

ASSOCIATION OF AMERICAN LAW SCHOOLS

SECTION ON

CIVIL PROCEDURE

FALL 2003 NEWSLETTER

MESSAGE FROM THE CHAIR

From Civil Procedure to Civil Processes

I had the luxury of reading the Newsletter before writing its introduction. As you will see, the breadth of topics and of sources relevant to our work as teachers of Civil Procedure is striking.

The cases discussed in the Newsletter arise from a host of different kinds of problems – ranging from an individual attempting to recover disability benefits in an administrative setting to groups of plaintiffs asking courts to redress injuries from asbestos. The Supreme Court's rulings outlined also sprawl across a wide array of legal problems, as the Court continues to struggle with the challenges of coordination among and across jurisdictions, with how to craft appropriate parameters for lawsuits, and with questions of when to make appellate review available. But new topics are also reflected in the current crop of decisions, as the Court debates the authority and roles of magistrate judges and of arbitrators.

The Federal Rule changes reviewed here display a similar range – from rules of style to rules adding new texts. Specifically, under revisions to Rule 23, judges are charged with and given more power to superintend class actions through mandates to appoint class counsel and to award fees. And, according to the Chair of the Advisory Committee, federal

judicial rulemakers will soon consider how litigation processes and new technologies might better cohere.

Turning to Congress, some of the legislative proposals on the near horizon are aimed at overriding federal class action rules in some instances as well as at divesting state courts of certain kinds of class actions (by moving them to federal courts) and at divesting federal courts of other kinds of cases (by moving them to administrative processes).

Meanwhile organizations such as the American Law Institute and UNIDROIT are now concerned with questions of aggregate

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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.

litigation, transnational rules, and the enforce-

ment of foreign judgments. The American Bar Association has chartered a project on the "Vanishing Trial" to examine the declining number of trials held in federal and state courts and to inquire about whether those trials have been outsourced to agencies, corporations, workplaces, and the like or whether factfinding of the adjudicatory kind is itself on the wane.

Thus, I have six points by way of introduction. First, proceduralists interested in rules of process can no longer rely on a compilation of the Federal Rules of Civil Procedure but rather must look to many sources to know – even at a descriptive level – the relevant governing regime. Congress is energetically in the business of rulemaking through subject-matter specific statutes rather than by trans-substantive statutes. Further, organizations such as the ALI, the American Arbitration Association, and the New York Stock Exchange are also in the business of promulgating procedural codes, as are private parties who craft their own procedures for dispute resolution into contracts that are now enforced by courts.

Therefore, and second, the Federal Rules of Civil Procedure have diminishing centrality to introductory courses. Those rules remain exemplary of the kinds of problems all procedural systems have to face: about distributing power among claimants and between claimants and third-party decision-makers. But those rules are but one of many illustrative sets, as procedural systems are proliferating in public and in private settings.

Third, and related, is an understanding that the venues relevant to our work include but are not limited to federal and state courts. Administrative agencies are an important place of procedural rulemaking, as are office buildings where arbitrators conduct proceedings and tribunals (like the dispute resolution mechanisms of the WTO and those chartered by the United Nations) that cross national boundaries through public processes prompted

by actors interested in commerce and in the international laws of human rights.

Thus, and fourth, I suggest revisiting the name of the subject matter, moving it from "Civil Procedure" (with its implicit reference to court-based adjudication) to "Civil Processes" in order to advert to the multiplicity of formats with which competent lawyers have to be familiar.

Fifth, the Mentoring Committee, formed under through the generous leadership of several of our colleagues and described herein, is one way to help new teachers navigate among the many theories, doctrines, ideas, topics, and methods now constituting our subject matter.

Sixth, and finally, I hope that you will join us on January 3 in Atlanta at our annual meeting program, described below. We will there continue a conversation begun last June at the workshop in New York on teaching Procedure about how to shape the subject matter of our course, circa 2003.

Judith Resnik
Yale Law School
November 5, 2003

2004 ANNUAL MEETING PROGRAM

Competing or Complementary Rule Systems?

Adjudication, Arbitration, and the Procedural World of the Future

Saturday, Jan. 3, 2:00-5:00 p.m.

At the January 2004 AALS Annual Meeting in Atlanta, the ADR and Civil Procedure sections will co-host a three-hour session to consider the reconfiguration of civil processes to include more "alternative dispute resolution." While focusing particularly on court-connected processes, the session will also examine free-standing arbitration and mediation. Speakers from a range of perspectives will focus on both domestic and trans-

national processes and on doctrine, practice, empiricism, theory, public policy, and the future. Speakers include Ellen Deason (Ohio State), Christopher Drahozal (Kansas), Bryant Garth (American Bar Foundation), Deborah Hensler (Stanford & Rand), Keith Hylton (Boston U.), Hon. Lee Rosenthal (S.D. Tex. & Adv. Comm. Chair), and Katherine Stone (Cornell). Judith Resnik (Yale) & Jean Sternlight (Nevada) will co-moderate. The sessions will include remarks by the speakers as well as break-out sessions for discussions.

SECTION ANNOUNCEMENTS

Business Meeting. There will be a business meeting at the conclusion of the section's annual meeting program on January 3 in Atlanta. The Executive Committee proposes to nominate the following for the 2003 Executive Committee:

<i>Chair</i>	Howard Erichson, Seton Hall
<i>Chair-Elect</i>	Nancy Marder, Chicago-Kent
<i>Past Chair</i>	Judith Resnik, Yale
<i>Exec. Comm.</i>	Margaret Woo, Northeastern
<i>Exec. Comm.</i>	Vikram Amar, Hastings

Many thanks to Jim Pfander and Steve Yeazell, who complete their executive committee service this year.

Mentoring Program. To assist new civil procedure professors, the section has instituted a Mentoring Committee, comprised of Jim Pfander, Bill Slomanson, Ellen Sward, and Jay Tidmarsh. The committee will contact untenured section members shortly to inform them of the following two initiatives:

The first initiative is a listserv to discuss teaching and other issues of interest to new civil procedure professors. The listserv will

include untenured faculty who choose to join, the Mentoring Committee members, and other interested section members, who may contact host Bill Slomanson to be included.

The second initiative is advice on scholarship. For any junior faculty member seeking advice on a draft, a member of the Mentoring Committee will either read your or work or seek another senior scholar to do so. Section members willing to serve as readers should contact Jay Tidmarsh. The Committee will maintain a list and assure a wide distribution so that no individual reviews more than one or perhaps two such articles in a year.

For more information, contact Jim (jpfander@law.uiuc.edu), Bill (slomansonb@worldnet.att.net), Ellen (esward@ku.edu) or Jay (tidmarsh.1@nd.edu).

