ASSOCIATION OF AMERICAN LAW SCHOOLS

SECTION ON

CIVIL PROCEDURE

FALL 2004 NEWSLETTER

MESSAGE FROM THE CHAIR

Howard M. Erichson,
Seton Hall Law School

I am no longer surprised when students enter their first civil procedure class prepared to find the subject dry. I endure ribbing from colleagues who do not understand my fascination with procedure. And once, I was asked in all seriousness by another professor whether the field of civil procedure was dead. Readers of this newsletter, of course, know better. Indeed, one look at the contents of this year's newsletter reminds us that our field is very much alive.

♫ ♫ ♫ **INSIDE THIS ISSUE** ♫ ♫ ♫

Newsletter Editor: Vikram Amar

Some of the most exciting current developments in the field involve aggregate litigation, subject matter jurisdiction, electronic discovery, and litigation confidentiality. In the area of aggregate litigation, federal courts are working with the Rule 23 amendments that went into effect a year ago, class actions and multidistrict litigation remain items of possible legislative reform, and mass litigation of both the class and non-class variety remains a prominent feature of the litigation landscape. The American Law Institute has initiated a project on Principles of the Law of Aggregate Litigation, an opportunity for a reexamination of fundamental principles of aggregation.

Federal subject matter jurisdiction seems to have reemerged as an area of lively interest, with disputes arising particularly when plaintiffs seek a state court forum and defendants remove to federal court. In the past year, the Supreme Court addressed the curing of defects in diversity jurisdiction and touched on other aspects of subject matter jurisdiction. Of greater significance, the Court granted certiorari to resolve the most important outstanding issue under the supplemental jurisdiction statute – whether the statute permits supplemental jurisdiction over claims by plaintiffs or absent class members that fail independently to meet the amount-in-controversy requirement.

Electronic discovery plays an increasingly central role in litigation and has drawn the attention of judges and

rulemakers. As lawyers continue to battle over access to electronically stored information, the Advisory Committee on Civil Rules has proposed amendments to the Federal Rules of Civil Procedure to address electronic discovery.

Issues of confidentiality present the tension between litigation as a public process and litigation as a dispute resolution mechanism. Courts and commentators have addressed issues of public access to discovery, as well as confidential and sealed settlements, and the Federal Judicial Center completed an empirical study of sealed settlements. On a somewhat related note, the ABA Litigation Section's project on The Vanishing Trial, with a symposium published recently by the Journal of Empirical Legal Studies, addresses the decline of the most public aspect of the litigation process. Some of the work in this area reflects a broader academic trend toward more empirical work in civil procedure. In light of the interesting work being done on issues of secrecy in litigation, the section chose that topic for its annual meeting program (see below).

With these and other topics continuing to engage teachers and scholars of civil procedure, I hope you find this newsletter of use and interest. For those who are relatively new civil procedure professors, I encourage you to take advantage of the mentoring program offered by the section, and to subscribe to the civpromentor listserv, described below in Section Announcements. Finally, I encourage all of you to join us for the section's annual meeting program in San Francisco on January 8, 2005, described in more detail below, which promises a lively exchange on issues of secrecy in litigation.

2005 Annual Meeting Program

Secrecy in Litigation
January 8, 2005
1:30-3:15 p.m.

Public access is widely understood as a defining characteristic of the civil litigation system. Litigants, lawyer, and judges, however, often find that confidentiality lubricates discovery, facilitates settlement, and protects a variety of interests. Thus, public access to the litigation process has seen encroachments from several directions. Parties reach discovery confidentiality agreements, and courts grant umbrella protective orders. Settlements include confidentiality provisions. Court proceedings are closed and orders sealed in the name of national security, trade secrets, or other values. Trials, the most public moment in the litigation process, have become a rarity. Privacy is touted as an advantage of alternative dispute resolution mechanisms, and the rise of arbitration in particular has removed much dispute resolution from the public eye. In sum, public access to the litigation process has come to seem much less true in fact than in theory. In the past few years, secrecy in litigation has emerged as an important area of both policy-making and academic commentary, as legislators, judges, rulemakers, and scholars have explored the implications of secrecy and have adopted or proposed rules to curtail secrecy in settlement, discovery, and other aspects of the litigation process. This program will examine issues of secrecy in litigation, and the tension between the public and private dimensions of dispute resolution. The program will be moderated by Howard Erichson of Seton Hall, and participants include Chief Judge Joseph Anderson, District of South Carolina; Richard Marcus,

Hastings; Arthur Miller, Harvard (invited); R. Timothy Reagan, Federal Judicial Center, and Judith Resnik, Yale.

Race and Civil Procedure

Directly following the Secrecy in Litigation Program, at 3:30-5:15 p.m. on Jan. 8, is another program co-sponsored by the Civil Procedure Section entitled: "Race and Civil Procedure: Teaching and Scholarship." The program will analyze, among many other topics, class actions (a device used in cases like *Brown v. Bd. of Ed.* to end racial discrimination), juries and the inclusion of racial minorities on juries, and the treatment of noncitizens under the general diversity statute. Speakers will include Roy Brooks (San Diego), Wendy Brown (Washington & Lee), Richard Delgado (Pittsburgh), George Martinez (SMU, Judith Resnik (Yale), and Kevin Johnson (moderator) (UC Davis).

SECTION ANNOUNCEMENTS

Business Meeting. There will be a business meeting at the conclusion of the Section's annual meeting program on January 8 in San Francisco. The Executive Committee proposes to nominate the following for the 2005 Executive Committee:

Chair	Nancy Marder, Chicago-Kent
Chair-Elect	Margaret Woo, Northeastern
Past Chair	Howard Erichson, Seton Hall
Exec. Comm.	Vikram Amar, UC Hastings
Exec. Comm.	Steve Gensler, Oklahoma
Exec. Comm.	Cathy Struve, Pennsylvania

Special thanks are due Judith Resnik, who completes her executive committee service this year.

Mentoring Program. The Section welcomes all new members, especially those who are just starting in the teaching ranks. For all new civil procedure professors, the Section runs two helpful mentoring programs. First, the Section maintains a listserv, hosted by Bill Slomanson, that allows new faculty to ask questions of general interest about teaching, casebook materials, syllabi, exams, and scholarship. Please send an e-mail message to listproc@chicagokent.kentlaw.edu. Do not fill in the Subject line. In the Text area, type in: "SUBSCRIBE CIVPROMENTOR Firstname Lastname" [without quotation marks]. The CivPro Mentoring mentor listing website is at: http://home.att.net/~slomansonb/AALSCivPro.html.

