

2009 AALS CIVIL PROCEDURE SECTION NEWSLETTER

FALL 2009 NEWSLETTER

2009 ANNUAL MEETING PROGRAM

Revisiting Discovery

Friday, January 8—10:15 a.m.

Lonny Hoffman
(University of Houston Law Center)

The civil procedure program at the annual meeting will be held on Friday, January 8, beginning at 10:15 a.m. The program is entitled “Revisiting Discov-

ery.” Our three presenters will be (1) Steven Gensler, *Procedure a la Carte*, (2) Suzette Malveaux, *Frontloading and Heavy Lifting: The Evolving Role of Discovery in Contemporary Civil Rights Litigation*, and (3) Adam Steinman, *Why Discovery Management Still Matters After Iqbal (and How It Might be Improved)*. Lonny Hoffman will moderate.

Professor Gensler examines two related criticisms of the current federal pretrial scheme: (1) that it is a “one size fits all” scheme that is too costly for most cases; and (2) that structural reforms like heightened pleading or separate tracks for different types of cases are needed because the judicial case management model has failed to rein in excessive costs. Gensler challenges both criticisms, arguing that the current scheme, properly administered, remains the best option for providing flexible and case-appropriate pretrial proceedings, and also offers suggestions for improvement.

In her paper, Professor Malveaux contends that while the Federal Rules are trans-substantive, their impact is not. Application of Rule 12(b)(6) and Rule 8(a)(2), under *Twombly* and *Iqbal*, is more outcome determinative for civil rights cases because of the informational inequities that exist between the parties. Malveaux critiques the new plausibility pleadings regime, particularly its impact on civil rights claims. She proposes that the courts grant proscribed, narrow discovery that would enable a plaintiff to amplify his claims following a Rule 12(b)(6) motion (plausibility discovery), and describes how this would work.

Professor Steinman maintains that *Iqbal*'s much-criticized plausibility standard is neither the primary

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Newsletter Editor:

Linda Simard (Suffolk University Law School)

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.

inquiry at the pleadings phase nor a necessary one. Reframing debate over the decision, Steinman contends that authoritative pre-*Twombly* sources--the Federal Rules, their Forms, and Supreme Court decisions that remain good law--foreclose any interpretation of *Iqbal*'s "conclusory" standard that would give courts drastic new powers to disregard allegations at the pleadings phase. Concomitantly, he also suggests some possible improvements regarding discovery management.

OTHER PROGRAMS OF INTEREST AT THE ANNUAL MEETING

Jonathan Siegel

(George Washington University Law School)

Of course the Civil Procedure Section program is circled in red on your Annual Meeting calendar. But what should you do with the rest of your time? Here's your Civil Procedure Section Guide to other programs that might be of interest to Civ Pro professors.

THURSDAY, JANUARY 7

9:00 AM

Section on Federal Courts: "Re-Examining Customary International Law and the Federal Courts." This program will feature discussion about how federal courts choose the applicable law.

FRIDAY, JANUARY 8

7:00 AM

Section on Alternative Dispute Resolution Breakfast. The Annual Meeting program doesn't indicate what the program for this breakfast will be, but ADR is of course a vital part of Civil Procedure these days. Advance purchase of tickets is required.

10:30 AM

Section on Civil Procedure (co-sponsored by Section on Litigation): "Revisiting Discovery". The main event! See you there.

4:00 PM

Section on Alternative Dispute Resolution (co-sponsored by Section on Professional Responsibility):

"Overcoming the Difficulties of Teaching Negotiation Ethics". This program will suggest methods for teaching attorneys the ethical rules that guide this crucial part of dispute resolution.

Section on Immigration Law (co-sponsored by Section on Administrative Law): "Adjudication in Immigration Law: Concerns and Realities". This program will explore issues in the realm of administrative adjudication.

Section on Remedies: "Remedies in Times of Economic Crisis and Financial Scandal". A discussion of how the legal system can provide remedies in the case of great financial scandals such as the Madoff ponzi scheme.

6:30 PM

AALS Gala Reception: Because Civ Pro professors like to party as much as anybody!

SATURDAY, JANUARY 9

10:30 AM

Section on Litigation (co-sponsored by Section on Civil Procedure): "The Future of Summary Judgment". Among other things, this program will address proposed changes to Rule 56 and the effect of *Iqbal* on the role of summary judgment. Obviously a must for Civ Pro profs.

SUNDAY, JANUARY 10

9:00 AM

Section on Criminal Justice: "The Lessons of DNA and the Innocence Revolution for the Criminal Justice System". This program will report on how certain forms of evidence are not as probative as they might seem and on how good or bad a job the trial system does of reaching accurate results.

SECTION ANNOUNCEMENTS

Patrick Woolley

(University of Texas School of Law)

Business Meeting. There will be a business meeting at the conclusion of the Section's annual meeting program on January 8. In addition to nominating individuals to serve on the 2010 Executive commit-

tee, the Executive Committee will move to amend the Section's by-laws.

Motion to Amend. Section 2(a) of the by-laws currently provides: "The Executive Committee of the section is the chairperson of the section, the chairperson-elect, the immediate past chairperson, and three other members elected annually." The Executive Committee will move to amend Section 2(a) so that it reads as follows: "The Executive Committee of the section is the chairperson of the section, the chairperson elect, the immediate past chairperson, and *at least* three other members elected annually. The proposed amendment is in italics.