SUPREME COURT DECISIONS

by Tobias Barrington Wolff

A Split Emerges in the Treatment of Sovereign Immunity in State and Federal Courts. In *Franchise Tax Board of California v. Hyatt*, 123 S. Ct. 1683 (2003), the Supreme Court reaffirmed the power of state courts to reject a sovereign immunity defense invoked by another State. Declining an opportunity to reconsider its decision in *Nevada v. Hall*, the Court treated the determination as to whether a state can invoke a sovereign immunity defense in another state's courts as a choice-of-law matter and found that the constitutional limits on that determination are governed by the standard set forth in *Allstate v. Hague*.

The suit arose out of a dispute between a former California resident, Gilbert Hyatt, and the California taxing authorities. During the course of an administrative review, Hyatt alleged, the Franchise Tax Board committed

various intentional torts against him, and he sued for damages in Nevada state court. California law granted sovereign immunity in such a case, but Nevada law did not. The Nevada Supreme Court treated the issue as a choice-of-law matter, applied principles of comity, and found Nevada's interest in protecting its citizens from intentional torts to outweigh California's interest in avoiding liability. The Supreme Court affirmed.

In its 1999 decision in *Alden v. Maine*, however, the Supreme Court had held that states enjoy a constitutional prerogative of sovereign immunity that protects them from suits brought in their own courts as well as in federal court. The reasoning of *Alden* offered a strong basis for arguing that states likewise enjoy a constitutional defense against suits brought in the courts of sister states — the situation in *Hyatt*. The *Hyatt* Court expressly declined to address that issue, finding that the parties had not properly raised it.

Exceptions to the Removal Statute Continue to be Construed Narrowly. The general removal provision, 28 U.S.C. § 1441, allows for Congress to make certain types of suits non-removable, even if the other requirements for removal are satisfied. The Supreme Court has interpreted this exception narrowly, finding that only an express statutory bar will prevent a party from removing to federal court. In *Breuer v. Jim's Concrete of Brevard*, 123 S. Ct. 1882 (2003), the Court adhered to this strict requirement and rejected an argument that suits under the Fair Labor Standards Act are nonremovable.

State-Owned Corporations and Removal as Foreign States. Under 28 U.S.C. § 1441(d), a “foreign state” may remove a lawsuit to federal court. Corporations that are so closely linked with a foreign sovereign as to constitute an “instrumentality” of the sove-

reign may also take advantage of this provision. In *Dole Food Co. v. Patrickson*, 123 S. Ct. 1655 (2003), the Court held that a majority of the shares in a corporation must be owned directly by a foreign sovereign in order for the corporation to claim “instrumentality” status and hence be eligible for foreign-state removal. The Court also held that the determination of the entity's ownership structure should be made as of the time the suit is filed.

Removal and the Complete Preemption Doctrine. The Supreme Court has added another to its short list of exceptions to the well-pleaded complaint rule for federal question jurisdiction. In *Beneficial National Bank v. Anderson*, 123 S. Ct. 2058 (2003), the Court found that the National Bank Act, 12 U.S.C. § 85 et seq., authorizes a defendant to remove a suit filed in state court when the suit accuses a national bank of charging excessive interest, even where the complaint raises only state law claims, because the Bank Act “completely preempts” this type of claim.

On two prior occasions, the Supreme Court has found statutes expressing such a strong federal interest in preemption that Congress must have intended preemption questions to be resolved in a federal forum, even though such issues ordinarily come up by way of defense and hence do not authorize jurisdiction under standard § 1331 analysis. In *Avco Corp. v. Machinists*, the Court found that the Labor Management Relations Act embodied such complete preemption that it authorized such removal to a federal forum; and in *Metropolitan Life Ins. Co. v. Taylor*, the Court reached a similar conclusion in reviewing ERISA.

With its decision in *Anderson*, the Court has added the National Bank Act to that elite company of federal statutes, finding Congress intended the Act to provide “the exclusive cause of action” for its field of concern —

“usury claims against national banks” — and hence that state law suits accusing national banks of charging usurious rates should be treated as removable federal claims.

Consent to Submission of a Case to a Magistrate Need Not Always Be in Writing.

Under the Federal Magistrate Act of 1979, 28 U.S.C. § 636, a magistrate judge has the authority to conduct “any or all proceedings in a ... civil matter,” including jury trials and dispositive motions, so long as the magistrate is designated for that purpose by the district court and the parties give their consent. In *Roell v. Withrow*, 123 S. Ct. 1696 (2003), the Court was asked to decide whether § 636 requires courts to obtain express written consent before submission of the case to the magistrate. The Court held that the answer was no. While obtaining the parties’ consent in writing is the preferred practice, a failure to do so does not automatically require vacatur of a resulting judgment. Rather, the course of conduct of the parties can demonstrate their consent to the proceedings.

The Supreme Court Fails to Provide Guidance on Collateral Attacks to Class-Action Judgments. In one of the most anticipated cases of the term, the Supreme Court divided equally on a collateral challenge to a class action judgment, leaving in place a Second Circuit decision that authorized the challenge. The Court thereby failed to resolve a split among the courts of appeals on this important issue.

The case, *Dow Chemical v. Stephenson*, 123 S. Ct. 2161 (2003) (per curiam), involved a challenge to the massive settlement of claims resulting from the use of Agent Orange during the Vietnam War. The settlement, implemented in 1984 by Judge Jack Weinstein, established a fund that paid compensation to

any eligible individual who manifested a condition identified with Agent Orange through 1994. The defendants received a global release that forever protected them from all claims arising out of the use of Agent Orange in Vietnam. Vietnam veterans Daniel Stephenson and Joe Isaacson were diagnosed with signature diseases in 1998 and 1996, respectively — after the eligibility period had expired and after the settlement funds had been exhausted. They filed suit, and the defendants argued that the settlement shielded them from liability. The district court (Judge Weinstein again) dismissed the claims, but the Second Circuit reversed.

The Second Circuit held that Stephenson and Isaacson were entitled to attack the settlement collaterally on the grounds that they had not received adequate representation in the first proceeding. On the merits of the challenge, the court held that the settlement could not bind “members of the class whose injuries manifested after depletion of the settlement funds.” Under the standards set forth by the Supreme Court in *Amchem* and *Ortiz*, the appeals court found, post-1994 claimants were not adequately represented in the initial proceeding and hence would be deprived of due process if that proceeding barred their claims. This ruling created a split of authority among the Circuits.

The Supreme Court, however, failed to resolve the issue. As to Joe Isaacson, the Court issued a one-line order vacating the judgment and remanding for further consideration in light of *Syngenta Crop Protection v. Henson*, a 2002 opinion in which the Court placed limits on the use of the All Writs Act to obtain subject-matter jurisdiction over state-law claims. (The District Court had relied upon the Act in removing Isaacson’s challenge from Louisiana state court.) As to Daniel

Stephenson, the Court divided equally. (Justice Stevens recused himself.)