Second, the Section has established a committee to read and comment on drafts of articles before their submission to law reviews. Please contact Ellen Sward (esward@ku.edu) or Jay Tidmarsh (tidmarsh.1@nd.edu) for more information.

SUPREME COURT DECISIONS

The Supreme Court in 2004 decided a number of cases that either fall squarely in the field of civil procedure, or at least affect civil proceduralists in a potentially significant way. In addition, the Court has on its current docket some disputes whose outcomes – likely to be resolved in the Spring – bear watching.

I. Subject-Matter Jurisdiction and Related Topics

In *Grupo Dataflux v. Atlas Global Group*, L.P., 124 S.Ct. 1920 (2004), the Court clarified the conditions under which a

post-filing change relating to one of the parties may cure a defect in diversity jurisdiction that existed when the complaint was filed. Atlas Global Group, L.P., a limited partnership organized under Texas law, filed suit in federal district court, alleging diversity jurisdiction under 28 U.S.C. § 1332, against Grupo Dataflux, a Mexican corporation. All plaintiff's claims sounded in state law; there is no allegation of any federal question raised by the complaint. At the time the action was filed, two of the limited partners of the plaintiff limited partnership were Mexican citizens (the other limited partners were citizens of Texas and Delaware.) Under *Carden v. Arkoma Associates*, 494 U.S. 185 (1990), a limited partnership is a citizen, for diversity purposes under section 1332, of each state or foreign country of which any of its partners is a citizen. Thus, because both plaintiff and defendant were Mexican citizens at the time of filing, the requisite diversity for federal jurisdiction was lacking.

No party raised the problem, however, until after pre-trial motions, discovery, and a jury trial had been concluded – almost three years later. Following a verdict for the plaintiff, defendant filed a motion to dismiss for lack of subject-matter jurisdiction based on the lack of diversity at the time the complaint was filed. The district judge granted the motion, even though by the time the case was tried the two Mexican partners who were part of the limited partnership had left the partnership, such that the plaintiff partnership was not a Mexican citizen at the outset of trial. The Court of Appeals for the Fifth Circuit reversed. The Fifth Circuit acknowledged the general rule that for subject-matter diversity purposes, the citizenship of the parties is to be determined by the facts in existence at the time of filing. But the Fifth Circuit thought that under the reasoning of *Caterpillar Inc. v. Lewis*, 519 U.S. 61 (1996), an exception should be carved out for situations where, even though an action is filed (or removed) at a time when constitutional or statutory jurisdictional requirements are not met, neither the parties nor the judge have raised the error until after a jury verdict has been rendered or a dispositive ruling has been made by the court, and the jurisdictional defect has been cured prior to the jury verdict or dispositive ruling. Under these circumstances, the Fifth Circuit concluded, quoting *Caterpillar*, "considerations of finality, efficiency, and economy become overwhelming."

The Supreme Court reversed 5-4. Writing for the majority, Justice Scalia characterized the rule that the "jurisdiction of the [c]ourt depends upon the state of things at the time the action was brought" as "quite literally" horn-book law "taught to first-year law students in any basic course on federal civil procedure." That rule is to be applied, despite its substantial costs, because creation of numerous exceptions of "indeterminate scope" would be difficult to manage in practice: "[C]onstant litigation in response to [the inevitable] change [that takes place after filing] would be wasteful. . . .[T]he policy goal of minimizing litigation over jurisdiction is thwarted whenever a new exception to the time-of-filing rule is announced, arousing hope of further new exceptions in the future. . . . Uncertainty regarding the question of jurisdiction is particularly undesirable, and collateral litigation on the point particularly wasteful. The stability of our time-tested rule weighs heavily against the approval of any new deviation."

Probably the most plausible argument against the majority (and one relied upon by

Justice Ginsburg's dissent) was that *Caterpillar* – a case in which the Supreme Court preserved the result of a trial, even though complete diversity was lacking at the time the lawsuit was removed, because such diversity was present by the time the case was tried – had already embraced an exception to the time-of-filing rule based on common sense efficiency and economy concerns. The majority in *Grupo Dataflux* rejected the analogy to *Caterpillar*, holding that *Caterpillar* "broke no new ground," but rather "involved an unremarkable application of [an] established exception" to the time-of-filing rule, namely, for situations in which parties whose presence had destroyed diversity were later dismissed from the litigation. Here, by contrast, there was no change of party, but rather only a change in the *condition* of a party. In other words, the limited partnership's citizenship had changed post filing, but the limited partnership was, and remained, the sole plaintiff in the case throughout.

The majority may be correct that *Caterpillar* technically involved a change in the party lineup, whereas *Grupo Dataflux* involved a change in the citizenship of one of the parties (inasmuch as we define a limited partnership as a single party even though we determine its citizenship by reference to the citizenship of all of its partners). What is far less clear is why this should matter, unless one thinks *Caterpillar* and its predecessors were wrongly decided or one embraces (for other reasons) the majority's instinct to limit any existing exceptions to the time-of-filing rule as narrowly as is humanly possible.

Another case that touched on subject-matter-jurisdiction doctrine is *Kontrick v. Ryan*, 124 S.Ct. 906 (2004), involving Federal Bankruptcy Rules 4004 and 9006(b)(3). Although the Court apparently believes that these rules, which limit the scope of a bankruptcy court's power, are "not properly labeled 'jurisdictional' in the sense of describing a court's subject-matter jurisdiction," the petitioner in *Kontrick* argued that "the Rules have the same import as provisions governing subject-matter jurisdiction." In the course of discussing this contention, the Court observed, among other things, that although a litigant may generally raise a court's lack of subject-matter jurisdiction for the first time at any stage in a civil action, including the highest appellate instance, "even subject-matter jurisdiction . . . may not be attacked collaterally." The question of whether and when collateral attack is available to challenge subject-matter jurisdiction is one whose nuances many Civil Procedure casebooks and treatises characterize as somewhat unresolved. As support for its offhand, broadly-worded and footnoted observation, the *Kontrick* Court cited *Des Moines Nav. & R. Co. v. Iowa Homestead Co.*, 123 U.S. 552 (1887). Two points might be made about the Court's reference to *Iowa Homestead Co*. First, that case involved a collateral attack for lack of diversity in the first action; query whether the same principles apply identically when the first action is challenged for lack of a federal question. Second, the merits of plaintiff's causes of action had been litigated in the first action in *Iowa Homestead Co*.; the defendant there had not suffered a default judgment. It is certainly not clear, then, that the statement in *Kontrick* should be read to apply in default judgment situations. Indeed, after its citation to *Iowa Homestead Co*., the *Kontrick* Court also cited § 12 of the Restatement (Second) of Judgments

(1982), which indicates that a judgment in a "contested action" ought not be susceptible to collateral attack for lack of subject-matter jurisdiction save unusual circumstances.

