

ASSOCIATION OF AMERICAN LAW SCHOOLS

SECTION ON

CIVIL PROCEDURE

FALL 2007 NEWSLETTER

2008 ANNUAL MEETING PROGRAM

The Revolution of 1938 Revisited: The Role and Future of the Federal Rules

In April, the Section announced this topic for the Annual Meeting Program and issued a call for papers. We included the following prompt:

70 years ago, the Federal Rules changed the landscape of civil litigation. Procedure in the federal courts became uniform and adopted a flexible, notice-based model that contemplated liberal access to discovery. Over time, most states followed suit. Some have called this the Golden Age of Rulemaking.

What will the next 30 years of rulemaking look like? What should they look like? From pleading standards to discovery to summary

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Newsletter Editor: Robert Schapiro
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.

judgment practice, there is no shortage of

critics of the federal model. And, increasingly, questions are raised about the extent to which state practice should continue to follow the lead of the Federal Rules. States might adopt different practices out of a belief that the state and federal courts hear different types of cases and are designed to do different things. States might adopt different practices in a spirit of local experimentation, supplementing or even displacing the federal rulemaking process as the leader in innovation and reform. Or, states might simply depart from the Federal Rules model out of a belief that the federal model proceeds from flawed first principles. Different models of judicial federalism could support very different conclusions about the proper interaction between state rulemaking and federal rulemaking.

The following submissions were selected for presentation:

The Revolution of 1938 and Its Discontents. Rex R. Perschbacher (U.C.-Davis) & Debra Lyn Bassett (Alabama)

Not Dead Yet. Richard L. Marcus (Hastings)

Making Effective Rules: The Need for Procedure Theory. Robert G. Bone (Boston University)

The program will be moderated by Steve Gensler (Oklahoma) and will allot time for

cross-comments and for questions from the audience.

SECTION ANNOUNCEMENTS

Business Meeting. There will be a business meeting at the conclusion of the Section's annual meeting program on January 4. The Executive Committee proposes to nominate the following individuals for the 2008 Executive Committee:

Chair Catherine Struve (Penn)
Chair-Elect Patrick Woolley (Texas)
Past Chair Steve Gensler (Oklahoma)
Exec. Comm. Vikram Amar (U.C. Davis)
Exec. Comm. Thomas Main (Pacific)
Exec. Comm. Robert Schapiro (Emory)

Special thanks are due to Margaret Woo, who served as Past Chair this year and provided invaluable institutional memory.

Section Website. Just a reminder that the Section has a website at: <http://home.att.net/~slomansonb/AALSCivPro.html>. The website also is accessible from the AALS website <http://aals.org>: click on "services" then on "sections" then on "civil procedure". The website contains a collection of original pleadings in many notable cases, past issues of this newsletter, and links to archives for exams, syllabi, and outlines. If you have any questions, submissions, or suggestions, please contact Bill Slomanson at slomansonb@att.net.

Mentoring Listserv. The Section has an associated mentoring listerv. Please see the

section website for instructions on how to subscribe. The section website also contains a list of experienced faculty who have

volunteered to field questions on various topics.

Civil Procedure Listserv. Jay Tidmarsh (Notre Dame) hosts a Civ Pro listserv. Please contact Jay at Jay.H.Tidmarsh.1@nd.edu to subscribe.

Civil Procedure Exam Bank. Radha Pathak continues to maintain the Civil Procedure Exam Bank. If you would like instructions on how to obtain a password in order to access the exam bank or if you would like to contribute exams to the exam bank, you can contact Radha at rpathak@ku.edu.

Civil Procedure Blogs

On the blog front, the following blogs might be of interest to those who teach or write about Civil Procedure:

W. Jeremy Counsellor (Baylor) and Rory Ryan (Baylor) maintain a blog called Civil Procedure Prof Blog that can be found at <http://lawprofessors.typepad.com/civpro/>

Benjamin Spencer (Richmond) maintains a blog called Federal Civil Practice Bulletin at <http://federalcivilpracticebulletin.blogspot.com>.

Byron Stier (Southwestern) and Howard Erichson (Seton Hall) maintain a blog called Mass Tort Litigation that can be found at: http://lawprofessors.typepad.com/mass_tort_litigation/.

Please let new Civil Procedure teachers know that these resources exist.

SUPREME COURT DECISIONS

Vikram Amar
U.C. Davis

During the October 2006 Term, the Supreme Court issued a handful of rulings that involved topics that either are generally covered in basic civil procedure courses or that fall at the intersection of civil procedure and related course offerings, such as Remedies or Federal Jurisdiction. Below is a very brief description of the more noteworthy of these cases.

In a complicated dispute involving maritime-related fraud, a Chinese government importer and the owner of a subchartered vessel, the Court in *Sinochem International Co., Ltd. v. Malaysia International Shipping Corp.*, held that a federal district court has discretion to dismiss a case on *forum non conveniens* grounds even if it has not yet resolved contested questions of its subject-matter jurisdiction over the case and personal jurisdiction over the parties. Although a defendant moving to dismiss on *forum non conveniens* bears the difficult burden of establishing that “an alternative forum has jurisdiction to hear the case, and . . . [that] trial in the chosen forum would establish. . . oppressiveness and vexation to a defendant. . . out of all proportion to plaintiff’s convenience, or . . . the chosen forum [is] inappropriate because of considerations affecting the court’s own administrative and legal problems,” that burden does not require definitive establishment of the court’s subject-matter and personal jurisdiction.