Interlocutory Appeals and the Collateral Order Doctrine. In *Sell v. United States*, 123 S. Ct. 2174 (2003), the Court considered the application of the collateral order doctrine in the context of an interlocutory ruling that may itself violate constitutional rights. *Sell* involved the criminal prosecution of Charles Sell, who suffered from serious mental illness and was unable to control his behavior during trial proceedings. The government wished to administer antipsychotic medication to Sell, against his will, so that the trial could proceed. The district court granted an order to that effect, and Sell sought immediate appellate review, claiming that the order violated his constitutional right to bodily integrity. The statute that ordinarily prevents interlocutory appeals in civil cases, 28 U.S.C. § 1291, also applies in criminal cases, and the government argued that the statute barred Sell's appeal.

The Supreme Court disagreed, holding that Sell's appeal fell within the scope of the collateral order doctrine. The Court explained that the order (1) "conclusively determined the disputed question," namely, whether Sell had a legal right to avoid forced medication; (2) "resolved an important issue" (the right to resist involuntary medication) that was "completely separate from the merits of the action"; and (3) raised issues "effectively unreviewable on appeal from a final judgment," since waiting until final judgment would result in subjection to "the very harm that he sought to avoid."

Punitive Damages and the Presumptive Ten-to-One Ratio. The Supreme Court has established a ratio of ten-to-one in comparing punitive and compensatory damages as the presumptive limit that due process allows. In *State Farm Mutual Automobile Insurance Co.*

v. Campbell, 123 S. Ct. 1513 (2003), the Court set forth its first numeric benchmark for the "grossly excessive" standard articulated in 1996 in *BMW v. Gore*, holding that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages ... will satisfy due process."

The Supreme Court Continues the Trend Toward Having Arbitrators Resolve Disputed Issues in the First Instance. The Court has reiterated its strong preference for having arbitrators resolve disputes in cases governed by the Federal Arbitration Act.

In one case, *Howsam v. Dean Witter Reynolds*, 123 S. Ct. 588 (2002), the Court reviewed a six-year deadline on arbitration disputes contained in the National Association of Securities Dealers Arbitration Code. It found that disputes over such a limitations provision do not present one of those "gateway" issues that parties would normally expect a court to rule upon. Rather, parties should expect such a provision to be encompassed within the broad language of any standard arbitration clause and hence to be entrusted to arbitrators.

In another case, the Court refused to allow judges to rule on whether an arbitration agreement would permit arbitrators to award treble damages in a RICO dispute. *Pacificare Health Systems v. Book*, 123 S. Ct. 1531 (2003) reversed two lower federal courts that had refused to compel arbitration on a RICO claim. The Court found that the scope of the arbitrators' remedial authority was an issue for the arbitrators to decide, with any challenge to the adequacy of the plaintiffs' relief to be considered through one of the limited avenues for review available in arbitration cases.

The Term's most dramatic statement about the prerogatives of arbitrators came in *Green Tree Financial Corp. v. Bazzle*, 123 S.

Ct. 2402 (2003) (plurality opinion), a closely watched case in which the availability of “class arbitration” proceedings was at issue. Plaintiffs were home mortgage consumers who claimed that Green Tree had failed to provide certain consumer information required by state law. Plaintiffs asked an arbitrator to certify a class action on behalf of all similarly situated mortgage holders bound by Green Tree contracts. The arbitrator granted this request, conducted the class proceeding, and issued a sizeable award. On appeal, the defendants argued that the arbitrator had exceeded his authority, claiming that (1) the contract did not authorize class arbitration, and (2) even if it did, such a proceeding was impermissible. The South Carolina Supreme Court rejected both arguments and affirmed.

The U.S. Supreme Court vacated the decision and remanded for further consideration. In a plurality opinion, Justice Breyer explained that the sequence of events made it unclear whether the arbitrator had exercised independent judgment in certifying the class or whether he believed himself required to do so because of certain orders issued by a state trial court. Although the arbitrator indicated that he had “determined that a class action should proceed” after making a “careful review” of the contract, that statement came only after the court rulings in question. These events created a “strong likelihood” that the arbitrator’s decision “reflected a court’s interpretation of the contracts rather than an arbitrator’s,” making it necessary to send the case back to the arbitrator for a fully independent decision on all issues entrusted to him by the contract. Justice Stevens provided the fifth vote for this disposition in a separate opinion.

OTHER COURT DECISIONS

PART I

by *David H. Isaacs*

Personal Jurisdiction. In *Wartsila NSD North America, Inc. v. Hill International, Inc.*, 269 F. Supp. 2d 547 (D.N.J. June 19, 2003), the plaintiff Wartsila sued a consulting company that had provided an expert witness, alleging that exposure of the absence of the credentials claimed by the expert led to a large arbitration award against Wartsila. The defendant filed a third-party complaint against plaintiff’s law firm and several of the firm’s attorneys, asserting they negligently investigated and prepared the expert. The third-party defendants moved to dismiss for lack of personal jurisdiction, and the court denied the motion. While rejecting specific jurisdiction, the court held that the third-party defendants’ ongoing attorney-client relationship with Wartsila in connection with the litigation exposed them to general personal jurisdiction. According to the district court, the attorneys and law firm had availed themselves of the privileges and benefits of the forum by a steady exchange of correspondence and telephone communication with Wartsila and its New Jersey counsel regarding the litigation; seeking admission *pro hac vice* in order to represent Wartsila in the court; and traveling to New Jersey for meetings, depositions and hearings. Moreover, the court held that, because third-party defendants did not make “any meaningful attempt to demonstrate that defending . . . in New Jersey would impose a [special or unusual] burden,” asserting personal jurisdiction over them would not offend traditional notions of fair play and substantial justice.

In *Gator.com Corp. v. L.L. Bean, Inc.*, 341 F.3d 1072 (9th Cir. Sept. 2, 2003), the Ninth Circuit reversed a dismissal for lack of personal jurisdiction over L.L. Bean, finding

that the defendant retailer had sufficient contacts with California for general personal jurisdiction, despite the facts that L.L. Bean is incorporated in Maine and has its primary place of business, all corporate offices, distribution and manufacturing facilities in that state; and that the corporation is not authorized to do business in California, has no agent for service of process in California, and is not required to pay California taxes. While the circuit court acknowledged that L.L. Bean's extensive sales and marketing in California provided added justification for asserting general personal jurisdiction, the court concluded that "even if the only contacts L.L. Bean had with California were through its virtual store, a finding of general jurisdiction in the instant case would be consistent with the 'sliding scale' test" applicable to Internet companies. Defendant's "highly interactive" website allows California residents to make purchases and interact with sales representatives, which had resulted in millions of dollars in sales to California. That website, the court concluded, approximates physical presence in California. Moreover, given L.L. Bean's resources and its employees' regular business travel to California, as well as the absence of issues requiring access to the retailer's facilities or records, the inconvenience would not constitute a deprivation of due process. The Ninth Circuit declared that "[o]ur conceptions of jurisdiction must be flexible enough to respond to the realities of the modern marketplace."