Scarborough v. Principi, 124 S.Ct. 1856 (2004) also contained a short discussion of the nature of subject matter jurisdiction. In *Scarborough*, the Court addressed the 30-day deadline for attorney fee applications under the Equal Access to Justice Act (EAJA), 28 U.S.C. §2412(d)(1)(B). This section gives a "prevailing party" in an action against the United States 30 days to file an application for fees, which may be awarded absent a showing by the government that its position in the underlying litigation "was substantially justified." 28 U.S.C. §2412(d)(1)(A). Section 2412(d)(1)(B) explicitly directs the person seeking fees to include within the application, among other things, a showing of prevailing party status, an itemized breakdown of the attorney time actually spent and the fees sought, and an allegation that the position of the United States was not substantially justified.

Randall Scarborough prevailed in his action against the Department of Veterans Affairs (Department) for disability benefits. His lawyer filed a timely application for fees under EAJA but failed, initially, to include in that application an allegation that the government's position in the underlying litigation was not substantially justified. The Department moved to dismiss the fee request on account of this omission, which prompted Scarborough's attorney to immediately file an amended fee application containing the required allegation. But by the time the amended application was made, the 30-day filing period had already expired, a fact that led the United States Court of Appeals for Veterans Claims to grant the government's motion to dismiss. The Court of Appeals for the Federal Circuit affirmed. After the case bounced back and forth between the Federal Circuit and the Supreme Court (to enable the Federal Circuit to consider the effect of recently-decided Supreme Court cases), the Federal Circuit stuck by its guns, and (re)affirmed the dismissal of the fee application.

By a 7-2 vote, the Supreme Court reversed. The Court held that a timely application under §2412 may be amended after the 30-day period has run to cure an initial failure to allege that the government's position was not substantially justified. The Court began by rejecting the idea that the time bar erected by §2412(d)(1)(B) concerns the federal court's "subject matter jurisdiction": "The question before us. . . . concerns a mode of relief (costs including legal fees) ancillary to the judgment of a court that has plenary jurisdiction of the underlying action against the government." The Court reiterated an earlier admonition that "[c]lassifying time prescriptions, even rigid ones, under the heading 'subject matter jurisdiction' can be confounding. Clarity would be facilitated if courts and litigants used the label 'jurisdictional' not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority."

Having rejected the idea that the 30-day time limit is "jurisdictional," the Court explained why the purposes behind EAJA justified allowing Mr. Scarborough to amend to cure the defect. In particular, the requirement that an applicant allege a lack of a substantially justified position was not intended to demand that the applicant *prove* anything at all. The requirement to allege is designed simply to make the applicant think

twice before filing, to ensure that the applicant believes there is a basis on which to seek the fees. The allegation, even when made in a properly completed application, does not put the government on notice of anything the government did not already know – namely, that it will have to establish that its position was substantially justified in order to avoid fees.

For these reasons, very little would be gained by denying the applicant the opportunity to amend under these circumstances. Instead, said the majority, the relation-back regime, which has origins that pre-date 1938 but which is now codified in Federal Rule of Civil Procedure 15(c), provides the appropriate analytic framework. The relation-back doctrine had been recently invoked by the Court in two earlier cases in which the Justices allowed a party to cure an earlier defective filing: in *Becker v. Montgomery*, 532 U.S. 757 (2001), the defect was a failure to sign, as required under Federal Rule of Civil Procedure 11, a notice of appeal; and in *Edelman v. Lynchburg College*, 535 U.S. 106 (2002), the defect was the failure to provide a required verification in a Title VII discrimination charge filed with the EEOC. Those cases, the *Scarborough* Court thought, informed the application of Rule 15(c) to this case.

Justice Thomas, joined by Justice Scalia, dissented, arguing that because EAJA is a waiver of the sovereign immunity the United States would otherwise enjoy, it must be construed narrowly. Because there is no express allowance for the relation back device in EAJA, they would have held the conditions under which the government has waived its immunity have not been met, and that therefore sovereign immunity remains a bar to Mr. Scarborough's fee application.

In *Frew v. Hawkins*, 124 S.Ct. 899 (2004), the Court examined the intersection of the subject-matter jurisdiction limitations imposed on federal courts by the Eleventh Amendment and the federal power to issue and enforce consent decreed. *Frew* involved a class action lawsuit brought under *Ex Parte Young* in federal district court in Texas against the Texas Health and Human Services Commissioner, among others, for allegedly failing to comply with requirements under the Federal Medicaid program. States that voluntarily opt to participate in (and receive monies under) Medicaid are required by federal law to provide certain benefits and programs to children.

Because neither side was sure it would win if the case went to trial, and for other pragmatic reasons as well, the parties agreed to settle the litigation and enter into a consent decree, a "lengthy document [which] orders the state defendants to implement many highly detailed and specific procedures." When plaintiffs claimed that the State failed to do what the consent decree required, and went back to the district court to enforce the decree, the State invoked the Eleventh Amendment and its sovereign immunity from suit. The district court disagreed, but the Fifth Circuit Court of Appeals ruled in the State's favor, holding that unless the requirements in the consent decree are themselves requirements imposed directly by the Medicare laws, a state is free to disregard the terms of the decree because of its Eleventh Amendment immunity.