While the *Sinochem* Court noted that a federal court ordinarily may not rule on the merits of a case without first determining that it has subject-matter and personal jurisdiction (and in so doing cited *Steel Co. v. Citizens for Better Environment*, a case whose opinions, taken together, have sometimes been read to suggest otherwise), *forum non conveniens* is a nonmerits ground for dismissal. This is so

because, although *forum non conveniens* may involve a brush with “factual and legal issues underlying the dispute,” resolving *forum non conveniens* does not entail any assumption by the court of substantive law-declaring power. The Court then went on to apply the rule that a court has leeway to “choose among threshold [i.e., nonmerits] grounds for denying audience to case on the merits.” There is, as the Court put it, no “mandatory sequencing” of nonmerits issues.

In *Powerex Corp. v. Reliant Energy Services Inc.*, the Court, in the context of a removed case involving claims of energy market manipulation and in which the original defendants filed cross-claims seeking indemnity against two United States Government agencies and a Canadian corporation, wholly-owned by British Columbia, and its subsidiary, ruled that 28 U.S.C. § 1447(d) bars the Court of Appeals from considering an appellant’s claim that the district court improperly remanded to state court under section 1447(c), where the district court arguably based its decision to remand on a lack of subject-matter jurisdiction. In so holding, the Court rejected the argument that for section 1447(d) to bar appellate review, the district court must have ruled that the removal itself was jurisdictionally flawed or otherwise problematic. Instead, even if the removal was proper, if subsequent events convince the district judge that subject-matter jurisdiction is lacking and it remands on that basis, section 1447 (d) still bars appellate review.

In *Sole v. Wyner*, the Court held that that a party who is granted a preliminary injunction on a claim brought under 42 U.S.C. § 1983 but who eventually fails on the merits after a full hearing is *not* considered a “prevailing party” eligible for attorney’s fees under section 1988.

Bell Atlantic Corp. v. Twombly concerns the standard to be used under Federal Rules of Civil Procedure 8 and 12 in deciding whether to dismiss a lawsuit for failure to state a claim upon which relief can be granted. In *Twombly*, plaintiffs sought to bring a class action on behalf of telephone customers against local telephone companies, asserting that the companies ran afoul of federal antitrust laws by conspiring to divide up the national market into a system of local monopolies. The Court held that the Complaint should be dismissed because it did not include “enough factual matter (taken as true) to suggest that an agreement was made” among the various local telephone company defendants. The Court noted that “antitrust discovery can be expensive,” and that accordingly district judges should take “care to require allegations that reach the level suggesting conspiracy” before permitting a case to survive a Rule 12(b)(6) motion. Reaching this level requires more than a formulaic recitation of the elements of the cause of action, but instead obligates a plaintiff to include enough “factual matter” to suggest that an agreement was plausible.

Some have accused the Court of effectively creating a “heightened pleading” standard — which the Court has in past cases explicitly rejected except for the narrow class of cases covered by Rule 9(b) — for lawsuits alleging conspiracy, or at least for cases alleging an antitrust conspiracy; whereas general assertions suffice in most cases, this antitrust conspiracy claim requires “factual matter.” Justices John Paul Stevens and Ruth Bader Ginsburg (the Court’s resident Civil procedure expert) dissented, arguing the Court had — notwithstanding its protestations to the contrary — effectively applied a heightened pleading requirement in violation of Rules 8 and 9 and basic principles of notice pleading.

Whether *Twombly* really does reflect a

change (and increase) in pleading standards, in antitrust cases, in conspiracy cases, in antitrust conspiracy cases, or perhaps in all cases (which seems somewhat unlikely given that the Court itself cited *Twombly* later in its term in *Erickson v. Pardus* as authority for rejecting a requirement of heightened pleading in a prisoner case), is something lower courts will be grappling with in the next few years until the Court revisits these issues with more clarification.

In *Bowles v. Russell*, the Court held by a 5-4 vote in the context of a federal habeas petition that Federal Rule of Appellate Procedure 4(a)(6) — which implements and reiterates 28 U.S.C. § 2107(c) and allows a district judge to afford a civil appellant 14 days within which to file his notice of appeal when the judge has granted a reopening of the appellate filing period — creates an absolute outer limit of additional time in which an appellant may file a notice of appeal, and that an appellant who files more than 14 days after the district court issues its order, even if the order purported (inexplicably and erroneously) to give him 17 days to appeal, is jurisdictionally barred from pursuing his appeal. Because the time limit embodied in section 2107 is set forth in a statute (rather than being judge-made) and constrains the appellate court’s jurisdiction, an appellant cannot invoke his reliance on the district court order to seek an equitable exception from the 14-day outer boundary.

Finally, in *Philip Morris USA v. Williams*, the Court, also by a 5-4 vote, invalidated on federal due process grounds a \$79.5 million Oregon state court punitive damage verdict on a claim brought by a smoker against tobacco giant Philip Morris alleging (and establishing) fraud and deceit.

Justice Breyer's opinion in *Philip Morris* holds that the punitive award was invalid because a jury was permitted to punish Philip

Morris for dishonesty and harm it may have inflicted on persons other than the plaintiff, and that such punishment is impermissible. But Justice Breyer goes on to say that juries can consider harm done to non-plaintiffs in determining how “reprehensible” a defendant’s conduct was — a permissible factor to take into account in deciding how large a punitive award should be.

As Justice Stevens suggests in dissent, “[t]his nuance [will] elude[] [many].” In addition to being fuzzy, Justice Breyer’s test seems less than completely coherent. He criticizes what the Oregon courts allowed below because there is no way to know “how many such [non-plaintiff] victims [there] are,” and because we cannot know “[h]ow seriously [they] were injured,” or “[u]nder what circumstances.” That may all be true. But these things would appear equally true — and seemingly equally unfair to the defendant — if we allow the jury to consider these non-party potential victims for purposes of “reprehensibility,” rather than for purposes of direct “punishment.”