Subject matter jurisdiction. *Atlas Global Group v. Grupo Dataflux*, 312 F.3d 168 (5th Cir. 2002), cert. granted, 2003 WL 21229394 (U.S. Oct. 14, 2003). In an action reaching the district court through removal, the district court failed to recognize *sua sponte* the absence of diversity at the time of filing.

Plaintiff partnership removed the diversity-destroying partners during the course of the litigation, and thus diversity was present at the time of verdict and judgment. In *Atlas Global*, the Fifth Circuit considered the impact of such an error on jurisdiction, and concluded that, in such circumstances, jurisdiction was not destroyed. Judge Emilio Garza dissented, saying the majority overextended *Caterpillar v. Lewis* (U.S. 1996), from a situation involving cure by dismissal of a non-diverse party to one involving unilateral action by a party to change its own citizenship. The Supreme Court has granted certiorari.

Venue Transfer. In *In re National Presto Industries*, 2003 WL 22389815 (7th Cir. Oct. 21, 2003), a Securities and Exchange Commission suit against an unregistered investment company, the Seventh Circuit upheld the denial of a section 1404(a) motion to transfer from Chicago, where the SEC has the regional office closest to defendant's headquarters, to Wisconsin, where defendant's headquarters are located. Rejecting the defendant's assertion that the government would not be inconvenienced by litigating in a district more convenient to the defendant, the court noted that "Federal agencies have limited resources, and the SEC in particular is often outgunned by the affluent defendants that it sues." Moreover, "[w]hen government lawyers and investigators incur time and travel costs to litigate in a remote forum, the burden falls on the taxpayer, who finances the federal government and who is no less worthy of the protection of the law than corporate officers, shareholders, and employees." As a result, the court held, the general principle of deference to plaintiff's choice of forum should apply even when the plaintiff is a federal agency.

Electronic Discovery. In *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y.

May 13, 2003), the court modified the analysis, previously established in *Rowe Entertainment Inc. v. William Morris Agency*, 205 F.R.D. 421 (S.D.N.Y. 2002), for shifting the costs of electronic discovery. First the court added two factors to the test: (1) “the amount in controversy”; and (2) “the importance of the issues at stake in the litigation,” explaining that the addition is needed to accurately reflect the valuation articulated in Rule 26. The court noted that “doing so would balance the Rowe factor that typically weighs most heavily in favor of cost-shifting, ‘the total cost associated with production.’” The court then eliminated two factors, declaring that one factor (“the specificity of the discovery request”) was duplicative of two others (relevance and cost), and the second factor (“the purposes for which the responding party maintains the requested data”) was irrelevant to the accessibility of electronic evidence. Finally, the court rejected previous decisions that weighed the Rowe factors equally, explaining that it would be more appropriate to give less weight given to certain factors. The court listed in descending order of importance: (1) the extent to which the request is specifically tailored to discover relevant information, (2) the availability of such information from other sources, (3) the total cost of production, compared to the amount in controversy, (4) the total cost of production, compared to the resources available to each party, (5) the relative ability of each party to control costs and its incentive to do so, (6) the importance of the issues at stake in litigation, and (7) the relative benefits to the parties of obtaining the information.

For more on electronic discovery, see the discussion of the proposed ABA Electronic Discovery Standards below at p.18.

PART II

by *Allan Ides*

Amount in Controversy and Affirmative Defenses. On April 15, 1998, Barbara Scherer filed a lawsuit in state court to recover disability benefits accruing over the previous twelve months. After a trial, which commenced on May 3, 2001, a jury verdict was entered against Scherer from which she appealed. While the appeal was pending, Scherer filed a diversity suit in federal court seeking disability benefits covering the period commencing April 16, 1998. The parties were diverse and she sought more than \$75,000 in damages. The defendant filed an affirmative defense premised on *res judicata*, arguing that the state court judgment resolved all of plaintiff’s disability claims through the date of trial, i.e., May 3, 2001. Defendant then filed a motion to dismiss under Rule 12(b)(1), arguing that to a legal certainty plaintiff’s claim did not meet the amount in controversy requirement since the amount of damages claimed post-May 3, 2001 was well below the required amount. The district court granted the motion. In *Scherer v. Equitable Life Assurance Soc.*, ___ F.3d ___, 2003 WL 22351627 (2d Cir. 2003), a divided panel reversed. Applying the legal certainty test, the court held that jurisdiction must be measured as of the date of the complaint and that an affirmative defense cannot be used to “whittle down” the amount in controversy regardless of the merits of that defense.

Class Actions, Issue Preclusion, and the Anti-Injunction Act. In *the Matter of Bridgestone/Firestone Tires Prods. Liab. Litig.*, 333 F.3d 763 (7th Cir. 2003). After the Seventh Circuit held that the district court had abused its discretion in certifying a nationwide class action in a suit seeking

prospective relief for owners of Bridgestone/Firestone tires that were allegedly defective but had not yet failed, lawyers for plaintiffs filed similar suits in other jurisdictions, again seeking certification of a nationwide class. The district court denied defendants' motion to enjoin these other proceedings, some of which were in state court. On interlocutory appeal, the Seventh Circuit reversed, finding that both named and unnamed plaintiff class members were bound *in personam* by the court's earlier ruling denying certification of a nationwide class. Furthermore, the Seventh Circuit held that the requested injunction fell within the relitigation exception to the Anti-Injunction Act. The case was remanded with instructions to enter the injunction against proceedings in other courts seeking nationwide certification of the class.

Defendant Class Certifications and Rule 23(f). Under FRCP 23(f), a court of appeals may permit interlocutory appeal of a decision granting or denying class certification. In *Tilley v. TJX Cos., Inc.*, 345 F.3d 34 (2d Cir. 2003), the Second Circuit became the first circuit to apply Rule 23(f) in the context of a defendant class. The district court had granted plaintiff's motion to certify a defendant class of retailers in a copyright infringement suit. The defendants applied for permission to appeal. In granting permission, the court developed special criteria for applying Rule 23(f) to defendant classes: "(i) denial of certification effectively disposes of the litigation because the plaintiff's claim would only be worth pursuing as against a full class of defendants; or (ii) an interlocutory appeal would clarify an important and unsettled legal issue that would likely escape effective end-of-case review; or (iii) interlocutory appeal is a desirable vehicle either for addressing special circumstances or for avoiding manifest injustice." On the merits of the class certifica-

tion issue, the court held that, as a general matter, Rule 23(b)(2) is an improper vehicle for the certification of defendant classes and that the effect of stare decisis, standing alone, is an insufficient basis for class certification under Rule 23(b)(1)(B). Finally, the panel gets a special award for its use of plain English: perscrutation, anent, limned, and pellucid.