The Supreme Court, unanimously and unsurprisingly, held the State to its bargain. Putting aside whether, by agreeing to the terms of the settlement that were embodied

in the consent decree, the state officials effectively waived any Eleventh Amendment immunity the State enjoyed, the federal courts have a strong interest in enforcing decrees that they have entered. And this federal interest in decree enforcement exists whether the consent decree entitled the plaintiffs to obtain more in the way of relief than they might have obtained had they won at trial and gotten a judge-imposed remedy after establishing liability. The Court in *Frew* did note that to the extent that subsequent substantive interpretations of the Medicare law make clear that the Texas defendants are being required to do much more under the decree than federal statutes actually require, the remedy for the defendants is not to disregard the decree, but rather to seek modification of the decree under Federal Rule of Civil Procedure 60(b).

II. Unusual Discovery Disputes

A few other significant cases this year concerned discovery, albeit in somewhat exotic contexts. *Intel Corp. v. Advanced Micro Devices, Inc.*, 124 S.Ct. 2466 (2004) involved 28 U.S.C. § 1782(a), which is the "product of congressional efforts, over the span of nearly 150 years, to provide federal-court assistance in [the] gathering of evidence for use in foreign tribunals." Adopted in 1964, the current version of section 1782(a) provides that a federal district court "may order" a person "resid[ing]" or "found" in the district to produce documents or provide testimony "for use in a proceeding in a foreign or international tribunal. . . upon application of any interested person."

The Intel controversy arose after Advanced Micro Devices (AMD), one of Intel's worldwide competitors in the microprocessing market, filed a complaint with the Directorate-General for Competition of the European Commission. "The Commission exercises responsibility over the wide range of subject areas covered by the European Union treaty; those areas include the treaty provisions [and regulations] governing competition." In its complaint, AMD alleged that Intel had abused its dominant position through a variety of anti-competitive devices. After filing, AMD urged the Directorate-General for Competition to attempt to obtain documents Intel had produced in a private antitrust lawsuit that had been brought against it in federal district court in Alabama. When the Directorate-General did not actively seek the documents from the U.S. courts, AMD made a petition under §1782(a) to the Northern District of California, where both AMD and Intel are headquartered, for an order forcing Intel to produce the same documents on file in the Alabama federal court.

The district court turned down the request, and the Ninth Circuit reversed and remanded. Largely because of a split of authority in the lower courts on the question whether 1782(a) permits discovery of documents that would not have been discoverable had they been located within the foreign jurisdiction (in this case, the European Union), the Supreme Court granted cert., and it affirmed.

In giving meaning to §1782(a), the Court made a number of potentially significant holdings: (1) A person need not hold formal "party" or "litigant" status in a foreign proceeding to be an "interested person" who is entitled to seek assistance under §1782(a). AMD qualifies under the statute; (2) the Commission is, for purposes of 1782(a), a "tribunal" when it acts as a first-instance decisionmaker, even though another, more

formally judicial, tribunal, may review the Commission's disposition of the complaint; (3) the "proceeding" for which a person wants discovery under §1782(a) need not be "pending" or "imminent," but rather must only be "in reasonable contemplation."; (4) there is no requirement under 1782(a) that the sought-after evidence would have to be discoverable had it been located in the foreign jurisdiction; (5) there is similarly no requirement in 1782(a) that the information sought be discoverable in an analogous action filed in the United States. For these reasons, the Court held that the district court in California had the power to grant AMD's request. Whether there were sound reasons – relating to the potential need for informational secrecy, among other things – to decline or limit the scope of the request were issues left to the district court on remand.

A final case to discuss, and one as well that technically involves discovery, is *Cheney v. U.S. District Court for the District of Columbia*, 124 S.Ct. 2576 (2004). The *Cheney* litigation began when various public interest groups sued Vice-President Richard Cheney and the National Energy Policy Development Group (NEPDG) that President Bush directed him to head. The plaintiffs, relying on the Federal Advisory Committee Act (FACA), sought to obtain records of the group's meetings. After reviewing defendants' arguments that the FACA did not and could not constitutionally apply, the federal district court allowed the plaintiffs to conduct some preliminary discovery. The Court of Appeals for the DC Circuit affirmed, and the Supreme Court, upon hearing the case, remanded and directed the lower courts to be more open and attentive to the arguments that Vice-President Cheney was making about the need for secrecy.

En route to its remand, the Court observed, among other things, that discovery in a civil case must give way to Executive privilege concerns much more so than in a criminal case, where the need for "every man's" evidence is overriding. Moreover, because criminal cases are controlled by prosecutors who – unlike private plaintiffs – are subject to various constraints, courts need to police discovery in criminal cases much less: "The observation in [the famous] *Nixon* [tapes case] that production of confidential information would not disrupt the functioning of the executive Branch cannot be applied in a mechanistic fashion to civil litigation. In the criminal justice system, there are various constraints, albeit imperfect, to filter out insubstantial legal claims. The decision to prosecute a criminal case, for example, is made by a publicly accountable prosecutor subject to budgetary considerations. . . .In contrast, there are no analogous checks in the civil discovery process here. Although under Federal Rule of Civil Procedure 11, sanctions are available, and private attorneys owe an obligation of candor to the judicial tribunal, those safeguards have proved insufficient to discourage filing of meritless claims against the executive Branch. In view of the visibility of the Offices of the President and the Vice-President and the effect of their actions on countless people, they are easily identifiable target[s] for suits for civil damages."

This language from the *Cheney* decision seems quite different from the tenor of *Clinton v. Jones*, 520 U.S. 681 (1997), where the Court effectively said that district court judges could easily manage the discovery process even where the defendant is the President. (It is also in some tension

with *Morrison v. Olson*, 487 U.S. 654 (1988), where the Court upheld broad prosecutorial powers wielded by an office that is not "publicly accountable" or "subject to budgetary considerations.")

Finally, the *Cheney* dispute spawned an interesting discussion by Justice Scalia concerning the appropriate bases on which Justices should recuse themselves under 28 U.S.C. §455(a). Justice Scalia's discussion can be found in an in-chambers opinion reported at 124 S.Ct. 1391 (2004).