One notable axis of disagreement between the Justices in *Philip Morris* is the legitimacy of invoking substantive due process principles in this context. The controversial nature of the doctrine of substantive due process, and its application in the sexual autonomy setting, may explain the odd lineup in *Philip Morris*; the majority is comprised of Justice Breyer, Chief Justice Roberts, and Justices Kennedy, Souter and Alito, while the dissenters are Justices Stevens, Scalia, Thomas and Ginsburg.)

Although Justice Breyer seems reluctant to admit it (he uses the word “procedural” to describe the focus of his inquiry in *Philip Morris*), his ruling for the Court that Oregon simply cannot punish defendants for wrongs done to non-plaintiffs certainly could be

thought of as a substantive barrier to a punitive objective Oregon wants to accomplish and could thus easily fall (and is characterized by dissenters as falling) on the (contentious) “substantive” side of the “procedural/substantive” due process dichotomy. To see that, one could ask oneself which additional procedures, if implemented, would enable Oregon to punish for harm to others in this context. Such additional possible “procedures” is not entirely obvious.

STATE, TRIBAL AND LOWER FEDERAL COURT DECISIONS OF INTEREST

Gary M. Maveal
University of Detroit Mercy

AFloating@ Forum Clauses Down in Ohio & Sixth Circuit

In *Preferred Capital, Inc. v. Sarasota Kennel Club, Inc.*, 489 F.3d 303 (6th Cir. 5/29/07), the Sixth Circuit refused enforcement of a forum selection clause in an equipment rental agreement. The clause identified the chosen forum to be the state of the lessor=s principal offices or, if the lease was later assigned, Athe State in which the assignee=s principal offices are located.@

The Kennel Club (based in Florida) rented equipment from Norvergence (a New Jersey corporation). Under a master agreement between Norvergence and Preferred Capital, a financial services firm based in Ohio, the agreement was assigned to the plaintiff. Defendant refused to pay after Norvergence did not perform contracted services and the assignee brought suit in Ohio.

The Court first determined that *Erie* principles dictate that state law governs a

motion to dismiss in a diversity action. *Stewart Organization v. Ricoh*, 487 U.S. 22 (1988) was distinguished by the context in which the *Erie* issue arose in that case — on a motion to transfer under 28 U.S.C. § 1404(a). By contrast, the Court observed that motions to dismiss for lack of personal jurisdiction must be resolved by state law. It further applied the procedural/substantive balancing test of *Hanna* to confirm the application of state law.

The Sixth Circuit then relied upon a recent opinion from the Ohio Supreme Court disapproving of a nearly identical clause involving the same assignee. *Preferred Capital, Inc. v. Power Eng'g Group, Inc.*, 112 Ohio St. 3d 429; 860 N.E.2d 741 (2007). The Ohio Supreme Court found that Norvergence's undisclosed intent to assign the agreement to Preferred Capital was a fundamental information imbalance violating the State's public policy. As in that case, Norvergence did not inform the renter (Sarasota) of an intent to assign the contract despite the fact that it was assigned to plaintiff the very next day.

The Sixth Circuit's rejection of the floating forum clause supplants a 2006 decision in yet a third case involving the very same clause. *Preferred Capital, Inc. v. Associates in Urology*, 453 F.3d 718, 724 (6th Cir. 2006) (upholding clause as reasonable under both federal and state law). That case was decided prior to the Ohio Supreme Court's authoritative decision finding the clause unenforceable.

Fifth Circuit's *Erie* Guess on Louisiana Law Favors Insurers

In an important appeal of consolidated cases by property owners for claims of losses caused by Hurricane Katrina, the Fifth Circuit ruled that the claims were excluded under the insurance policies. *In re Katrina Canal*

Breaches Litigation, 495 F.3d 191 (5th Cir. 8/2/07).

The District Court had held that homeowners' claims for water damage caused by the breach of levees in Katrina's wake were not excluded losses under most of the contracts in question. The Court of Appeals reversed, concluding that the Supreme Court of Louisiana would rule that the losses were excluded.

The *Erie* aspect of the case is particularly intriguing due to the State's civil law tradition. Like the District Court, the Court of Appeals framed its contract analysis under the State Constitution and Civil code as primary authority. The fact that the State Supreme Court had yet to address the particular issues eliminated consideration of only a secondary law source.

Apparently on these grounds, the Court denied a request by Xavier University and another plaintiff that the issues should be certified to the State Supreme Court. 495 F.3d at 208, n. 11 (The trial judge had noted that he would have certified the question if allowed to do so under Louisiana Supreme Court Rule XII. 466 F.Supp.2d 729, 780 (E.D. La 2006)).

Pre-Suit Discovery Denied in Minneapolis Bridge Collapse

Two weeks after sudden collapse of the I-35 bridge this past August, attorneys for some of those injured sought and were denied access to the site for purposes of investigating possible civil claims. *In re I-35 Bridge Collapse Site Inspection*, 243 F.R.D. 349 (D. Minn., 10/15/07).

A law firm filed a motion under Fed.R.Civ.P. 27, 34, and 45, asking that the United States and other governmental authorities be ordered to allow experts to inspect the site. The Court found the petition failed in several respects under Rule 27(a):

that it did not demonstrate that a federal action was expected and why none could yet be brought. It had also failed to identify potential defendants to the action.

Fundamentally, the opinion confirms that Rule 27 does not afford a device for determining whether a cause of action exists and, if so, against whom. Texas and Alabama are apparently the only states with rules expressly authorizing pre-suit discovery for the purpose of investigating potential claims. See Lonny Hoffman's recent article on the issue, 40 U. Mich. J.L. Reform 217 (2007).

Michigan S.Ct. Dismisses Bankrupt's Injury Action; Refuses to Add Trustee as Plaintiff

A recent case from the Michigan Supreme Court has some practitioners reconsidering whether the state's court rules adequately allow for substituting parties plaintiff.