Nominations. The Executive Committee will nominate Thomas Main (Pacific) to serve as the 2010 Chair-Elect and Lonny Hoffman (Houston), Rebecca Hollander-Blumoff (Wash. U.-St. Louis), Jonathan Siegel (George Washington), and Linda Simard (Suffolk) to serve as elected members of the 2010 Executive Committee. Vikram Amar (UC Davis) and Patrick Woolley (Texas) will serve on the 2010 Executive Committee *ex officio* as Chair and past-Chair respectively.

The Executive Committee gives special thanks to Cathie Struve, who served as past-Chair this year and provided the Executive Committee (and especially its Chair) with wise guidance and invaluable institutional memory).

Section website. The Section has a website at <http://home.att.net/~slomansonb/AALSCivPro.html>, which contains a collection of original pleadings in 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 bills@tjssl.edu.

Mentoring Listserv. The Section has an associated mentoring listserv. 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. Mentors are reminded to update their website information via e-mail to Bill at bills@tjssl.edu. Listserv

members are also reminded to include a copy of relevant messages—for new faculty teaching Civil Procedure—to the CIVPROMENTOR listserv.

Civil Procedure Listserv. Jay Tidmarsh hosts a Civil Procedure listserv. Please contact Jay at jtidsmars@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@law.whittier.edu.

Procedure-related blogs. Blogs that may be of interest to proceduralists include the following:

W. Robin Effron (Brooklyn), Cynthia Fontaine (TEVAS Wesleyan), and Adam Steinman (Cincinnati) edit the **Civil Procedure and Federal Courts Blog**: <http://lawprofessors.typepad.com/civpro/>.

Ben Spencer (Washington & Lee) maintains the **Federal Civil Practice Bulletin**: <http://federalcivilpracticebulletin.blogspot.com/>.

Byron Stier (Southwestern), Howie Erichson (Fordham), Alexandra Lahav (Connecticut), and Beth Burch (FSU) edit the **Mass Tort Litigation Blog**: http://lawprofessors.typepad.com/mass_tort_litigation/.

Howard Bashman (an appellate litigator) maintains the **How Appealing** blog: <http://howappealing.law.com/>

SUPREME COURT UPDATE

Vikram D. Amar

(University of California at Davis School of Law)

During the 2008-2009 Term, the Supreme Court decided a relatively large number of cases focusing or touching on topics commonly taught in basic Civil Procedure courses. While space limitations of this

Newsletter do not permit full treatment of these rulings, short descriptions/analyses of many of the most important ones follow:

Ashcroft v. Iqbal, 128 S.Ct. 1937 (2009) builds upon and arguably expands the Supreme Court's ruling a few years back in *Bell Atlantic v. Twombly* concerning the pleading standards governed by FRCPs 8 and 12(b)(6). In a 5-4 ruling in an action brought by a Muslim Pakistani pretrial detainee against current and former federal government officials accused of a series of unconstitutional actions taken during the course of his confinement, the *Iqbal* Court held that a plaintiff's pleading facts that are "merely consistent" with liability falls short of the "plausibility" standard *Twombly* requires. Per Justice Kennedy, the Court found that plaintiff Iqbal's allegations that the named defendants designed and implemented the policy of which he complained were "conclusory and not entitled to be assumed as true," notwithstanding the traditional view that at the 12(b)(6) stage a court is supposed to take plaintiff's assertions as factually correct. The author of the majority opinion in *Twombly*, Justice Souter, dissented in *Iqbal*. One wonders how, without discovery, plaintiffs in cases like *Iqbal* will ever be able to obtain the information necessary to surmount the "plausibility" threshold. Nor is the difficulty alleviated by the availability of state courts with different (and sometimes lower) pleading standards; defendants in *Iqbal*-like cases would seem to be able to remove to federal court to take advantage of *Iqbal*'s protections. Yet another part of the Court's opinion confirmed that the judicially-created "collateral order" doctrine, most often associated with the Court's opinion in *Cohen v. Beneficial Industrial Loan Corp.*, permitting federal appellate review even in the absence of a final judgment, applies to decisions by district courts rejecting qualified immunity defenses by government officials in civil rights actions, notwithstanding "the limits dictated by [the doctrine's] internal logic and the strict application of the criteria set out in *Cohen*."

In *Pearson v. Callahan*, 129 S.Ct. 808 (2009), the Court unanimously retreated from the two-step sequence it had prescribed in *Saucier v. Katz* for the handling of assertions of qualified immunity by gov-

ernment defendants. In *Saucier*, the Court had ruled that lower courts must first determine whether, under the alleged facts, a constitutional or federal violation had occurred, and then decide whether the law was well-enough settled at the time of the alleged violation for a reasonable defendant to have known better. In *Pearson*, the Court liberated lower courts to proceed in the order that makes sense in each individual case; often times, the *Saucier* sequence will be appropriate (and will be helpful in order to clarify unresolved questions of substantive federal law), but in many instances the second question --whether the law was settled at the time of the alleged violation --should be taken up and resolved first (sometimes obviating the need to resolve the other question.)

In *Carlsbad Technology, Inc., v. HIF Bio, Inc.*, 129 S.Ct. 1862 (2009), the Court held that when a district court, in a properly removed case raising a federal claim, dismisses the only federal claim and then declines to exercise supplemental jurisdiction over the remaining state law claims under 28 U.S.C. §1367 (c), the district court's order of remand is not a remand for lack of subject matter jurisdiction for which appellate review is barred by 28 U.S. C. §§1447(c) and (d).