Diversity Jurisdiction and Foreign Parties.

In *Tango Music, LLC v. DeadQuick Music, Inc.*, ___ F.3d ___, 2003 WL 22415336 (7th Cir. 2003), the Seventh Circuit joined other courts in holding that 28 U.S.C. § 1332(a)(3), which grants jurisdiction over suits between citizens of different states and in which an alien is also a party, does not preclude the presence of aliens who are citizens of the same nation from being on both sides of the controversy. In other words, § 1332(a)(3) does not include a "complete alienage" requirement. This is to be contrasted with 28 U.S.C. § 1332(a)(2) – citizen of a state versus a citizen of a foreign state – which has been held unavailable when citizens of foreign states are on both sides of the controversy.

Supplemental Jurisdiction. In *Allapattah Servs. v. Exxon Corp.*, 333 F.3d 1248 (11th Cir. 2003), the Eleventh Circuit joined those circuits that have held that § 1367 effectively overrules *Zahn*, thus joining the Fourth (*Rosmer v. Pfizer, Inc.*, 263 F.3d 110 (4th Cir. 2001)), Fifth (*In re Abbott Labs.*, 51 F.3d 524 (5th Cir. 1995)), Seventh (*Stromberg Metal Works v. Press Mechanical*, 77 F.3d 928 (7th Cir. 1996), and Ninth (*Gibson v. Chrysler Corp.*, 261 F.3d 927 (9th Cir. 2001)). Circuits refusing to so read § 1367 include the Third (*Meritcare Inc. v. St. Paul Mercury Ins. Co.*, 166 F.3d 214 (3d Cir. 1999)), Eighth (*Trimble v. Asarco, Inc.*, 232 F.3d 946 (8th Cir. 2000)), and Tenth (*Leonhardt v. Western Sugar Co.*, 160 F.3d 631 (10th Cir. 1998)).

STATUTORY DEVELOPMENTS

by Shaun Shaughnessy

Although there are major pieces of procedural legislation pending in Congress, as of this writing none has been enacted into law since last year's newsletter. Congress has before it legislation in four areas of particular interest to section members. It continues to consider proposals for class action reform. Two separate suggestions for ameliorating the asbestos litigation crisis are pending. Changes to the Multiparty, Multiforum Act, which became law last year, have been proposed. Finally, Congress again has before it a bill to change the result of the *Lexecon* case.

Class Action Legislation. For a number of years, Congress has entertained proposals that would substantially change class action practice. The most significant provisions would permit the removal of most large class actions from state court to federal court. The current version, H.R. 1115, the Class Action Fairness Act of 2003, passed the House on June 12, 2003. It is currently pending in the Senate as S. 274. It was approved by the Senate Judiciary Committee, with significant amendments aimed at gaining Democratic support, on April 4, 2003. The bill faces a Democratic filibuster on the Senate floor. On October 22, 2003, proponents came within a single vote of breaking the filibuster. Further negotiations between proponents and moderate Democrats may yet lead to passage of the legislation in this session of Congress.

The legislation currently before the Senate gives federal courts subject matter jurisdiction, based on minimal diversity, of plaintiff class actions where the aggregate amount in

controversy exceeds \$5 million, and the number of class members is 100 or more. It excludes certain corporate and securities cases, cases in which the primary defendants are states or state officials, and cases in which two-thirds or more of the class members and the primary defendants are citizens of the state in which the action is originally filed. The bill gives the court discretion, based upon a number of factors, to decline jurisdiction in cases where between one-third and two-thirds of the class members and the primary defendants are from the state where the action was originally filed. The bill facilitates removal of state court class actions by permitting removal by any unnamed class member or by any defendant and it permits appellate review of a class action remand. The bill requires dismissal of actions that do not meet the requirements of Rule 23 unless there is a separate basis for subject matter jurisdiction over the action. It permits refile of the dismissed action in state court, but permits repeat removal of cases that are refiled as class actions. In effect, this provision prevents a state court from certifying a class action in circumstances where the federal court has found the federal class action requirements unsatisfied. It would allow individual claimants to pursue claims in state court following dismissal of the federal class action for failure to satisfy Rule 23.

The legislation also contains a number of provisions that would adjust federal class action practice, especially with respect to settlements. It would limit the payment of bonuses to class representatives, calls for special scrutiny of noncash settlements, and contains detailed provisions concerning notice of proposed settlements, both to class members and to state and federal regulators.

Asbestos Reform. Asbestos litigation has

been a major feature of the civil litigation landscape in many state and federal courts for decades. Although at one time it was expected that asbestos litigation would have abated by now, there is reason to believe that, absent intervention, asbestos litigation will continue at current levels or increase. Two proposals are currently before Congress. One, embodied in the Fairness in Asbestos Injury Resolution Act of 2003, S. 1125, was reported out of the Judiciary Committee on a closely divided vote on July 10, 2003. This bill proposes to remove asbestos claims from the tort litigation system. The bill establishes a substitute compensation scheme to be administered by special asbestos masters operating within the Court of Federal Claims. Eligibility would require a showing that the claimant was exposed to asbestos and was suffering from one or more specified diseases, which the legislation identifies as asbestos-related. The Act establishes award levels for claims based upon a number of factors, including length and extent of asbestos exposure, type of disease, age of claimant and smoking history. The scheme would be funded by payments from companies that have been defendants in asbestos litigation, from insurance companies who have asbestos-related obligations and from existing asbestos trusts. Funding of the scheme, over a number of years, would be approximately \$108 billion. There are provisions for additional assessments if the fund is depleted. The bill has bipartisan support, but faces serious opposition from a variety of sources.

The second proposal for asbestos litigation reform – S. 413, the Asbestos Claim Criteria and Compensation Act of 2003, and H.R. 1586, the Asbestos Compensation Fairness Act of 2003 – limits asbestos litigation to plaintiffs suffering from physical impairment. The Act requires plaintiffs to file, with their initial pleadings, prima facie

evidence of impairment to which asbestos exposure was a contributing factor, and requires that the court dismiss without prejudice any action that does not comply. The Act extends to state court actions by permitting removal of any case in which the state court does not comply with the prima facie evidence requirement. The Act also addresses statutes of limitations in asbestos cases. It forbids awards of damages for fear or risk of cancer in cases alleging nonmalignant asbestos claims, but preserves the right to bring a later claim for asbestos-related cancer by defining the scope of certain asbestos claims for preclusion purposes and by limiting the scope of settlement releases in asbestos cases. The Act also prohibits consolidation for trial of asbestos claims involving multiple plaintiffs without the consent of all parties and limits the forum choice of asbestos plaintiffs to the their state of residence or to a state in which they were exposed to asbestos.