In *Miller v. Chapman Contracting*, 477 Mich. 102; 730 N.W.2d 462 (4/25/07), the Court affirmed a dismissal of a personal injury claim by a Chapter 7 debtor on grounds that the Trustee in bankruptcy was the real party in interest. Plaintiff was injured in an automobile accident. After he filed for bankruptcy, plaintiff retained private counsel who began a state court tort action. By answer and motion for summary judgment, Defendants urged that the claim belonged to the Trustee alone. Plaintiff argued in response — after the statute of limitations had run — that the Trustee had authorized the suit's filing and that he should be allowed to amend his complaint to add the Trustee as a plaintiff.

The Michigan Supreme Court affirmed the dismissal on grounds that such amendment would have been futile as there was no provision for its relation back to the filing of the original complaint. The dissent urged that

the result in the case was unfair, that there was no prejudice in allowing amendment since defendants' Answer had stated that the Trustee was the real party in interest.

Federal cases of this sort typically allow a substitution of the Trustee. Indeed, Fed.R.Civ.P. 17(a) precludes dismissal due to failure to name the real party in interest until after a reasonable time for that person to ratify, join, or substitute into the action. Michigan's analogue real party in interest rule contains no mechanism for substitution and its rule on substitution of parties applies only to cases of death, transfer of an interest, or similar changes after the filing of the action. Neither rule expressly addresses a mistake naming the wrong party as plaintiff. The opinion didn't mention a third rule that misjoinder of parties is not grounds for dismissal and that parties may be added or dropped on such terms as are just. The latter rule has no relation-back provision.

Seventh Circuit En Banc Reversal for Refusal to Appoint Counsel for Prisoner

In an en banc reversal without dissenting opinion, the Seventh Circuit refined its standard for evaluating a prisoner's request for appointment of counsel under 28 U.S.C. § 1915(e). *Pruitt v. Mote*, ___ F.3d ___, 2007 U.S. App. LEXIS 23109 (No. 05-1620, 10/03/07).

Plaintiff, an inmate in an Illinois state prison, filed a 1983 action against a correctional officer and supervisors claiming sexual assault by the officer. The trial court denied plaintiff's several pretrial motions for appointment of counsel and oversaw a jury trial which found for the defendants.

Reversing a panel decision affirming the judgment of no cause of action, the en banc opinion ruled that the district court abused its discretion by considering only the lack of

complexity presented in the case. The Seventh Circuit found that the district court failed to assess the plaintiff's ability to competently prepare and try the case without counsel. It concluded that the record clearly showed his deficiencies and further found that a reasonable likelihood that plaintiff's claims failed due his incompetence.

The majority stressed that prisoners have no constitutional right to counsel and that the matter was one for trial court's discretion. Four concurring judges would have extended the reach of the ruling to prescribe a continuing obligation on the district court to monitor an indigent party's ability to proceed without counsel and reconsider its ruling sua sponte when it becomes clear that counsel is needed.

Junk Fax Claims: State vs. Federal Statutes of Limitation

Just in time for December exams, the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 (TCPA) offers more on its unique state court approach for federal claims. In *Sznyter v. Malone*, 155 Cal. App. 4th 1152; 66 Cal. Rptr. 3d 633 (Ct. of Appeal, 10/0207), the Court held that TCPA claims were subject to the four-year statute of limitations found in 28 U.S.C. § 1658.

A consumer sued in a California state court (a limited civil action, claiming less than \$25,000) against a dentist, alleging damages caused by advertising faxes the dentist sent to the plaintiff in violation of the federal TCPA. The California Superior Court granted judgment on the pleadings in favor of the defendant on statute of limitations grounds.

The Appellate Division of the Superior Court affirmed, then issued an order certifying the transfer of this case to the Court of Appeal — which held as follows: (1) the statute of limitations was not tolled from time that a

small claims court dismissed consumer's earlier claim until the Court of Appeal in other litigation determined that the TCPA authorized a private cause of action, and (2) as an issue of first impression, the federal catchall four-year statute of limitations of § 1658 applied to the TCPA action, rather than the state's three-year statute for statutory causes of action. The lower court decision was reversed and remanded, with directions to reinstate the case.

(Thanks to Bill Slomanson, Thomas Jefferson.)

DEVELOPMENTS IN THE FEDERAL RULES OF CIVIL PROCEDURE

Steve Gensler
University of Oklahoma

The big news this year is the approaching arrival of the restyled Civil Rules. Starting in 2003, the Civil Rules Advisory Committee began the process of restyling the Civil Rules in order to clarify, simplify, and modernize the language of the rules provisions, without changing their substantive meaning. The Supreme Court transmitted the restyled Civil Rules to Congress in May, and they will take effect on December 1, 2007 unless Congress intervenes.

This update first looks at the amendments scheduled to take effect this year. It then looks deeper into the rules amendment pipeline. While no Civil Rules are slated to take effect on December 1, 2008, several notable rules amendments slated for the 2009 cycle have been published for comment. Beyond that, several proposals — including one to amend Rule 56 to address motion and briefing practices — are currently before the Civil Rules Advisory Committee but have not

yet been published for comment.

Detailed information regarding these rulemaking projects is available at that Federal Rulemaking website accessible via www.uscourts.gov.

A. Amendments Scheduled to be Effective December 1, 2007

1. The Style Project

In previous years, the Appellate Rules and the Criminal Rules have been restyled to clarify meaning, improve and modernize expression, and remove inconsistent uses of words and conventions. The success of those projects emboldened the Standing Committee and the Civil Rules Advisory Committee to take up the larger and more daunting task of restyling the Civil Rules. The Civil Forms also have been restyled.