In *Winter v. Natural Resources Defense Council, Inc.*, 129 S.Ct. 356 (2008), the Court addressed the proper standard to be applied in federal court when a preliminary injunction is sought. In reversing, the Court rejected the Ninth Circuit's suggestion that when a moving party demonstrates a "strong likelihood of prevailing on the merits," it need only show a "possibility" of irreparable harm in order to obtain a preliminary injunction. Instead, the Court ruled, "our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction" (emphasis in original). (It might be worth noting here that, although the point was not directly discussed by the *Winter* Court, the Court's "frequently reiterated standard" for preliminary relief also requires plaintiff to establish that he is *likely* to succeed on the merits, not merely that he raises substantial questions on the merits.)

In *Horne v. Flores*, 129 S.Ct. 2579 (2009), a case involving complicated district court remedies ordered to rectify violations of the Equal Educational Opportunities Act, the Court sent the matter back to the district court to more thoroughly consider whether the defendant's request for relief from the judgment under FRCP 60(b)(5) should be granted. In so doing, the 5-member majority observed: "Rule 60 (b)(5) serves a particularly important function in what we have termed 'institutional reform litigation.' For one thing, injunctions issued in such cases often remain in force for many years, and the passage of time frequently brings about changed circumstances -- changes in the nature of the underlying problem, changes in the governing law or its interpretation by courts, and new policy insights -- that warrant reexamination of the original judgment. [Such cases also] raise sensitive federalism concerns [which implicate] state or local budget priorities."

In a somewhat quirky application of issue preclusion doctrine, the Court in *Bobby v. Bies*, 129 S.Ct. 2145 (2009), reminded that issue preclusion is a device "available [only] to prevailing parties." In *Bies*, a death row inmate was pursuing post-conviction relief and trying to take advantage of the Supreme Court's decision in *Atkins v. Virginia* (decided after his murder conviction), holding that the imposition of the death penalty against mentally retarded individuals violates the Eighth Amendment. In his federal habeas proceedings, he argued that the issue of his own mental retardation had already been resolved in his state criminal trial, in which he had argued (consistent with state law in place at the time) that his retardation should be a factor mitigating against the death penalty. After pointing out that it was not entirely clear whether the state criminal trial did in fact determine the question of Bies' retardation, the Supreme Court found a "[m]ore fundamental error" in Bies' invocation of issue preclusion: the state court's statements about Bies' retardation were not necessary to the judgment affirming his death sentence. "Far from being necessary to the [death penalty] judgment, the Ohio courts' mental retardation findings cut against it." The Ohio courts, after all, imposed the death penalty against Boies in spite of any retardation; whatever else may be said about his

arguments about his mental retardation at the state trial and appellate level, they did not carry the day as to the sentence he sought. And, as the Supreme Court observed, "[i]ssue preclusion . . . does not transform final judgment losers, in civil or criminal proceedings, into partially prevailing parties."

The Court decided at least two significant cases involving the proper interpretation of the increasingly important Federal Arbitration Act (FAA). In *Vaden v. Discover Bank*, 129 S.Ct. 1262 (2009), the Court unanimously affirmed that a petition to enforce a state-law arbitration obligation arises under federal law where the plaintiff brings the action in federal court under § 4 of the FAA even if the petition itself raises no federal question, *provided* that the underlying dispute does. The Justices broke down 5-4 (in an unusual lineup), however, on how to decide whether the underlying dispute raised a federal question. The majority concluded that, at least where a complaint between the parties has been filed, the contours of that complaint -- read through the prism of the well-pleaded complaint rule used by federal courts to decide jurisdiction under 28 U.S.C. § 1331 -- determine federal court access to enforce arbitration under §4. Because, in the *Vaden* dispute, the complaint filed in the case raised only state law claims, and any federal issues entered the dispute only through counterclaims filed by the state court defendant, there was no federal jurisdiction. The Court observed, though, that even though federal jurisdiction was lacking, state courts would have to respect the substantive demands of the FAA and assist in enforcing the arbitration agreement.

In *Arthur Anderson, L.L.P. v. Carlisle*, 129 S.Ct. 1896 (2009), the Court ruled that litigants who were not parties to the relevant arbitration agreement nonetheless are entitled to seek, under § 3 of the FAA, appellate review in federal court of decisions by district courts refusing to stay judicial actions under that section. Immediate appellate review -- an exception to the ordinary requirement of a final judgment -- is available regardless of whether the litigant was a party to the arbitration agreement, and regardless of the strength of the litigant's argument on the merits that a stay of the judicial action should have

been entered. Whether the litigant who has successfully invoked the jurisdiction of the federal appellate court will succeed depends in large part on state law (which is preserved by §2 of the FAA), and the extent to which state law allows him to enforce the agreement even though he was not a party to it.

As this newsletter went to press, the Court decided *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. ____ (2009) (No. 08-678), holding that disclosure orders adverse to the attorney-client privilege are not within the class of orders that are immediately appealable under the collateral order doctrine. Per Justice Sotomayor, the Court held that effective appellate review of such disclosure orders can be accomplished through other means, such as postjudgment review vacating an adverse judgment and remanding for a new trial, certification of a controlling question of law by the district court to the court of appeals, or petition for a writ of mandamus. Recognizing the likely institutional costs of an expansion of the class of collaterally appealable orders, as well as recent legislation designating rulemaking as the preferred means for determining the class of orders that should be immediately appealable, the Court suggested that any further opportunity for immediate appeal of adverse attorney-client privilege rulings should be provided through the rule-making process.

