzle over the appropriate metes and bounds of aggregate litigation.

AMENDMENTS TO OTHER RULES

by Stephen Subrin

I. Amendments Effective 12/01/01

Rule 5(b) (Service). This amendment permits electronic service (e.g., fax) on parties who give written consent. Electronic service would be complete on transmission, but service by electronic means is not effective if the party making service learns that the attempted service did not reach the person served.

Rule 6(e) (Time). This amendment provides

a party with an additional three days to respond to a paper served by electronic means. The added three-day response time is consistent with the three day “mail rule” and is intended to eliminate any perceived disadvantage in using electronic means.

Rule 65(f) (Injunctions, Copyright Impoundments). This amendment states that Rule 65’s provisions will also govern copyright impoundment proceedings.

Rule 77(d) (Notice of Judgments). The amendment allows for the clerk to serve a notice of entry of judgment in any manner allowed under Rule 5(b); the importance of the amendment is that parties may be given notice of judgment via electronic service.

Rule 81 (Applicability). The changes extend the Rules’ coverage to Section 2254 cases and Section 2255 proceedings.

II. Amendments Approved by the Supreme Court, and in Effect as of 12/01/02 Absent Congressional Action

Rule 7.1 (Disclosure Statements). This creates a new Rule 7.1, and, like Fed. R. App. P. 26, requires disclosure of non-governmental corporate parties’ financial interests. Such parties must file two copies of a statement that “identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation.” A party must file such statement when first making official contact with the court (such as filing an appearance or pleading), and must file supplemental disclosure statements “upon any change in the information that the statement requires.” The purpose of the amendment is to notify district court judges about potential conflicts so that they may recuse themselves.

Rule 54 (Judgments, Costs). The Committee Note explains: “Subdivision (d)(2)(C) is amended to delete the requirement that judgment on a motion for attorney fees be set forth in a separate document. This change complements the amendment of Rule 58(a)(1)” Also consistent with the proposed changes to Rule 58, the proposed amendment to Rule 54(d)(2)(C) eliminates the service prerequisite for submitting a timely motion for fees.

Rule 58 (Entry of Judgments). Former Rule 58 had provided that a judgment is effective only when set forth on a separate document and entered as provided in Rule 79(a). The Committee Note explains that this requirement was often ignored, and consequently, on occasion, the time for making some types of motions and the time for appeal never began to run. Under the amendment, final orders on motions brought under Rules 50(b), 52(b), 54(d)(2)(B), 59, or 60 need not be entered on a separate document. When no separate document is required, the time for appeal begins to run when the order is entered on the docket. When a separate document is required, the time for appeal begins to run from the earlier of the entry of the separate document on the docket or 150 days after entry of the order on the docket.

III. Proposed Amendments Submitted by the Advisory Committee on Civil Rules to the Supreme Court in September, 2002

Rule 23 (Class Actions). These extensive proposals are described in detail above.

Rule 51 (Jury Instructions). The proposed amendments clarify that the trial judge is authorized to require attorneys to submit jury instruction prior to trial. They also require the judge, before instructing the jury and before

closing arguments, to inform the attorneys of the jury instructions that will be given. If a judge definitively decides on the record not to read a proposed jury instruction, the proposing party need not make a later objection in order to preserve the issue for appeal; otherwise, both the initial request and the objection are needed to preserve the point on appeal.

Rule 53 (Masters). The proposed amendments would thoroughly rewrite the rules for special masters. The Committee Report to the Supreme Court described portions of the overhaul this way: “In general, proposed new Rule 53 brings pretrial and post-trial masters expressly into the rule, establishing the standard for appointment. It carries forward the demanding standard established by the Supreme Court for appointment of trial masters, and eliminates trial masters from jury-tried cases except upon consent of the parties. The rule establishes that a master’s findings or recommendations for findings of fact are reviewed *de novo* by the court, with limited exceptions adopted with the parties’ consent and the court’s approval.” There are also provisions covering such matters as the order of appointment, the master’s authority, and compensation. The citations to Rule 53 in Rules 54(d) and 71A(h) would be changed to reflect the renumbered provisions in amended Rule 53.

ADVISORY COMMITTEE WORK

*by the Hon. David Levi (E.D. Cal.),
Advisory Committee Chair*

Having just completed two major projects, one on discovery and the other on class action procedures, the Civil Rules Committee may now return to several other matters that will consume much of the Committee’s energies. First, the Committee has been looking at electronic discovery and whether rule changes would be helpful to account for the somewhat unique discovery of computer based information. The Federal Judicial Center has surveyed all magistrate judges on the topic and has intensively studied ten cases that were identified through the survey. Our Special Reporter, Professor Richard Marcus, has prepared a rather comprehensive “Reporter’s Request for Comment,” in which he seeks comments on areas for possible rule amendments. The Request has been widely circulated to members of the bar nationwide. Responses are requested by December 10, 2002. Second, the Committee has begun to review a new Supplemental Admiralty Rule G, proposed by the Department of Justice, to gather in one place the provisions governing civil forfeiture that now are scattered throughout the Supplemental Rules. Although the new Rule G is not a rule for admiralty practice, it will remain in the Supplemental Rules because many statutes state that civil forfeiture is governed by the practice for in rem admiralty proceedings. Third, we have begun the restylization of the rules to clean up ambiguity, improve and modernize expression, and make the rules more internally consistent in wording and convention. The appellate and criminal rules have been re-styled already. Now it is our turn. The Committee has divided itself into two subcommittees for this purpose. One

subcommittee is chaired by Judge Thomas B. Russell (W.D. Ky.) and is assisted by Professor Tom Rowe (a former member of the Committee). The second subcommittee is chaired by Judge Paul J. Kelly, Jr. (CA 10) and is assisted by Professor Richard Marcus. Our intrepid reporter, Professor Edward Cooper, will oversee the work of both subcommittees. Fourth, we have begun to look at sealing orders and whether there is need of a national rule to address the sealing of settlement agreements. The Federal Judicial Center will assist this study with empirical work describing current practice in the federal system. Finally, we continue to look at Rule 23 and, in particular, at the possible consequences of *Amchem* and *Ortiz* for the settlement of class actions in federal court. The FJC is studying patterns in filing and settlement of class actions in state and federal courts.

Our plate is full. We are grateful for the assistance of civil procedure experts around the country who have testified or otherwise given aid and comfort to the Committee on these important and complex topics.

LAW REVIEW ARTICLES

by Jay Tidmarsh

Although personal jurisdiction in cyberspace remained a topic of some discussion, the number of articles on the issue seems to be on the decline. International and comparative topics seem to be more prevalent in this year's articles, at least in comparison to recent years.*

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