Unlike most other rule amendments, these amendments deliberately make no substantive changes. Rather, the restyled rules attempt only to take what the rules already say and say it better. To do that, the restylers: (1) altered the format of certain rules to remove dense block paragraphs and lengthy sentences; (2) added “tag line” headings at the first and second levels of subdivision; (3) addressed inconsistent word usage so that different rules use the same words to say the same thing, though some variation in expression is carried forward as the context requires; and (4) replaced archaic words and minimized the use of redundant intensifiers (whose absence elsewhere might then suggest less emphasis).

Several objections and concerns were raised during the comment period. First, some objected that the effort to change terminology without meaning was fraught with danger and would lead to troubling satellite litigation about the meaning of the newly-worded

provisions. Second, some raised concern about the research and resource costs that the restyling would impose on practicing lawyers and academics alike. Third, some argued that the restyling would create “supersession” problems in that all of the rules would have a new effective date and, as a result, would supersede intervening statutory reforms.

The Advisory Committee considered these objections and elected to press forward. First, the Advisory Committee concluded that, in the aggregate and over the long term, the restyling of the Civil Rules would not increase — and might decrease — litigation regarding the meaning of the Civil Rules. Second, the Advisory Committee concluded that the research and resource burden caused by the restyling would be transitory and modest. Finally, the Committee concluded that the risks associated with unintended supersession effects were addressed adequately in the Advisory Committee Notes and language added to Rule 86(b) specifying that the restyling does not alter the “take effect” date for purposes of supersession.

So who was right? Some early satellite litigation is inevitable. Practice under the restyled rules almost certainly will expose some problems. Some corrective amendments may be required. On the other hand, the promise of the restyling project is to make the Civil Rules easier to learn, understand, and apply. If realized, these benefits will accrue for as long as the restyled Civil Rules remain in effect. Will the long term benefits ultimately exceed the short term costs? How long will it take for that balance to tip? Check back in 2, 5, and 10 years.

2. The Style-Substance Track

A handful of modest and non-controversial changes were submitted along

with, but separately from, the Style Project. These are changes that make eminent sense and that do not materially alter the substance of the rules, but that also cannot be described as wholly stylistic. The Committee was concerned that these changes — though clearly beneficial — were too minor to warrant separate amendment projects, such that if they were not accomplished in connection with the Style Project they likely would not be made at all. To give an example, several amendments require lawyers to include their e-mail addresses along with their addresses and telephone numbers.

3. New FRCP 5.2

The E-Government Act of 2002 requires federal courts to make unsealed electronically-filed documents available on their websites. It also requires the Supreme Court to establish rules to address the privacy and security concerns raised by making court filings available over the internet. New Rule 5.2 serves that purpose.

Internet access to court records pits historical rights of access against heightened potential for abuse. Persons have long had the ability to rummage through court files in an attempt to mine information. But the sheer work required meant that, in most cases, information that might be exploited was protected by a practical obscurity. With remote access and powerful search engines, that is no longer the case.

In 2001, the Judicial Conference adopted a general policy that records access over the internet should be generally the same as it is at the courthouse. New Rule 5.2 starts from that premise and then builds in various privacy and security protections. It presumptively requires filing parties to redact “personal data identifiers”; for example, only the last four digits of a social security number

or of a financial account number are to be used. Due to the volume of filings and the prevalence of sensitive information contained therein, New Rule 5.2 exempts social security and immigration cases from internet access by non-parties, though full access is still available at the courthouse. New Rule 5.2 does not alter the court’s authority to place items under seal, and it allows courts to issue protective orders requiring additional retraction or further limiting remote access for good cause.

B. Amendments Scheduled to be Effective December 1, 2008

None.

C. Proposed Amendments Published for Comment

Persons who wish to submit comments on these published proposals may do so by writing to the Rules Committee Support Office (see the website for address) or by sending comments electronically to Rules_Comments@ao.uscourts.gov. Comments are due by February 15, 2008.

1. Time-Computation Amendments

The Standing Committee (which oversees all of the five Advisory Committees) has orchestrated a comprehensive project to simplify the time computation methods in each set of rules and make them consistent across the rules. The principal innovation is the adoption of a “days are days” approach to computing all time periods. Thus, regardless of the length of the time period in question, all days — including Saturdays, Sundays, and legal holidays — will count under Rule 6(a). (Time periods will still be extended when they would end on a Saturday, Sunday, or legal holiday.) Recognizing that the “days are

days” approach would affect the sufficiency of some existing time periods — especially those 10 days or less — each Advisory Committee was charged with reviewing all of the time periods in their respective sets of rules. As part of that review, a number of time periods in the Civil Rules are proposed to be changed. Finally, the Civil Rules Advisory Committee elected to further simplify time-counting by opting to use 7, 14, and 21-day deadlines so that applicable deadlines would usually fall on a weekday.

2. Rule 15

Rule 15 would be amended to redefine the circumstances in which a pleading may be amended without leave of court. Under current Rule 15, the filing of a responsive pleading (but not the filing of a Rule 12(b) motion) cuts off the right to amend once as a matter of course. Under the proposal, a pleading to which a responsive pleading is required could be amended once as a matter of course within 21 days after the earlier of (1) service of a responsive pleading, or (2) service of a motion under Rule 12(b), (e), or (f). The basic idea is to give the plaintiff one amendment as of right within 21 days after the defendant first responds to the merit or sufficiency of the complaint, whether that response is in the form of an answer or a Rule 12 pre-answer motion.

3. Rule 62.1

Proposed new Rule 62.1 would address the procedure for obtaining postjudgment relief from the trial court during the pendency of an appeal. It would adopt well-recognized practices for securing a limited remand for trial-court action, but would also explicitly authorize the trial court to defer or deny such

relief despite the pendency of the appeal. Proposed new Rule 62.1 is integrated with a parallel proposed new Appellate Rule 12.1.

4. Other Proposals

Minor amendments are also proposed to Rule 13(f), Rule 48, and Rule 81.