III. Pending Cases

Among the disputes on which the Court has granted certiorari this Term are two cases in which the Court will finally (one hopes) resolve the intersection of supplemental jurisdiction under 28 U.S.C. §1367 and the rule that each plaintiff in a diversity case (even a diversity class action) independently satisfy the amount-in-controversy threshold. The textual quirks in §1367 have led many Courts of Appeals to conclude that 1367 effectively overrules *Zahn v. Int'l Paper Co.*, 414 U.S. 291 (1973) (involving diversity-based class actions), and/or *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (209) (involving multiple plaintiffs joined together under Rule 20). The Supreme Court granted cert. a few years ago to resolve these kinds of issues in *Free v. Abbott Labs, Inc.*, 529 U.S. 333 (2000), but ultimately split 4-4 and affirmed without opinion in that case. This Term's cases are: *Exxon Corp. v. Allapattah Services, Inc.*, No. 4-70 (coming from the Eleventh Circuit and raising the question in the Rule 23 class action setting) and *Ortega v. Star-Kist Foods, Inc.*, No. 4-79 (coming from the First Circuit and raising the question in the multiple-plaintiff under Rule 20 setting.) The two cases have been consolidated, and allotted 90 minutes total for argument. No argument date has yet been set.

STATUTORY DEVELOPMENTS

Jim Pfander

Class Action Reform

Probably the biggest legislative event of the year for those interested in procedure and jurisdiction was the failure of the Senate to adopt class action reform. The best chance came on October 22, 2003, when the Senate failed by a single vote (59-39) to reach cloture on the Class Action Fairness legislation, S. 274. As most members of the Section know, the Class Action Fairness bill would have shifted many consumer (and other) class actions over issues of state law into federal court on the basis of minimal diversity. It would have done so both by adopting a more liberal rule for the aggregation of damages to reach the amount in controversy threshold, and by considering the citizenship of members of the plaintiff class as well as defendants in determining the existence of diversity for purposes of federal jurisdiction. Carefully tailored removal provisions would have prevented lawyers for the plaintiffs from keeping the cases in state court, setting aside the in-state defendant removal bar in 28 U.S.C. § 1441(b). Although some exceptions would have preserved state court control over class actions of modest size, virtually all significant multi-state class actions would have flowed into federal court under the terms of the statute. (The House of Representatives had already passed similar legislation and President Bush was on record as willing to sign).

When the new session began in January 2004, sponsors reintroduced Class Action

Fairness legislation in the Senate as S. 2062. But despite bipartisan support, the Senate leadership was unable to bring the bill to the floor for a vote. The Chamber of Commerce blamed Tom Daschle (D-S.D.) for the collapse of the bill, and targeted him for defeat in November 2004.

Multi-District Litigation Fix

Since the adoption of the Multiparty, Multiforum Trial Jurisdiction Act of 2002, codified in 28 U.S.C. §§ 1369, 1391, 1441(e), 1697, and 1785, a number of observers have noticed obvious glitches in the drafting of the legislation. The legislation appeared to have contemplated the inclusion of a provision that would have authorized a district court in a multiparty case within the terms of the statute to retain the consolidated cases for trial on issues of liability and punitive damages. Unfortunately, Congress left section 1407(j) out of the 2002 Act, among other things.

On March 24, 2004, the House adopted legislation to fix this problem. H.R. 1768, the Multidistrict Litigation Restoration Action of 2004, would have supplied the missing section 1407(j). The legislation also would have included a provision allowing a district court in an MDL proceeding to transfer a case to itself for trial (thus supplying the legislative authority identified as missing in *Lexecon, Inc. v. Milberg Weiss*, 523 U.S. 26 (1998). No similar legislation emerged from the Senate.

DNA and Innocence Protection Legislation

In a surprising show of bipartisan and bicameral spirit, Congress adopted and the President signed into law H.R. 5107, DNA testing legislation that was years in the making. The bill includes provisions to encourage DNA testing, for the purposes both of improving law enforcement and of securing DNA testing in support of claims of wrongful conviction. Among the statute's most interesting provisions, from a jurisdictional perspective, are those that enable federal prisoners to challenge their conviction or sentence by making an application for a test of potentially exculpatory DNA evidence.

The provisions operate on two tracks. First, the legislation adds a new section 3600 to title 18 U.S.C. that specifies the manner in which federal prisoners may challenge their conviction or sentence. The legislation hedges the right to request DNA testing in a variety of ways, but importantly permits testing to challenge both the federal crime itself and any state convictions on which the sentencing authority relied in imposing the sentence. The legislation also creates a new remedy for cases in which DNA testing exculpates the prisoner; it also expressly declares that the new remedy is not subject to various rules (such as the successive petition rule) that apply to federal habeas petitions under section 2255.

For state prisoners, the new legislation does not expressly change the rules for post-conviction DNA testing. But it does offer conditional grants to encourage states to provide DNA testing and exoneration procedures comparable to those made applicable to federal prisoners. Additional grants seek to encourage states to improve the quality of representation for defendants who face the death penalty. Senators Orrin Hatch (R-Utah) and Patrick Leahy (D-Vt) hailed the legislation as among the most significant accomplishments of the 108th Congress.

DEVELOPMENTS IN THE FEDERAL RULES OF CIVIL PROCEDURE

I. Amendments that took effect on 12/01/03

In March of 2003, the Supreme Court submitted to Congress proposed changes to Rules 23, 51 and 53, along with more technical amendments to Rules 54 and 71A, and to Forms 19, 31 and 32. Because the 108th Congress took no action to block them, these changes all went into effect on December 1, 2003. As Steve Gensler wrote in this Newsletter last year, the changes to Rule 23 (concerning class actions) deal with certification and notice (governed by Rule 23(c)) and settlement of class actions (governed by Rule 23(e)). The new Rule 23 added a section (g) to regulate appointment of class counsel, and a section (h) which relates to attorneys fees. As Steve explained, " the amendments leave intact the existing criteria for class certification and [were] not intended to alter the existing balance between classes and class adversaries. Rather, their stated purpose is to improve administration" of the class device.

The changes to Rule 51 make clear now that district judges have power to require parties to submit proposed jury instructions before trial, although it leaves intact the power of parties to submit proposed instructions after the close of evidence with respect to issues that could not have been reasonably anticipated pre-trial. Judges retain the power to permit parties to submit untimely instructions at any time when justified. The amendments also do not disturb the requirement that a party, in order to preserve an issue for appeal, must do more than simply unsuccessfully propose an instruction, but must instead object to the instruction the court intends to give, unless a judge denies a requested instruction and makes a definitive ruling on the request on the record.