There are a number of federal civil procedure cases on this Term's docket, including: *Hertz Corp. v. Friend* (No. 08-1107) (involving how to properly determine a corporation's principal place of business for diversity jurisdiction purposes under 28 U.S.C. §1332(c)); and *Shady Grove Orthopedi Associates PA v. Allstate Insurance Co.* (No. 08-1008) (involving the question of whether, when state law precludes plaintiffs from maintaining a state-created claim as a class action in state court, federal courts may hear such a claim as a class action under Rule 23).

FEDERAL, STATE AND TRIBAL COURT DECISIONS OF INTEREST

Gary M. Maveal
(University of Detroit Mercy School of Law)

State High Courts Grapple with Extra-Territorial Seizures

Two state supreme courts wrestled with the reach of their powers to seize or compel delivery of property located outside their borders:

Arizona S.Ct. Invalidates Seizure of Defendant's Out-of-State Accounts

Reinforcing how *Pennoyer* principles burden state prosecutors who employ civil procedure, the Arizona Supreme Court invalidated seizure warrants that reached Western Union's accounts originating in other states. *State of Arizona v. Western Union Financial Services, Inc.*, 220 Ariz. 567; 208 P.3d 218 (June 3, 2009).

Investigating the smuggling of illegal drugs and Mexican immigrants into the state, Arizona's Attorney General had successfully seized Western Union wire money transfers to and from Arizona as proceeds of racketeering activity under state law. He then sued Western Union in an Arizona Superior Court, alleging that after the first seizures a marked increase of wire transfers had originated from other states to locations in the State of Sonora, Mexico. Although the State claimed many of these transfers represented proceeds of racketeering in Arizona, it did not specify any particulars of such transfers or details of persons initiating them. Instead, the state secured an ex parte seizure warrant (authorized by state law) to detain and impound person-to-person wire payments placed in 28 other states to 26 locations in Sonora.

Western Union, a Colorado corporation, successfully moved to quash the warrants. The trial court determined that it lacked jurisdiction under the Due Process Clause to seize transfers originating in states other than Arizona. The Arizona Court of Appeals

reversed, reasoning that since Western Union was subject to general *in personam* jurisdiction in Arizona, its debts could be considered within the state for purposes of *in rem* jurisdiction. 219 Ariz. 337; 199 P.3d 592 (Ariz. Ct. of App. 2008).

Arizona's Supreme Court reversed. The majority opinion rejected the Attorney General's argument that money transfers placed in other states constituted debts of Western Union that were "present" wherever it was subject to general jurisdiction. The court emphasized that the purchasers of the transfers could cancel the orders at any time before their payment and that the State's failure to demonstrate jurisdiction over any such purchaser precluded the *in rem* seizures. The opinion discussed at length why *Harris v. Balk*, 198 U.S. 215 (1905), did not offer a viable theory for ascertaining the situs of intangible property. The dissenting Justice urged that the electronic credits at issue had no actual physical location at all and ought to be deemed within Western Union's control wherever it is subject to jurisdiction.

NY Court of Appeals Affirms Judgment Against Garnishee Defendant's Intangibles Held Overseas

Answering a certified question from the Second Circuit Court of Appeals, New York's high court concluded that the State's judgment execution statutes authorize an order that a non-resident garnishee defendant, a Bermuda bank, turn over property located in that country. *Koehler v. The Bank of Bermuda Ltd.*, 11 N.Y.3d 533; 911 N.E.2d 825; 883 N.Y.S.2d 763 (June 4, 2009).

Keohler, a Pennsylvania citizen, had sued Dodwell, a former business partner and Maryland citizen, in Maryland state court in 1993 and won a default judgment of \$2.6 million. He registered the judgment in the U.S. District Court for the Southern District of New York at a time when shares of stock owned by Dodwell were held by the Bank of Bermuda Ltd. in Bermuda. Koehler then sought a writ of garnishment and the district court ordered the Bank to deliver the stock certificates to Koehler. After contesting the issue for many years, the bank eventually conceded that it was subject to personal jurisdiction in New York. Nevertheless, the district court found that it

lacked authority to enforce the turnover order because (1) it lacked in rem jurisdiction over the stock and (2) state law did not authorize attachment of property outside the state.

On appeal, the U.S. Court of Appeals for the Second Circuit refused to decide whether the requested order could be sustained under federal equity powers after *Grupo Mexicano de Desarrollo, S.A.*, 527 U.S. 308 (1999). Instead, it certified the question of the reach of state law to the New York high court. 544 F.3d 78 (September 23, 2008).

In a 4-3 decision, the New York Court of Appeals held that state law authorized the order against the Bermuda bank. Such delivery orders under Article 62 of New York Civil Procedure Law and Rules operate personally against the garnishee and are enforceable by contempt. The majority distinguished *in rem* and *quasi in rem* pre-judgment seizures from those in aid of execution of a money judgment. It held that state law authorized seizure of property located outside the state so long as *in personam* jurisdiction existed over the party subject to the order, whether it be a judgment debtor or a garnishee defendant.