D. Proposals Currently Before the Advisory Committee

The proposals briefly summarized below are currently under consideration. Should the Advisory Committee choose to press forward with any of them, they will be sent to the Standing Committee for permission to publish for comment. The most likely schedule for these proposals, should they proceed, would be for them to be published for comment in August 2008, with the comment period running until February 2009. At the earliest, these amendments would take effect in December 2010.

1. Expert Disclosures and Discovery

The Advisory Committee has been considering amendments to Rule 26(a)(2) and Rule 26(b)(4) governing expert disclosures and discovery. Possible changes would be: (1) to require that lawyers supply statements regarding the content of testimony to be given by experts not required to supply a formal report; (2) to amend the rules language currently construed by most courts as waiving attorney-client privilege and work-product protection for all materials shown to a testifying expert; (3) to make draft expert reports nondiscoverable absent a showing of substantial need and undue hardship; and (4) to make the working papers of experts

nondiscoverable absent a showing of substantial need and undue hardship.

2. Summary Judgment Procedures

The Advisory Committee has been considering amendments to Rule 56. Possible changes would be: (1) to implement a nationally-uniform process for parties to state and respond to the facts asserted to be undisputed; (2) to clarify the options available when a party fails to properly respond to a summary judgment motion; (3) to clarify when a court may grant summary judgment sua sponte; and (4) to clarify the court's power to grant partial summary judgment on specific claims or issues in the case. The amendments under consideration would not alter the existing standards or burdens for summary judgment as currently set forth in rule text and as explicated by the 1986 trio of *Celotex*, *Anderson*, and *Matsushita*.

INTERNATIONAL DEVELOPMENTS

Thomas Main
University of the Pacific

Recognizing the increasing significance of global perspectives on civil procedure, this year's Newsletter includes a separate discussion of certain developments in the field of transnational litigation that may be of interest to civil procedure teachers.

As a preliminary matter, experienced and aspiring internationalists alike should take note of two new books that offer a rich set of materials and perspectives offering global perspective. First, *Civil Litigation in Comparative Context* (West 2007) is a pacesetter for course materials on comparative

civil procedure. Although the book could be used for a separate course on comparative procedure, it is also ripe for sampling in the standard first year domestic course. This book's slate of editors includes not only the foremost U.S. experts in domestic and international civil procedure (namely O. Chase, H. Hershkoff, and L. Silberman), but also an international team from the U.K. (A. Zuckerman), Italy (V. Varano), and Japan (Y. Taniguchi). Also in 2007, the long-awaited fourth edition of *International Civil Litigation in the United States* (Wolters Kluwer 2007) was published. This edition of the casebook-cum-treatise, edited by Gary Born and Peter Rutledge, is the teachers' teacher in this field.

Among the past year's U.S. Supreme Court decisions affecting transnational litigation, *Sinochem International Co. Ltd. v. Malaysia International Shipping Corp.*, ___ U.S. ___, 127 S. Ct. 1184 (2007), deserves mention. Writing for a unanimous Court, Justice Ginsburg held that a district judge need not consider subject matter jurisdiction nor any other "threshold objection" to hearing the case when the doctrine of forum non conveniens supports dismissal:

This is a textbook case for immediate forum non conveniens dismissal. The District Court's subject-matter jurisdiction presented an issue of first impression in the Third Circuit ... and was considered at some length by the courts below. Discovery concerning personal jurisdiction would have burdened Sinochem with expense and delay. And all to scant purpose: The District Court inevitably would dismiss the case without reaching the merits, given its well-considered forum non conveniens appraisal. Judicial economy is disserved by continuing litigation in the Eastern District of Pennsylvania given the proceedings long launched in China. And

the gravamen of Malaysia International's complaint — misrepresentations to the Guangzhou Admiralty Court in the course of securing arrest of the vessel in China — is an issue best left for determination by the Chinese courts. (*Id.* at 1194.)

A second case from the recent Term with significance to the field of international litigation clarified the scope of foreign sovereign immunity with respect to tax levies, reiterating the principle that immunity must be interpreted restrictively. *Permanent Mission of India to the United Nations v. City of New York*, __ U.S. __, 127 S. Ct. 2352 (2007). In this case, the Permanent Mission of India to the U.N. owned a 26-story building in New York City that was used in part for diplomatic offices, with the remainder used for residential units for lower-level diplomatic employees of the Mission and their families. The City levied property taxes only on that portion of the building that housed the employees, but the taxes were never paid. The unpaid taxes, totaling \$16.4 million, were eventually converted into tax liens held by the City. When the City sought a declaratory judgment to determine the validity of the liens, the Mission argued that they were immune by virtue of the Foreign Sovereign Immunities Act of 1976. (A companion suit with substantially similar facts involved property owned by the Mongolian Government.) The issue before the Court was whether the tax lien fell within the statutory exception to immunity where “rights in immovable property” situated in the U.S. are “in issue.” Writing for a 7-2 majority, Justice Thomas held that a tax lien creates an adverse effect on the property because it is enforceable against any potential purchaser. And because the Foreign Sovereign Immunities Act does not otherwise limit the meaning of the words in the immovable

property exception, a lien involves a right that puts the property in issue. *Id.* at 2355-2356. Justice Stevens (with Justice Breyer) dissented, arguing for a more restrained interpretation: “[T]his case is not about the validity of the city’s title to immovable property.... Rather, it is a dispute over a foreign sovereign’s tax liability. If Congress had intended the statute to waive sovereign immunity in tax litigation, I think it would have said so.” *Id.* at 2359.