Rule 53 underwent the most significant changes. The new provisions dealing with masters make clear that special masters may have a role in pre-trial and post-trial proceedings, not just with respect to trials themselves. The committee notes emphasize, though, that masters should be used only in exceptional cases, and only when magistrates could not perform the functions for which masters are considered. The amended Rule also lays out a more detailed process for picking masters, including a chance for the parties to be notified and heard before a master is appointed. Whenever a judge does appoint a master, the master's authority, duties, and limits on that authority and duties, should be spelled out, including limitations on ex parte communications, the kind of record to be compiled, the master's compensation, and the standard of review to be used in assessing the master's findings.

II. New Rules Pending Before the Supreme Court

The Judicial Conference met on September 21, 2004, and approved the recommendations of the Committee on Rules of Practice and Procedure and approved proposed amendments to Federal Rules of Civil Procedure 6, 27 and 45, and Supplemental Rules B and C.

Proposed Civil Rule 6(e) clarifies the method for counting the additional three days a person has to respond to a pleading if service is by mail or by one of the methods provided for in Rule 5(b)(2)(C) or (D). The amendment clarifies that the three days are

added after the prescribed period ends. Amended Rule 27(a)(2) would fix an outdated cross-reference to Rule 4(d), and proposed Rule 45 would notify a witness of the manner for recording the deposition. Proposed supplemental Rules B of the Supplemental Rules for Certain Admiralty and Maritime Claims fixes the time for determining whether a defendant is "found" in the district when the complaint is filed, and allows for attachment in an in personam action. Proposed Supplemental Rule C accomplishes technical amendments.

The proposed amendments will be transmitted to the Supreme Court with a recommendation that they be approved.

III. Proposed Rules Submitted for Public Comment

In August 2004, Civil Rules 16, 26, 33, 34, 37, 45, 50, Supplemental Rules A, C, and E, a new Supplemental Rule G, and Form 35 were published. Rules 16, 26, 33, 34, 37, and 45 deal with the discovery of electronically stored information. New Rule G is a Supplemental Rule for Certain Admiralty and Maritime Claims (civil forfeiture). Supplemental Rules A, C, and E, and Civil Rule 26(a)(1)(E)(ii) are conforming amendments, and Civil Rule 50(b) deals with renewing a motion for judgment as a matter of law after trial. The public comment period for the proposed amendments and form will end in February 2005.

The most complicated and important of these proposed rules concern electronic discovery. These proposals are described and analyzed, in a short essay that follows this summary, by Richard Marcus, special Reporter to the Advisory Committee. As Rick points out, the Committee is meeting in San Francisco a few days after the AALS Conference, which may be of interest to those who can extend their West Coast stay.

At its October 28-29, 2004, meeting, the Advisory Committee on Civil Rules approved for publication—on an expedited basis—a proposed amendment to Civil Rule 5(e) authorizing mandatory electronic filing. The proposed changes—suggested by the Judicial Conference Committee on Court Administration and Case Management—authorize courts to promulgate local rules that would require documents be filed electronically. In November 2004, the Standing Committee on Rules of Practice and Procedure approved the recommendations of the advisory committees and authorized publishing the proposed amendments for comment on an expedited schedule.

All comments on the proposals published in August and in November are due by February 15, 2005.

IV. Restyling Project

The Restyling project seems to be moving forward; the Committee on Rules of Practice and Procedure has approved for publication and comment styled Rules 1-63 -- having approved 1-15, 16-37 and 45, and then 38-63 except 45, at different times -- although none of the restyled rules have yet been opened up for public comment. The Advisory Committee has approved and recommended for publication Rules 64-86; this recommendation is pending before the Standing committee and may be resolved at the January 2005 meeting. Once Rules 64-86 are approved by the Standing Committee for publication, the entire set will be published, presumably as early as February 2005, with a comment time-frame that could be as long as one year.

PROPOSED RULES RELATING TO E-DISCOVERY

Richard Marcus
(Special Reporter to the Advisory Committee)
(A version of this essay first appeared in the Daily Journal on 11/15/04).

In recent years, the hottest topic for litigators has been discovery of electronically stored information -- E-discovery. Over the last three years, there have been two or three CLE programs every week addressing E-discovery. After several years of discussion, formal amendments to the Federal Rules of Civil Procedure have been proposed to address E-Discovery. The public comment period runs through February 15, 2005, and there is a hearing on the proposed amendments in San Francisco on January 12, 2005. Interested attorneys should review the proposed amendments and consider offering their views during this public comment period. It is not clear whether any of these proposed amendments will ultimately be adopted.

A decade ago, E-discovery was not a concern, but the huge increase in e-mail traffic has changed all that. Just consider how often you have read of e-mail as crucial evidence in high-profile cases. E-mail evidence was central to the convictions of Arthur Andersen and Frank Quattrone. Attorney General Eliot Spitzer of New York has followed the "e-mail trail" in search of wrongdoing in a variety of financial institutions. So interest in access to e-mail is not going to disappear.

Besides e-mail, there is a lot more electronically stored information that will be sought through discovery. It is estimated that more than 90% of business documents are created electronically and never printed out. An ABA Journal article last year said that "[s]ome major cases now involve one terabyte of information, which, if printed to paper, would fill the Sears Tower four times." E-discovery vendors trumpet the differences that result for discovery practice. Consider the following recent assertions in newspaper articles: "The document production of 2003 bears little resemblance to that of the 1980s and 1990s;" "Technology has changed forever the way lawyers produce their clients' documents;" "Within three years, I'm sure almost all evidence collected in discovery will be electronic-based."

Quantity is not the only distinctive feature of E-discovery. Another is format. With hard copies, there is little question about what format should be used for production. But some electronically stored information, like databases, may have no real analogy in the hard copy world because it only produces information in usable form if queried. Beyond that, there are questions about whether information should be produced in "native format," including "embedded data" and "metadata," or can properly be produced instead in TIFF or PDF form, or in paper. If some of those terms don't mean anything to you, you should probably bone up on computer terminology because they describe things central to E-discovery.

Backup tapes can provide even more vexing problems in many cases. Almost all organizations create backup tapes for disaster-recovery purposes. But finding information on them is very difficult and costly. Similar difficulties can arise regarding "deleted" items that remain on a computer's hard drive. When should the effort be made to find these pieces of

potential evidence?