The dissenters found no precedent for such an expansive view of New York law and questioned whether the result was constitutional. They emphasized that none of the parties were New York citizens and that the judgment had no connection with the State. They feared the result would convert New York into a judgment creditor's haven and invite forum shopping to reach debtors assets held by banks around the world.

Tenth Circuit Upholds Right to Jury Trial on Attorneys Fees as Damages

A corporation which suffers summary judgment for its liability on a contract has a Seventh Amendment right to a jury trial on the issue of attorneys fees incurred as damages from the breach. *Simplot v. Chevron Pipeline Co.*, 563 F.3d 1102 (10th Cir., April 23, 2009).

Plaintiffs sued Chevron for its failure to defend and

indemnify it for litigation costs as required under agreements for the plaintiff's purchase of a pipeline. On a motion for summary judgment, the district court found Chevron liable for over \$2.9 million in attorneys' fees and expenses. The Tenth Circuit's opinion reversed after concluding that the district court failed to analyze whether there was a genuine issue of fact with respect to the reasonableness of the fees. The court distinguished cases from other circuits where fees are awardable to the prevailing party on a claim as a matter of contractually-agreed or statutorily-authorized fee shifting. In such cases, the court properly determines the amount of the fees. Where, as here, fees were instead an element of damages for breach of contract, Chevron was entitled to jury trial on the amount.

Pre-Service Removals Reveals Quirk in §1441(b)

District courts continue to face early removals of state court actions on diversity grounds which reveal that 28 U.S.C. §1441(b) falls short of its goal. The statute provides diversity jurisdiction may be the sole grounds for removal "only if none of the parties in interest properly joined *and served* as defendants is a citizen of the State in which such action is brought." Defendants now have the technology to monitor new filings and have tried to circumvent this limitation by removing before being served with process in new actions. The gambit was at issue in two recent decisions surveying opinions on both sides of the issue and reaching opposite conclusions.

In *North v. Precision Airmotive Corp.*, 600 F.Supp.2d 1263 (M.D. Fla. 2009), a foreign corporation removed the action before any defendants were served. The court held that §1441(b)'s plain language allowed removal even though unserved co-defendants were citizens of the forum state. It analogized to *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005), that reliance on Congressional intent was appropriate only if the statute was ambiguous. Other district courts have disregarded the plain language of the statute, claiming to do so to avoid an absurd result. *Sullivan v. Novartis Pharms. Corp.*, 575 F.Supp.2d 640 (D.N.J. 2008). In *Sullivan*, the removing defendant was a citizen of the fo-

rum state. That district court reasoned that the purpose of the statute was clearly to allow a court to disregard in-state defendants if they had been improperly joined to prevent removal. It concluded that the "properly joined and served" language of §1441(b) could not have been designed "to reward defendants for conducting and winning a race, which serves no conceivable public policy goal, to file a notice of removal before the plaintiffs can serve process."

Ashcroft's Mixed Success on *Iqbal* Motions

As courts grapple with applying the Supreme Court's new "plausibility" test under Rule 8(a), a review of the former Attorney General's own cases reveals his mixed success in invoking the new pleading standard.

In *Arar v. Ashcroft*, ___ F.3d ___, 2009 U.S.App. LEXIS 23988 (November 2, 2009), the Second Circuit voted en banc (7-4) to affirm a panel opinion that upheld the dismissal of his allegations under the Torture Victim's Protection Act and the *Bivens* doctrine. Arar had alleged he was detained while changing planes at NYC Kennedy Airport, mistreated for twelve days while in U.S. custody, and then removed to Syria pursuant to an intergovernmental understanding that he would there be interrogated under torture. The court (per Chief Judge Jacobs) found the broad allegations of conspiracy insufficient under *Twombly* and *Iqbal* and that plaintiffs "must provide some factual basis supporting a meeting of the minds . . . to achieve [an] unlawful end." The majority also determined that the complaint failed to identify particular acts by Ashcroft which would allow a conclusion that he was complicit in denying Arar access to the courts, his lawyers or family members during the period prior to his removal to Syria. The four dissenting judges each wrote separate opinions and all joined in each others'; Judge Parker's dissent found Arar's allegations sufficient even after *Iqbal*.

On the other hand, the Ninth Circuit has recently affirmed the denial of Ashcroft's motion to dismiss based upon immunity in an action alleging unconstitutional arrest and detention as a material witness in

a criminal case in 2003. *Al-Kidd v. Ashcroft*, 580 F.3d 949 (September 4, 2009).

In *Al-Kidd*, Ashcroft took an interlocutory appeal from denial of his motion to dismiss. The appellate panel majority distinguished *Iqbal* and found that the Al-Kidd's complaint alleged facts demonstrating plausibility. Plaintiff quoted Ashcroft's public statements as Attorney General in the aftermath of the September 11 attacks that the material witness statute would be used as a "tool to take suspected terrorists off the street" and that "aggressive detention" would be pursued to prevent future attacks. The court found these and other allegations furnished a basis supporting the plaintiff's allegation that Ashcroft had purposefully used the material witness statute as a means of preventive detention and investigation. Judge Bea filed a dissenting opinion. (Ashcroft filed a motion for rehearing en banc which has been answered and remains pending).