The current prospects of asbestos reform in Congress are well described in a front page article in the October 15, 2003 Wall Street Journal entitled “Asbestos Factions Struggle to Settle their 30-Year War” by Shailagh Murray and Kathryn Kranhold.

Lexecon Change and Reform of the Multiparty, Multiforum Act. A bill is pending in the House entitled Multidistrict Litigation Restoration Act of 2003, H.R. 1768, which would amend 28 U.S.C. § 1407, the multidistrict litigation statute, to permit transferee courts to transfer cases to themselves for trial, either of the entire case or of all but compensatory damages. Such transfers were an accepted practice until the Supreme Court found the practice inconsistent with the current statutory scheme in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998). Under current law, cases transferred under the multidistrict

litigation statute are transferred for consolidated pretrial treatment only. *Lexecon* requires that they be remanded to the transferor court for trial. Legislation to change the *Lexecon* result has been introduced unsuccessfully several times.

The same bill includes a number of proposed amendments to the Multiparty, Multiforum Trial Jurisdiction Act of 2002. The Act provides for federal jurisdiction of litigation arising from mass accidents. This year's bill would cure one of the anomalies that commentators noted in the Act passed last year. By changing the *Lexecon* result, it would allow a single judge, using amended § 1407, to hear trials of mass accident cases, but with determination of the amount of compensatory damages ordinarily being remanded to the court in which the case was originally filed. The bill also proposes an expansion of the Act by reducing the number of deaths required to trigger coverage from 75 to 25.

Readers interested in federal statutory developments will find a helpful source at the U.S. Courts website: <http://www.uscourts.gov/rules/index.html>.

DEVELOPMENTS IN THE FEDERAL RULES OF CIVIL PROCEDURE

by Steven S. Gensler

The 2003 amendment cycle brings several important changes. Extensive amendments to Rules 23, 51, and 53 become effective December 1 absent contrary action by Congress. The 2004 and 2005 rules amendment cycles, in contrast, are relatively quiet. No rules amendments are set for the 2004 cycle; of the amendments set for the 2005 cycle, the substantive revisions are few and modest.

The absence of major rules changes for 2004 and 2005, however, should not be interpreted as a sign that the rules committee has been taking it easy. Rather, the committee's recent efforts have focused on several major projects. As discussed in more detail below by the new Chair of the Advisory Committee, the Hon. Lee Rosenthal (S.D. Tex.), the committee is restyling the rules, continuing its study of electronic discovery, and completing work on new civil forfeiture rules. The reform agenda is also heating back up, with current inquiry into Rules 15 and 50 and with ongoing activity concerning Rule 23.

I. Amendments Effective Dec. 1, 2003

On March 27, 2003, the Supreme Court submitted to Congress proposed substantive amendments to Rules 23, 51, and 53. The Court also proposed technical and conforming amendments to Rules 54 and 71A and to Forms 19, 31, and 32. These amendments will take effect December 1, absent contrary action by Congress.

Rule 23 (Class Actions). The amendments substantially alter subsection (c)

dealing with class certification and notice and subsection (e) dealing with settlement. The amendments add subsection (g) dealing with the appointment of class counsel and subsection (h) dealing with attorneys fees. The amendments leave intact the existing criteria for class certification and are not intended to alter the existing balance between classes and class adversaries. Rather, their stated purpose is to improve the administration of Rule 23.

Subsection (c): The amendments make several changes to subsection (c)(1) dealing with the class certification order. One change instructs the court to resolve the certification question “at an early practicable time” instead of the current “as soon as practicable.” The advisory committee note explains that the new language better reflects current practice and the need, in some cases, for “certification discovery” in advance of a certification ruling. The amendments also delete the reference to conditional certification, on the basis that judges should not certify class actions until the certification requirements are shown to be met. For the first time, the notes would reference the practice of having a trial plan for consideration at the certification stage.

The amendments also alter subsection (c)(2) dealing with notice. The amendments make explicit the court’s authority to direct notice in (b)(1) and (b)(2) classes where appropriate, but caution that courts exercise care not to impose crippling costs. The amendments also identify and list several “plain language” requirements for notice, referencing the Federal Judicial Center’s illustrative forms in the advisory committee note.

Subsection (e): The amendments to subsection (e)(1) clarify that court approval of a settlement is necessary only after a class has been certified. This requirement, however, extends to the settlement of any claims, issues

or defenses that will be binding on the class. The amendments add the explicit requirement that the settlement must be “fair, reasonable, and adequate” to receive the court’s approval. The court must hold a hearing and support that conclusion with findings.

New subsection (e)(3) authorizes the court, in its discretion, to refuse to approve a (b)(3) settlement unless class members are afforded a second opportunity to opt out. This provision is primarily geared towards cases where the settlement is proposed after the class is certified and the original opt-out period has expired. A second opt-out period ordinarily will be unnecessary in a case proposed to be certified as a settlement class, because the class members can evaluate the proposed settlement terms during the initial opt-out period and act accordingly. It may be relevant in some settlement class contexts, however, such as when the initial opt-out period expires before the precise terms of settlement are reached, or where the initial settlement terms are not approved.

Two provisions target hidden transactions. New subsection (e)(2) requires settling parties to identify any side agreements. New subsection (e)(4) requires court approval before a class member may withdraw an objection to a proposed settlement.

Subsection (g): Subsection (g) is new. It regulates the appointment of class counsel, a topic previously subsumed under the 23(a)(4) adequacy of representation prerequisite. The provision requires the court to appoint class counsel, except where a federal statute provides other guidance (e.g., PSLRA). The court may appoint interim counsel. The subsection makes explicit that class counsel owes its duty to the class rather than to the class representative.

In selecting class counsel, the court may consider any relevant factor. However, the court must consider the attorney’s prior work

in the action, experience with complex litigation and the subject matter, knowledge of the law, and available resources. If more than one attorney seeks appointment, the court must select the best candidate. If there is only one applicant, the court may appoint that applicant as class counsel if the applicant meets the criteria listed above and would fairly and adequately represent the class. The court may order applicants to submit proposed fee terms, and may include fee provisions in the order appointing class counsel.

Subsection (h): Subsection (h) is also new. It creates procedures for courts to award attorneys fees (and nontaxable costs) in class actions. It does not create new grounds for such fees, however. Rather, it creates a format for courts to award fees that are authorized by law or agreement of the parties. It governs all fee awards in certified classes, including awards to class counsel, attorneys who worked on the case before certification, and attorneys who represent objectors.