Lawyers began calling these problems to the attention of the Advisory Committee on Civil Rules (the people who recommend amendments to the Federal Rules of Civil Procedure) in the late 1990s, but the question what rule changes would be helpful was unclear. As a result, the Advisory Committee proposed no rule changes until June, 2004, when a set of possible amendments was approved for publication and public comment. The proposals fall into several categories:

Planning for E-discovery: Rule 26(f), which already directs the parties to work out a discovery plan before they start formal discovery, would be amended to require discussion of E-discovery, and particularly the form of production, if this type of discovery is contemplated in the action. In addition, other amendments to Rule 26(f) would require discussion of preservation of discoverable materials and the possibility of agreements to reduce the risk of privilege waiver.

Rule 34 requests: Rule 34 would be amended to distinguish between "documents" and "electronically stored information," perhaps meaning that the requesting party must specify whether only one or both is requested. In addition, the amended rule would permit the requesting party to specify the form of production for electronically stored information. If that specification is not included in the request, the responding party may either produce in a form in which the information is maintained, or in a form that is electronically searchable.

Inaccessible information: As noted above, backup tapes and "deleted" items can be accessed, but often only at great cost. This concern prompted a proposal to amend Rule 26(b)(2) to relieve the responding party of the need to provide discovery regarding electronically stored information that is not "reasonably accessible." On motion to compel, the responding party must show that the information is not reasonably accessible, and if it does so the court may nonetheless order discovery for good cause. At the same time, it may specify terms and conditions for production, which could include some provision for cost bearing by the party seeking discovery.

Privilege protection: For years there has been concern about the high cost of privilege review. Electronically stored information can present particularly difficult problems for that review. As noted above, privilege protection is one of the topics to be added to the Rule 26(f) conference. Beyond that, there is a proposal to amend Rule 26(b)(5) to create a procedure for a party that produces privileged information without intending to waive the privilege to demand return, sequestration, or destruction of the information pending a court ruling on whether a waiver has occurred. This provision would apply to hard copy discovery as well as to E-discovery.

Spoliation sanctions: Spoliation issues often present distinctive challenges for E-discovery because computer systems automatically alter or delete information. Simply turning on a computer can have that effect. But ceasing all computer operations would cripple most litigants. Moreover, the ordinary practice of recycling backup tapes means that older ones are no longer available should discovery of their contents be warranted. A new Rule 37(f) would address these concerns by creating a safe harbor that precluding sanctions under the Federal Rules for loss of information due to the "routine operation of a party's electronic information system" under some

circumstances. One formulation would require that the party implement a "litigation hold," and an alternative formulation would provide protection unless the party intentionally or recklessly failed to preserve the information.

The amendments package includes a number of other minor provisions. The entire package can be found at www.uscourts.gov/rules. Altogether, the proposed changes are meant to provide a comprehensive rule-based approach to E-discovery in the federal courts. But the question whether rule changes are needed -- and which ones should be made -- remains open. For that reason, it is important that lawyers with thoughts about these proposals communicate their reactions during the public comment period. One way to do that is (appropriately) by e-mail to www.uscourts.gov/rules. Another is to send written comments by mail before Feb. 15, 2005, to:

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Federal Judiciary Building
Washington, DC 20544

In addition, the Advisory Committee will hold one of its three hearings (the others are in Dallas and Washington D.C.) in San Francisco on January 12, 2005. Anyone who wishes to testify should contact Mr. McCabe at least 30 days before Jan. 12.

If the proposed amendments are ultimately adopted, they could go into effect on Dec. 1, 2006. Meanwhile, at least four district courts have adopted local rules that regulate E-discovery. Others may follow, perhaps patterning their local rules on the published proposals for the national rules.

ABA'S AMERICAN JURY PROJECT

Nancy Marder

In September 2004, the American Bar Association's (ABA) American Jury Project released a draft of its Standards Relating to Jury Trials. ABA President Robert J. Grey, Jr. has identified jury reform as one of the major initiatives of the ABA this year. A draft of the Standards can be found online at www.abanet.org/juryprojectstandards. The project invited public comments of the Standards up until October 18, 2004, and expects to present its recommendations to the ABA House of Delegates for consideration in February 2005 at the ABA's mid-year meeting.

Among the Standards' more innovative proposals are: providing jurors with preliminary instructions in addition to the instructions that are typically given at the close of the trial (Standard 6); allowing jurors to submit written questions to the judge who would then meet with the lawyers to decide whether the questions should be asked of the witnesses (Standard 13); having the judge meet with the jury should the jury reach an impasse to see if the judge or counsel can assist the jury in overcoming its impasse (Standard 15); and having the court instruct jurors after they have reached a verdict that they are free to discuss or refuse to discuss the case with counsel or members of the press (Standard 18). Although these practices would be new to many courts, they have been adopted by some courts, such as those in Arizona, where they have worked

well.

Some proposals, like encouraging 12-person juries whenever possible, including in civil cases (Standard 3), or encouraging unanimous verdicts even in civil cases (Standard 4), mark a return to past practices that have been abandoned in some courts in recent years in the interests of efficiency.

Other proposals are standard practice in some courts, but not yet in all courts. For example, many, but not all, courts allow jurors to take notes during the trial and to refer to them during the deliberations (Standard 13) and provide each juror with a written copy of the instructions that the juror can read while the judge is instructing the jury and consult during deliberations (Standard 14). The idea behind these and the other proposals is that they have worked well in the courts that have adopted them and should now be adopted by all courts.

BOOKS OF INTEREST

Margaret Y.K. Woo

It is difficult to compile a list of books that will meet the interest of every reader. I have attempted to put together a list with titles that vary from technical procedure to broader considerations of the role of the court as an institution, the practice of law as legal culture, and comparative and international issues relating to procedure. I hope you will find a few items below to be of interest.

For teachers of civil procedure, two books published this year are worth noting -- Kevin M. Clermont ed., **Civil Procedure Stories**, (Foundation Press, 2004) and **Processes of the Law: Understanding Courts and Their Alternatives**, by Judith Resnik (Foundation Press, 2004). **Civil Procedure Stories** is a compilation of the "story" behind major civil procedure cases from *Hickman* to *Erie*. Each chapter focuses on one landmark civil procedure case and can be assigned as self-standing reading to supplement any civil procedure class. Presenting social and legal background to significant procedure cases, these chapters cut through the technical morass and give greater clarity to the values behind procedure.