West Virginia Supreme Court in *Caperton* Reverses \$50 Million Jury Verdict for Violation of Forum Selection Clause

In the aftermath of the U.S. Supreme Court's ruling on judicial disqualification this past summer in *Caperton v. A.T. Massey Coal Co., Inc.*, ___ U.S. ___, 129 S. Ct. 2252 (2009), the case was reheard by the West Virginia Supreme Court without Chief Judge Benjamin. The State's Supreme Court of Appeals ruled (4-1) on the merits and reversed a \$50 million judgment upon a jury verdict due to plaintiffs' breach of an exclusive forum selection clause. ___ W.Va. ___, 2009 W. Va. LEXIS 107 (November 12, 2009).

The complicated case featured two coal supply agreements with identical forum selection clauses requiring "all actions brought in connection with" them be brought in Buchanan County, Virginia. Plaintiffs' suit in Boone County, West Virginia, instead resulted in the substantial verdict on their claims for (1) tortious interference; (2) fraudulent misrepresentation; and (3) fraudulent concealment. The majority concluded that these tort claims were all brought in connection with the coal supply agreements because they all related to the invocation of a

force majeure clause therein. The court also held that several plaintiffs and defendants who were not signatories to the clause could be fairly bound by it if was foreseeable that they will benefit from or be subject to it. The court also rejected arguments that its new rules on forum clauses should not be applied retroactively.

Fugitive Claim in Civil Forfeiture Action Dismissed Under Disentitlement Statute

The interesting part is that the fugitive was named Maxim Lam. *United States v. \$6,190.00 in U.S. Currency*, 581 F.3d 881 (9th Cir. 2009) (dismissal under 28 U.S.C. §2466).

STATUTORY DEVELOPMENTS

Joel H. Samuels

(University of South Carolina School of Law)

State legislators tend to turn to the rules of civil procedure only rarely, so it is uncommon for state legislatures to be active in a single area at the same time. However, in the past several years, state legislatures have started to take action to revise the rules regarding electronic discovery. As practitioners have known for some time, discoverable information that was previously in the form of paper documents is now primarily stored electronically.

In 2006, the Federal Rules of Civil Procedure were amended to modernize the discovery process accordingly. As typically occurs, the states were, for the most part, slower to adopt electronic discovery amendments to their civil procedure rules. However, there appears to have been a wave of change in recent years; at least fifteen states have adopted new e-discovery provisions in the last two years. Many of these amendments are adaptations of the 2006 Federal Amendments. In addition, the National Conference of Commissioners on Uniform State Laws (NCCUSL) has developed Uniform Rules Relating to Discovery of Electronically Stored Information and the Conference of Chief Justices has provided Guidelines for State Trial Courts Regarding Discov-

ery of Electronically-Stored Information, from which states have also borrowed in formulating their discovery rules.

Ten years ago, Texas was the first state to adopt e-discovery rules. The Texas amendments required that “a party requesting production of magnetic or electronic data must specifically request the data, specify the form in which it wants the data produced, and specify any extraordinary steps for retrieval and translation. Unless ordered otherwise, the responding party need only produce the data reasonably available in the ordinary course of business in reasonably usable form.”ⁱ

California passed comprehensive e-discovery amendments in June 2009ⁱⁱ as part of emergency measures that were to take effect immediately. The drafters of the California rules commented that they found the NCCUSL Uniform Rules to be particularly helpful.ⁱⁱⁱ The new California rules differ from the Federal Amendments in several ways. The safe harbor provisions, which provide that there shall be no sanctions for failure to provide electronic information that has been lost, damaged, or altered due to routine, good faith operation of an electronic information system, mirror Federal Rule 37(e) but add that they apply to attorneys as well as parties.^{iv} An additional sentence states that this subdivision is not to be “construed to alter any obligation to preserve discoverable information.” Further, the California rules lack a presumption against production from inaccessible sources. The producing party must affirmatively object in such instances.^v

Virginia amended its civil rules to include e-discovery provisions effective January 1, 2009.^{vi} Virginia’s amendments include many of the 2006 Federal Amendments with some notable differences. Absent are the “safe harbor provisions” and the “meet and confer obligations,” which require the parties to conduct an early conference on electronic discovery. However, the Virginia rules provide that at a court’s discretion, it may order counsel to discuss “preservation of potentially discoverable information, including electronically stored information and information that may be located in sources that are

believed not reasonably accessible.”^{vii} In addition, the Virginia rules differ in that they only require production of electronic information in the form in which it is maintained “if it is reasonably useable in such form.”^{viii}

Tennessee’s amendments became effective July 1, 2009. In addition to being modeled after the Federal Rules,^{ix} these amendments borrow from the Guidelines for State Trial Courts Regarding Discovery of Electronically-Stored Information issued by the Conference of Chief Justices. The Tennessee rules also lack the “meet and confer” provision.

While a majority of states have adopted e-discovery provisions, there are a few notable exceptions. The state of New York, for example, has not yet codified specific electronic discovery provisions and therefore maintains an ad hoc approach to dealing with electronic discovery. Proposed e-discovery legislation stalled in the legislature earlier this year. One notable difference between the federal rules and the current New York rules is that in New York state courts, costs of discovery requests are generally borne by the requester. Because the costs of electronic discovery can be so great, this is a significant difference from the federal rules, which require that each party pay its own costs.^x In an August 2009 report by the Joint Committee on Electronic Discovery of the Bar of the City of New York,^{xi} the authors strongly recommended several changes to the civil procedure rules to expressly address electronic discovery including the duty to preserve evidence; the scope of preservation; the scope of production; inadvertent production of privileged material; and the form of production. However, the report specified that the authors were not recommending changes to existing metadata and cost-shifting rules. Thus, this important distinction between state and federal courts regarding who is responsible for discovery costs will likely continue.