Among the noteworthy decisions arising from the federal appellate courts is *Royal and Sun Alliance Ins. Co. of Canada v. Century Intern. Arms, Inc.*, 466 F.3d 88 (2d Cir. 2006). After the trial court had dismissed the plaintiff’s case in light of parallel proceedings in Canada, the appeals court vacated the order. The district court had granted the motion to dismiss, stating that it had “the inherent power to stay or dismiss an action based on the pendency of a related proceeding in a foreign jurisdiction.” 2005 WL 2087870 (S.D.N.Y. 2005). However, the Second Circuit held that “the mere existence of parallel foreign proceedings does not negate the district courts’ ‘virtually unflagging obligation ... to exercise the jurisdiction given them.’” 466 F.3d at 92-93. Under the facts presented, the absence of “exceptional circumstances” precluded international comity abstention. *Id.*

A second important appellate case involves the enforcement of an arbitration award. Although that award had been nullified by the country in the arbitral seat, the victor sought enforcement in the U.S. under the New York Convention. Bucking a recent trend of reflexive enforcement, in *TermoRio A.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928 (D.C. 2007), the D.C. Circuit refused to enforce an award that had been “lawfully nullified by the country in which the award was made.” *Id.* at

930. The court recognized that there could be instances where public policy could militate in favor of enforcement, but the facts presented were not sufficiently compelling here. *Id.* at 936-937.

Third, *Sloss Industries Corp. v. Eurisol*, 488 F.3d 922 (11th Cir. 2007), presents an especially good fact pattern for testing the limits of personal jurisdiction over foreign corporations. In the case, an Alabama manufacturer of slag wool (synthetic fiber) sued a French purchaser in Alabama when the latter allegedly failed to pay for certain shipments. The court premised a finding of purposeful availment primarily on the circumstances surrounding ten unsolicited orders during a period of time spanning several months. The court further held that there would be no offense to traditional notions of fair play and substantial justice since the burdens on the defendant “would be lessened by the available methods of foreign transportation and communication ... and by the fact that, if Eurisol filed a counterclaim or interposed a defense based on purported defects in the slag wool — as it said it would in its motion to set aside the default — Sloss would have to travel to France to do some discovery and inspect the tons of product that Eurisol rejected.” *Id.* at 934.

And finally, professors following the history of the *Sarei v. Rio Tinto, PLC* litigation in the Ninth Circuit must stay tuned. The case, which involves current and former residents of New Guinea asserting claims for violations of jus cogens norms of international law under the Alien Tort Claims Act against a copper mining company has already generated several opinions and much controversy. Although the most recent opinion of the court held that some violations of jus cogens norms of international law may not be protected by the act of state doctrine, *see* 2007 WL 1079901 (9th Cir. 2007), the case is scheduled

for rehearing en banc.

In the district courts, the utility (and complexity) of 28 U.S.C. § 1782 appears to be maturing. Although the statute, which permits an interested person to obtain discovery in the U.S. for use in a foreign or international tribunal, is far from new, the number of applications is increasing and the class of applicants expanding. *See, e.g., In re Application for an Order for Judicial Assistance in a Foreign Proceeding in the Labor Court of Brazil*, 244 F.R.D. 434 (N.D. Ill. 2007); *In re Application Pursuant to 28 U.S.C. § 1782 of Elizabeth Kang v. Nova Vision, Inc.*, 2007 WL 1879158 (S.D. Fla. 2007); *In re Application of Nokia Corp.*, 2007 WL 1729664 (S.D. Fla. 2007).

For a contemporary application of the stateless citizen and its effect on diversity jurisdiction, *see Swiger v. Allegheny Energy, Inc.*, 2007 WL 442383 (E.D. Pa. 2007). In this case, because one of the partners of Morgan Lewis & Bockius is a U.S. person domiciled outside of the United States, the court is without diversity jurisdiction when the partnership is sued.

Lastly, from a comparative perspective, the emergence of collective and representative actions continues to receive increasing amounts of worldwide attention. Stanford Law School and the Centre for Socio-Legal Studies, Oxford University, are cosponsoring a blockbuster conference titled *The Globalization of Class Actions* on December 13-14, 2007 in Oxford. According to the conference website, “This major conference will bring together leading legal scholars, practitioners and judges from North and South America, Europe, Africa and Asia to examine and debate the global spread of class actions and other forms of representative and group litigation.”

<http://www.law.stanford.edu/calendar/details/1066/The%20Globalization%20of%20Class%20Actions>

[s%20Actions/>>](#)

BOOKS OF INTEREST

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Several books may be of interest to civil proceduralists not because they discuss the doctrine of procedure, but because they illustrate the importance of litigation and procedure in American democracy.

The Making of A Civil Rights Lawyer, a semi-autobiographical book by Michael Meltsner, now on the faculty at Northeastern University School of Law, recounts Meltsner's formative years working with Thurgood Marshall at the NAACP. The book evokes an idealistic era when great faith was placed in law and procedure as the instrument for social change. More importantly, the book also thoughtfully ruminates on what it means to be a "civil rights" lawyer then and today. The prose is elegant and with its self-revelations would be useful in any first year curriculum to generate discussions on the role of a lawyer in today's society.

While Meltsner's book reminds us of an era when civil liberties and process were valued, two books, with contrasting views, remind us of the trade off between civil liberties and security during times of emergencies. David Cole, a professor at Georgetown and legal correspondent for the Nation, in *Less Safe, Less Free: Why America Is Losing the War on Terror* (co-authored with Jules Lobel, New Press, 2007), traces in critical detail the expansion of executive powers by the Bush administration in the post-9/11 period. Critical of judicial and legislative acquiescence, Cole's book argues that emergencies are periods of political and constitutional failures when government

abuses its power.

By contrast, *Terror in the Balance: Security, Liberty, and the Courts*, by Eric A. Posner and Adrian Vermeule, (Oxford University Press, 2007) defends the use of executive power as the only branch of government with the resources, power and flexibility to respond to threats of national security. While admitting the danger of abuse, *Terror in the Balance* takes a more positive and historical look by examining six periods of emergencies in American history: the Quasi-War with France accompanied by the Sedition Act, the Civil War, World Wars I and II, the cold war, the unrest during Vietnam War, and post 9/11. Using cost/benefit analysis, these authors argue that the benefits gained from the increase in security will exceed the losses from the loss in liberties.