Processes of the Law: Understanding Courts and their Alternatives, meanwhile, is a succinct synopsis of the current options for processes – be they adjudicatory, alternative dispute resolution (ADR) or dispute resolution (DR), small and large scale proceedings, or "civil criminal and administrative." Consistent with Professor Resnik's argument, this book suggests that American civil litigation must be understand not simply as traditional adversary combat, but rather as a variety of processes. It is a useful guide to the current landscape of American litigation as well as the debate concerning these available processes.

Other books of interest published in 2004 include two books presenting fresh perspectives on the Supreme Court. Christopher Wolfe, **That Eminent Tribunal: Judicial Supremacy and the Constitution** (Princeton University Press, 2004), and Thomas Moylan Keck, **The Most Activist Supreme Court in History: The Road to Modern Judicial Conservatism** (University of Chicago Press, 2004).

That Eminent Tribunal brings together a distinguished group of legal scholars and political scientists who argue that the Court's power has exceeded its appropriate bounds,

and that sound republican principles require greater limits on that power. Lamenting the judicial activism of federal courts over the past half-century, these essays contend that the principles of republicanism and the contemporary form of judicial review exercised by the Supreme Court are fundamentally incompatible. Whether or not one agrees with the conclusions, the book is an interesting addition to the debate about the appropriate role of courts in a democracy.

On a similar note but a different trajectory, **The Most Activist Supreme Court in History** traces the legal and political forces from 1937 to present that have shaped the modern Supreme Court. Keck argues that modern conservatism has produced a court that exercises its own power quite actively, on behalf of both liberal and conservative ends. Justices of the Rehnquist Court have stepped in to settle divisive political conflicts over abortion, affirmative action, gay rights, presidential elections, and much more. Keck focuses in particular on the role of Justices O'Connor and Kennedy, whose deciding votes have shaped this uncharacteristically activist Court.

For those interested in comparative and international procedure, Sofie Geeroms, **Foreign Law in Civil Litigation** (Oxford University Press, 2004) and Tim Koopman's **Courts and Political Institutions: A Comparative View** (Cambridge University Press 2003) offer new comparative analyses. **Foreign Law in Civil Litigation** is an informative volume on how foreign law should be pleaded and dealt with in the litigation process of another country. The book compares how these issues are handled in different national systems, with particular focus upon civil litigation rules in the US, UK, France, Germany, the Netherlands, and Belgium. Perhaps unsurprisingly, the way foreign law is procedurally treated in court is a window to the degree of tolerance of a legal system towards foreign ideas.

Koopman's **Courts and Political Institutions**, meanwhile, is the latest work seeking to examine the legal relations between political institutions and courts. The book compares the four constitutional systems – the U.S., France, Germany, and Holland, as well as the European courts. Topics range from an analysis of the sovereignty of parliament, judicial review of legislation, growth of judicial power, limits of judicial review, legality of administrative action, to courts and individual rights.

In the area of social history, there were two books on Brown v. Board of Education published to timely commemorate the 50th anniversary of this historic case – Derrick Bell, **Silent Covenants: Brown v. Board of Education and the Unfulfilled Hopes for Racial Reform** (Oxford University Press, 2004) and Charles Ogletree, **All Deliberate Speed: Reflections on the First Half Century of Broad v. Board of Education**, (W.W.Norton & Co., 2004). Both books assess the role of court-imposed remedies, and also the important question of the future of racial equality in American schools. Additionally, in the area of legal culture, Thane Rosenbaum, **The Myth of Moral Justice: Why Our Legal System Fails to Do What's Right** (HarperCollins Publishers, 2004), is an interesting book that seeks to exhort new lawyers to a more ethical practice. Rosenbaum, a lawyer, essayist and novelist, presents an indictment of the rational American legal system to argue for a more "moral" practice – one that is responsive to the nuance of human sensibility and spirit. By its description of today's legal culture, this book may be a worthy assignment for first year law

students.

Finally, other books of interest, less recent but no less noteworthy, are two that were published in 2003: Owen Fiss' **The Law as It Could Be**, (New York University Press, 2003) and **Symposium: Introduction to the Jury At A Crossroad: The American Experience**, 78 Chi.-Kent Law Review 909 (2003). The **Law as It Could Be** is a compilation of essays written by Owen Fiss over a span of twenty five years. As a whole, these essays seek to identify the right place of adjudication in American society and defend the conception of the judge as the paramount instrument of public reason. The clarity of prose and argumentation make this an enduring volume about the power of reason in public life.

Introduction to the Jury at a Crossroad: the American Experience provides a multifaceted and sustained examination of the roles of the jury past, present, and future. It explores not only the broad roles that the jury does and should play in the American judicial system, but also offers reforms that take as their starting-point a "jury-centric" perspective to enable the jury to function effectively in the future. The volume is a timely response to the increasing critique of the jury system and the calls for imposing legislative limits on jury awards. If you would like to receive a copy of this symposium issue on the jury, please contact Nancy Marder (nmarder@kentlaw.edu).

UPCOMING CONFERENCES

On December 3, 2004, the ABA Section of Dispute Resolution and the Cardozo Journal of Conflict Resolution will hold a symposium entitled "Trials on Trial: Are Trials Vanishing and Why?" The Symposium will be held at the Benjamin N. Cardozo School of Law (55 Fifth Avenue, at 12 Street) in New York City and will examine declining trial rates and the growing use of alternative dispute resolution. For more information, please contact Jessica Oser (symposiaed@cardozojcr.com)

On February 18, 2005, the Mississippi College School of Law will host a conference on whether Mississippi should adopt a class action rule. It will include

Howard Erichson, Seton Hall, Robert Klonoff, University of Missouri -Kansas City, Francis McGovern, Duke, Linda Mullenix, Texas and David Rosenberg, Harvard. For more details, call (601) 925-7100.

On March 18, 2005, the Frances Lewis Law Center at Washington and Lee Law School in Lexington, VA will sponsor a conference entitled "Have We Ceased To Be a Common Law Country?" A Conversation on Unpublished, Depublished, Withdrawn and Per Curiam Opinions." For additional information, contact David Caudill (caudilld@wlu.edu).