In addition to the states highlighted, the following states also adopted e-discovery provisions during the last two years: Alaska, Arizona, Arkansas, Indiana, Iowa, Kansas, Maine, Michigan, Montana, Nebraska, North Dakota, and Ohio.

The following states had e-discovery amendments in place prior to 2008: Idaho, Louisiana, Maryland, Minnesota, Mississippi, New Jersey, Texas, and Utah.

- ⁱ. TX Rules of Civ. Pro. Part II, R. 196. cmt. 3
- ⁱⁱ. Assembly Bill 5, Electronic Discovery Act (Cal. 2009). OR Cal. Code Civ. Proc. §§ 2016.010 et seq.
- ⁱⁱⁱ. Judicial Council of California Administrative Office of the Courts, Report on Electronic Discovery: Proposed Legislation, available at <http://www.courtinfo.ca.gov/jc/documents/reports/042508item4.pdf>.
- ^{iv}. Cal. Code Civ Proc. §§ 2031.060; 2031.300; 2031.310; 2031.320; 1985.8.
- ^v. Thomas Y. Allman, State E-Discovery Rulemaking after the 2006 Federal Amendments: An Update (as of Sept. 2, 2009), available at <http://www.law.northwestern.edu/searlecenter/uploads/01%20-%20Allman%20-%20State%20Rulemaking%209-2009.pdf>.
- ^{vi}. Va. R. Civ. P. 4:1, 4:4, 4:8, 4:9, 4:9A & 4:13, available at http://www.courts.state.va.us/courts/scv/amendments/2008_1031_4_1_rule.pdf.
- ^{vii}. Va. R. Civ. P. 4.13.
- ^{viii}. Va. R. Civ. P. 4.9.
- ^{ix}. Baker Donelson, New E-Discovery Rules for Tennessee (Mar. 31, 2009), available at <http://www.bakerdonelson.com/Content.aspx?NodeID=200&PublicationID=585>.
- ^x. Robert W. Trenchard, *Two Roads Diverge in E-Discovery Costs*, New York Law Journal (Nov. 17, 2009), available at <http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202435521647&slreturn=1&hblogin=1#12>.
- ^{xi}. Bar of the City of New York, *Explosion of Electronic Discovery in All Areas of Litigation Necessitates Changes in CPLR* (August 2009), available at <http://www.nybar.org/pdf/report/uploads/20071732-ExplosionofElectronicDiscovery.pdf>.

UPDATE ON FEDERAL RULES OF CIVIL PROCEDURE

Aaron-Andrew P. Bruhl
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After enjoying a break from amendments last year, we close 2009 with a substantial number of amend-

ments to the Federal Rules of Civil Procedure. Most of the year's amendments, which took effect on December 1, are part of the Standing Committee's comprehensive time-computation project, which aimed to simplify the calculation of time periods throughout the federal rules. There were a few other notable amendments as well. The summary below begins with the December 2009 amendments and then looks ahead to the future.

December 2009 Amendments

Time-Computation Amendments

The major change to the method of calculating time is the adoption of a "days are days" method in revised Rule 6 – that is, weekends and holidays are no longer excluded from the calculation of short time periods, as they generally had been under prior practice. Amended Rule 6 also clarifies how to count backward when a time period is expressed in terms of time before an event (e.g., 14 days before a scheduled hearing), describes how to calculate time periods expressed in hours, and specifies that electronic filings are timely when filed before midnight.

In addition to changing the general method for calculating time, the time-computation amendments alter specific deadlines in over twenty civil rules. The shorter deadlines found in the rules were typically lengthened so as to avoid becoming unduly brief under the new computation method, and there is now a general preference for stating deadlines shorter than 30 days in multiples of 7 (e.g., 21 days instead of 20 days for filing an amended pleading). (In Pub. L. No. 111-16, 123 Stat. 1607 (2009), Congress amended a number of statutory time periods to harmonize them with the new approach.)

Although most of the revisions to specific time periods are minor, a few deserve special mention. In particular, the period for filing post-judgment motions under Rules 50, 52, and 59 has been extended from 10 days to 28 days. This change was made in response to the realization that 10 days was often too little time to prepare a proper and fully supported motion (which led courts and parties to embrace

various methods of circumventing the 10-day limit anyway). In addition, Rule 56 is amended to address the timing of motions for summary judgment. The prior rule distinguished between claiming and defending parties as to when a motion could be filed, but the new rule permits either party to move for summary judgment at any time until 30 days after the close of discovery. It also establishes a timeline for filing responses and replies. All of these are defaults that can be modified by local rule or court order. (Note: some of these mechanical aspects of Rule 56 are set to be revised again in December 2010; see below.)

Keep in mind as well that local rules in many federal courts across the country are being amended to harmonize them with the new approach of the national rules.

There were also a few non-time-computation amendments, to which we next turn.

Rule 13

Rule 13 has been amended to delete subsection (f), which concerns amendments to pleadings to add a counterclaim, on the ground that it was redundant and potentially misleading in light of Rule 15.