Both books, when read against Meltsner's recollections, remind us of how little we have traveled in the last thirty years, of the constancy of due process abuse, and of the need to remain ever so vigilant in our fundamental support for legal procedure.

With the plethora of books focused on the Supreme Court and the Justices of that court, two books take a refreshing look by focusing on judicial decision making at the state and appellate level — *Running for Judge: The Rising Political, Financial and Legal Stakes of Judicial Elections*, Matthew J. Streb (ed.). (New York University Press, 2007) and *Making Law in the United States Court of Appeals* by David E. Klein, (Cambridge University Press, 2002). In *Running for Judge*, leading scholars provide detailed statistical studies on the current state of judicial elections for state courts. Today's judicial elections increasingly resemble elections for other political offices. What this changing tone in judicial elections means for

the state judiciary, what the future of judicial elections may bring, how to balance freedom of speech with judicial reforms and campaign spending, electoral competition, interest group support and accountability are some of the topics addressed by this book. *Running for Judge* is a comprehensive look not only at the state of our judiciary but also at the inherent tension between democratic processes and judicial independence.

In *Making Law in the United States Court of Appeals*, David Klein shares his empirical studies of how courts of appeals handle decisions of first impression. Using quantitative studies of several hundred cases as well as interviews of two dozen judges, Klein found that while Supreme Court precedents appear to factor in rulings, judges seemed to be more influenced by works of colleagues (whether on their own court or on other circuits) than by predictions of how the Supreme Court would rule. Klein found support for the following unsurprising hypothesis: that the probability of adopting a precedential rule is greater when the ideological direction of the rule is compatible with that of the judge; that the likelihood of a judge adopting a precedential rule increases with the prestige and expertise of the judge; and that likelihood of the judge to adopt a rule varies with whether the court is unanimous in support of the rule or whether that rule is supported among the circuits already studying it. These outcomes perhaps are uncontroversial, but they nevertheless revived speculation on how judges decide in the midst of institutional dynamism.

Two “litigation” books are worthy of mention for their value to those teaching about litigation — *Business and Commercial Litigation in Federal Courts*, Second Edition, edited by Robert L. Haig (Thomson/West, 2nd edition, 2006); and *International Civil Litigation in the United States* (Wolters

Kluwer, 4th ed. 2007). Both books, in their updated versions, added much to their original editions. *International Civil Litigation* is worthy not only as a casebook but also for its thorough treatise like treatment of the expanding field of transnational litigation. In this latest edition, the authors have added materials in the areas of personal jurisdiction, foreign sovereign immunity, the Alien Tort Claims Act, forum selection clauses and forum non conveniens, followed tightly by the recognition of foreign judgments and transnational discovery. Such additions tell us that the growing focus in transnational litigation is on the front-end with forum selection and the back-end with enforcement of judgments.

In *Business and Commercial Litigation in the Federal Courts*, Robert L. Haig pulled together an impressive list of one hundred and ninety-nine commercial and business prominent lawyers to share tactics and strategies in business litigation. A browse through the chapters revealed up to date topics that include discovery of electronic information, litigation technology, and e-commerce. Needless to say, this extensive volume is invaluable more as a reference than as bedside reading for those who teach procedure as well as those who practice it.

Finally, *The Curmudgeon’s Guide to Practicing Law*, by Mark Hermmann (American Bar Association, 2006) gives basic advice for surviving and thriving in a law firm. The book covers the basics of law practice and law firm etiquette. Humorous and curmudgeonly, this book gives insight on law firm culture and the culture of professionalism. The book is a nice complement to those of us who may be teaching students “how to think” but not necessarily “how to survive” in law practice.

UPCOMING CONFERENCES

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On November 30 and December 1, the *Pennsylvania Law Review* will host a symposium in Philadelphia, Pennsylvania entitled “Fairness to Whom? Perspectives on the Class Action Fairness Act of 2005.” Further information is available at <http://www.pennumbra.com/symposia/>

On December 13 and 14, Stanford Law School and the Centre for Socio-Legal Studies at Oxford University will hold a conference in Oxford, England entitled “The Globalization of Class Actions.” Further details are available at <http://www.law.stanford.edu/calendar/details/1066/The%20Globalization%20of%20Class%20Actions/>

On January 18, the *Southwestern University Law Review* will hold a symposium in Los Angeles, California entitled “Perspectives on Asbestos Litigation.” For further information, please contact, Liz Reinhardt at reinhardt@swlaw.edu

On February 15 and 16, the *Tulane Law Review* will host a symposium in New Orleans, Louisiana on “The Problem of Multidistrict Litigation.” Further details are available at <http://www.law.tulane.edu/tlsjournals/lawreview/index.aspx?id=4678>

On February 22 and 23, Southern Illinois University will host a conference in Carbondale, Illinois on the United States Court of Appeals for the Seventh Circuit. “The focus of the conference will be on the process by which the court decides cases,

including its relations with other courts. Further information can be found at <http://legalscholarshipblog.com/2007/10/10/seventh-circuit-carbondale-il/>

In April, the *Northern Illinois University Law Review* will hold a symposium in DeKalb, Illinois on “The Modern American Jury.” Further information is available at <http://legalscholarshipblog.com/2007/09/07/american-jury-dekalb-il/>

For a general listing of law school conferences, some of which pertain to civil procedure, see the website maintained by Rick Bales at: <http://chaselaw.nku.edu/faculty/symposia.php>. You can also contact Rick Bales at balesr@nku.edu if you have a symposium that you would like him to include.