Fee awards must be “reasonable,” and it is the court’s duty to determine what is the reasonable amount. The proposed rule does not take sides in the debate between the lodestar and percentage methods of calculating fees. Courts are instructed to consider the actual benefits received by class members.

A claim for fees must be made by motion under Rule 54(d)(2). Class members are to receive notice of the fee claim and may object. To approve a fee claim, the court must make findings that the fee is justified and reasonable. Courts may refer fee claims to magistrate judges or special masters.

Rule 51 (Instructions to Jury; Objections; Preserving a Claim of Error). Rule 51 is amended to reflect and anchor prevailing practice. The amendments explicitly authorize district judges to require parties to submit

proposed instructions before trial. However, parties always may submit proposed instructions at the close of evidence for issues that could not reasonably have been anticipated. Courts may permit parties to submit untimely instructions at any time.

The amendments continue the distinction between a request for an instruction and an objection on the court’s instruction ruling. Generally, the amendments continue the requirement that parties object to the court’s ruling on a request in order to preserve the issue for appeal. The failure to object, however, does not preclude appeal if a court denies a request and makes a definitive ruling on the request on the record, or for plain error.

Rule 53 (Masters). Rule 53 is entirely rewritten. The most significant revisions address the role of masters. Rule 53 originally was crafted with trial masters in mind, but the actual usage of masters had evolved quite differently. The amendments seek to re-align the rule with practice. First, they eliminate non-consensual reference for trial in jury cases. The amendments retain the authority to appoint a master for trial in non-jury cases, but re-emphasize that courts should do so only under “exceptional conditions” or where complex accountings or calculations are involved. For the first time, the amendments explicitly recognize a role for special masters in pre-trial and post-trial matters.

Even as the amendments clarify the role of masters, the rule and committee notes emphasize that appointment of a master should be the exception, not the rule. Judges bear primary responsibility for their work, and should appoint masters only when the need is clear. Moreover, judges must keep in mind the availability of magistrate judges, and not appoint a master to do the job of a magistrate judge.

The amendments also address the appointment process. The court must give the parties notice and an opportunity to be heard before appointing a master. Parties are invited to suggest candidates. The appointment order must be as precise as possible about the master's role and authority, describing in detail the master's duties and limits of authority, the topics for report, the nature of ex parte communications allowed, if any, the nature of the record to be preserved and filed, the standards of review that will govern the master's findings, and compensation.

The amendments alter existing review practices. The time to object to a master's report is extended to 20 days (from 10) and is deemed non-jurisdictional. The amendments increase the court's responsibility for fact matters; the court must review objections to fact findings de novo, unless the parties previously stipulated, with the court's consent, to a different standard. All legal conclusions continue to be reviewed de novo.

II. Proposed Amendments for 2004 Cycle

None.

III. Proposed Amendments for 2005 Cycle

The Standing Committee submitted the following rules for public comment on August 15, 2003. Written comments are due no later than February 16, 2004. Information on submitting comments or testifying is available at www.uscourts.gov/rules.

New Rule 5.1 (Constitutional Challenge to Statute – Notice and Certification). New Rule 5.1 would require that a party that draws into question the constitutionality of an Act of Congress or a state statute file and serve notice of such challenge on the United States Attorney General or state attorney general.

Courts already have this duty under 28 U.S.C. § 2403, a duty which current Rule 24(c) restates. However, current Rule 24(c) imposes no similar duty on the parties – it merely instructs the parties to alert the court to its duty – and the current location is not optimal because the existing litigants often have no occasion to refer to Rule 24.

The goal of new Rule 5.1 is to assure that the appropriate government official learns of a constitutional challenge early in the litigation to assess the need to intervene. New Rule 5.1 accomplishes this by creating an additional notification duty – on the parties – and by locating this duty in the vicinity of the other rules dealing with service and pleading. New Rule 5.1 also incorporates the court's statutory duty to notify government officials.

Rule 6 (Time). Amended Rule 6 would clarify the method of counting the additional three days provided to respond if service is by mail or one of the methods prescribed in Rule 5(b)(2)(C) or (D). The three days are added *after* the prescribed period expires. All other time-counting rules apply unchanged.

Rule 24 (Intervention). The final three sentences of Rule 24(c) would be deleted to conform with the relocation to new Rule 5.1 of notice requirements for constitutional challenges.

Rule 27 (Depositions Before Action or Pending Appeal). Amended Rule 27 would correct the outdated cross-reference to former Rule 4(d) and clarify that all methods of service under Rule 4 can be used to serve a petition to perpetuate testimony.

Rule 45 (Subpoena). Amended Rule 45 would require that a deposition subpoena state the manner for recording testimony. This closes a small gap under the current rules. In

some cases, concerns about the manner of recording might lead non-party witnesses to seek protective relief under Rule 26(c).

Rule B, Supplemental Rules for Certain Admiralty and Maritime Claims (In Personam Actions: Attachment and Garnishment). Amended Rule B would specify that Rule B allows for attachment in an in personam action if the defendant cannot be found in the district at the time the complaint is filed, such that the defendant's appearance in the district after filing but before attachment does not divest the court's power to attach the property.

Rule C, Supplemental Rules for Certain Admiralty and Maritime Claims (In Rem Actions: Special Provisions). The amendments are technical and correct amendments made in 2000.

ADVISORY COMMITTEE UPDATE

*by the Hon. Lee Rosenthal,
Advisory Committee Chair*

At the end of 2003, the Advisory Committee on Civil Rules is in the middle of several significant and diverse projects.

Electronic Discovery: For some time, the Committee has been laying the groundwork for an intensive examination of discovery into electronic information and data. That examination is proceeding, focusing on whether rules changes are necessary or desirable to accommodate the differences between electronic discovery and discovery into information in non-computerized forms. Building on the results of mini-conferences with lawyers, technical experts, and judges with experience in electronic discovery; a

Federal Judicial Center survey of magistrate judges and an intensive study of ten cases; and reactions to a request for comment prepared by Professor Richard Marcus, a special reporter to the Committee, the discovery subcommittee, chaired by Professor Myles Lynk, has prepared preliminary drafts of possible rules changes. These drafts will serve as a starting point for thorough examination of whether rules changes should be pursued. The Committee will explore these issues at a conference on electronic discovery at Fordham Law School in February 2004.

Civil Forfeiture Rules: On a very different topic, the Committee is well advanced in its work on a new Supplemental Admiralty Rule G, on civil forfeiture procedures. This new rule will put in one place the civil forfeiture provisions now scattered in different places, make them cohesive, and harmonize them with recent forfeiture legislation. The Committee has obtained extensive comment from the Department of Justice and from the National Association of Criminal Defense Lawyers. A proposed rule is expected to be presented to the full Committee at its spring meeting.

Reform Agenda: The Committee is beginning to look intensively at Rule 15 and Rule 50(b). As to Rule 15, the Committee is exploring whether a motion to dismiss or similar responsive motion should – like a responsive pleading – cut off the right to amend without judicial approval, and is evaluating complaints that the standards governing relation back of an amended pleading create problems in practice. A proposal under consideration for Rule 50(b) would ameliorate the requirement that a post-verdict motion for judgment as a matter of law must renew a motion made at the close of the evidence. The Committee continues its examination of Rule 23, particularly whether

a settlement class rule should be added. The Federal Judicial Center has been very helpful to the Committee as it tries to understand how class action practice has changed since *Amchem* and *Ortiz* and how it is likely to develop in the future.

Restyling Project: Great progress has been made on restyling the civil rules to clean up ambiguities, improve and modernize expression, and remove inconsistent uses of words and conventions. The work is now far enough advanced to reveal what the results will look like. It is exciting to see how much easier the “restyled” rules are to understand and use. It is the civil proceduralist’s version of cleaning the Sistine Chapel, revealing the beauty of the original work without changing its meaning.

Each rule is examined by a number of academics, judges, and lawyers, by one of two style subcommittees – one headed by Judge Thomas B. Russell (W.D. Ky.) and assisted by Professor Thomas Rowe, the other headed by Judge Paul J. Kelly, Jr. (CA 10) and assisted by Professor Richard Marcus – then by the full Committee. Professor Edward Cooper oversees the work of both subcommittees, in addition to his other reporter tasks. The Standing Committee has approved the publication of styled Rules 1-15 for comment from the bench and bar. That publication is deferred until August 2004, when the Committee expects to publish Rules 1-37 plus 45, followed by Rules 38-82 in August 2005.

The intensive examination of each rule, without changing the substantive meaning, is revealing problems that deserve attention but are beyond the scope of the style project. A separate reform agenda is emerging that will provide the Committee with a rich array of future challenges.

The Committee is fortunate to have received great assistance from a number of civil procedure experts on the diverse and challenging projects underway. We look forward to

continuing to receive such help as we proceed.

ELECTRONIC DISCOVERY STANDARDS

On November 17, 2003, the ABA Section of Litigation released draft amendments to the Civil Discovery Standards addressing electronic discovery. The ABA adopted Civil Discovery Standards in 1999 to address practical aspects of the discovery process that are not covered by state or federal rules. Since the adoption of those standards, electronic discovery issues have become increasingly prevalent and complex. For example, see the discussion of the *Zubulake* case at p.9 above. The Litigation Section appointed a task force to reexamine the applicable standards and to propose amendments. Among other things, the draft standards address privilege and work product issues relating to electronic discovery, the duty to preserve information, and the effective use of discovery conferences. The full text of the proposed standards may be found at www.abanet.org/litigation/taskforces/electronic/home.html. The ABA invites comments on the draft, which may be directed to task force co-chair Gregory P. Joseph, Esq., gjoseph@josephnyc.com.

BOOKS OF INTEREST

by *Danné L. Johnson*

Compiling a list of books of interest is difficult in that “interest” is defined by each reader. That being stated, I hope that the list below notes a few things that might be of interest to you. The descriptions of these items are from critics, publishers, and a variety of additional sources.

Neil Andrews, *English Civil Procedure: Fundamentals of the New Civil Justice System* (Oxford University Press 2002).

This book describes and analyzes the new system of civil procedure and justice in England and Wales. The book, according to the publisher, focuses on the fundamental principles that underlie the post-Woolf system. These include the principles set out in the Woolf reforms themselves, principles relating to civil justice derived from the Human Rights Act and ECHR, and older common law principles that continue to apply.

Dorothy A. Brown, *Critical Race Theory: Cases, Materials and Problems* (West 2003).

This book combines critical race theory with the case method approach. Professor Brown applies the lens of critical race theory to the first year curriculum and has separate chapters on Torts, Contracts, Criminal Procedure, Criminal Law and Sentencing, Property, and Civil Procedure.

Owen Fiss & Judith Resnik, *Adjudication and its Alternatives: An Introduction to Procedure* (Foundation 2003). A new casebook with a new title, but also very much the successor to the Cover, Fiss & Resnik *Procedure* casebook published in 1988, this book uses extensive materials from *Goldberg*

v. Kelly to set the stage for an examination of competing visions of procedural justice. Searching for principles that run through various forms of legal procedure – civil, criminal, and administrative – the book examines the difference between process-based visions and alternatives that emphasize resolution.

David J. Levy, ed., *International Litigation: Defending and Suing Foreign Parties in U.S. Federal Courts* (ABA 2003).

This new book, according to the ABA’s website, provides American and foreign lawyers with a practical overview of issues that parties and attorneys confront in international litigation in U.S. federal courts. Starting with the laws and strategies involved with service and citation of process, and concluding with the rules regarding enforcement of foreign judgments, the book is structured to take the litigator through the various stages of a lawsuit.

David M. O’Brien, ed., *Judges on Judging: Views from the Bench*, 2nd ed. (Chatham House 2003).

The publishers note that, “Based on the highly successful *Views from the Bench*, [1st ed.], this comprehensive collection of essays by state and federal judges in the United States looks at how they approach their function as judges and the role of the judiciary in the American constitutional system. O’Brien seeks to contribute to the ongoing debate over off-the-bench commentaries and to encourage readers to think about the qualities of judges and the role of courts in American politics. Among the eminent contributors are Warren E. Burger, Lewis F. Powell Jr., William H. Rehnquist, Thurgood Marshall, and William J. Brennan Jr., and Sandra D. O’Connor.”

Jeffrey M. Senger, *Federal Dispute Resolution: Using ADR with the United States*

Government (John Wiley & Sons 2003).

The government's use of ADR has grown greatly in recent years. *Federal Dispute Resolution* – co-published with ABA – addresses disputes between individuals and the many departments and agencies of the federal government. The book is appropriate for all types of disputes including sexual harassment, discrimination, environmental issues, business practices, and other kinds of civil disputes.

Symposium: Teaching Civil Procedure, Saint Louis University Law Journal, 47 St. Louis U. L.J. 1-156 (2003). The Winter 2003 issue of the Saint Louis University Law Journal concerns the teaching of civil procedure. According to Judge Michael Wolff, Supreme Court of Missouri, “The articles gathered here are useful to thinking about how we impart the culture of our profession — concepts, principles and strategies — through its essential subject. From an accumulation of decades of experience, these teachers offer various perspectives on the cases, techniques and strategies that are effective in transmitting our culture. The importance of the effort cannot be overstated. We hope these works will offer guidance, not just on how you teach the words, but how you bring your students to ‘get’ the music.”