Rule 15

Amendments to Rule 15(a)(1) are especially likely to be relevant to in-class hypos and short-answer exam questions. Under prior practice, the filing of a responsive pleading immediately cut off the pleader's ability to amend as of right, but the filing of a Rule 12 motion had no such effect. This meant, among other things, that a plaintiff could file an amended complaint after the court had already expended substantial effort considering a motion to dismiss. Under the revised rule, the differential treatment is eliminated: a party can amend once as of right within 21 days after being served with either a responsive pleading *or* a Rule 12 motion, whichever comes first. (Amendments are still permitted with leave of court in other circumstances, of course.) As a result of the new rule, a plaintiff always has one chance to amend

no matter whether the defendant answers or moves to dismiss – but only if the plaintiff acts promptly.

Rule 48

Rule 48 has been amended to permit the court to poll the jurors individually and requires the court to do so if a party requests. (Criminal Rule 31(d) already so provides.)

Rule 62.1 (and Appellate Rule 12.1)

The pendency of an appeal ordinarily bars the district court from granting relief concerning the subject of the appeal, such as through a Rule 60(b) motion. In some cases, efficiency would be served by permitting the district court to grant such relief rather than proceeding with the appeal. Accordingly, most courts have developed mechanisms through which a district court can indicate its inclination to grant post-judgment relief, whereupon the court of appeals can order a limited remand or otherwise restore the district court's jurisdiction. New Rule 62.1 and its companion appellate rule codify and regularize this "indicative ruling" procedure.

Rule 81

Rule 81(d) has been amended to provide that the term "state" includes not only the District of Columbia but also U.S. commonwealths and territories.

Proposed December 2010 Amendments

At its September 2009 meeting, the Judicial Conference approved several amendments to the civil rules, including notable changes to Rules 26 and 56, and forwarded the proposed amendments to the Supreme Court. If approved by the Court and not blocked by Congress, these amendments would take effect in December 2010.

Rule 26

The proposed amendments to Rule 26 attempt to address difficulties with expert witness discovery that have arisen since the 1993 amendments. There are

two significant changes. First, the proposed amendments curtail discovery by extending work-product protection to: (1) draft expert reports and disclosures and (2) most communications between attorneys and 26(a)(2)(B) experts. The latter protection does not extend to communications concerning an expert's compensation or the facts, data, or assumptions given to the expert and considered in forming the expert's opinion. These limits on discovery were largely motivated by the fact that attempts at such discovery unduly increase cost and protract the proceedings even though the attempts are often fruitless because parties engage in various tactics (themselves often inefficient) in order to avoid creating discoverable information. Second, the amended rule would require a party to provide a brief summary of the facts and opinions to be addressed by those expert witnesses who are not required to prepare a 26(a)(2)(B) report. (Typical examples of such witnesses are treating physicians and government accident investigators.)

Rule 56

Other proposed amendments modify Rule 56 with the aim of clarifying and improving summary judgment procedures. The Rule will be reorganized and much of its text rewritten, but the amendments are, for the most part, not tremendously significant. Among other things, the amendments describe how a party's factual contentions are to be shown, explain what happens when a party fails to respond to the other side's contentions, provide for making evidentiary objections, and describe procedures for *sua sponte* action. Perhaps of greater interest, careful readers will note that the word "shall" – as in "the judgment sought shall be rendered" – makes a return after a brief hiatus. The restyling project recently banished "shall" from the rules in favor of "must" or "should," the latter of which was used in restyled Rule 56. Numerous commentators objected that a body of law had developed concerning whether a court had any discretion to deny summary judgment when the standard had been met and that changing the wording threatened to create the appearance of substantive alteration. The Advisory Committee acknowledged the debate over whether discretion ex-

isted and wished to leave that matter as it stood by restoring the traditional "shall."

One especially controversial aspect of the original Rule 56 proposal that has *not* been carried through is the formal point-counterpoint procedure for documenting the (non)existence of a genuine dispute of material fact. That procedure, required by local rules in some courts, had been opposed by many observers as unduly complicated and perhaps unfair to some classes of plaintiffs.

Other Changes

Other proposed December 2010 amendments remove Rule 8(c)'s designation of discharge in bankruptcy as an affirmative defense, which was deemed erroneous or at least confusing in light of statutory provisions concerning discharged debts, and make technical corrections to Form 52, which provides a sample Rule 26(f) conference report.

On the Horizon

Looking ahead to other future developments, the Advisory Committee is planning a major conference in May 2010 at Duke University School of Law to discuss perceived defects in federal pretrial litigation, especially discovery. The Committee is also considering, among other things, changes to Rule 45 subpoena provisions and Rule 4 service rules in cases involving government defendants. Pleading standards have, unsurprisingly, been on the Committee's discussion agenda, but there are no concrete proposals for action through the rulemaking process (though legislation to overturn recent Supreme Court decisions has been introduced in Congress; see as discussed elsewhere in this newsletter).

* * *

Additional information on the rulemaking process and proposed amendments is available from the Administrative Office of the U.S. Courts at <http://www.uscourts.gov/rules/>.

BOOKS OF INTEREST

Rebecca Hollander-Blumoff
(Washington University School of Law)

If you've ever had a class torn apart by disagreement over the ruling in *Hanson v. Denckla*, you may have considered an in-class discussion of realism and formalism to help students understand the way that judges reach decisions. In **Beyond the Formalist-Realist Divide: The Role of Politics in Judging** (Princeton 2009), Brian Z. Tamanaha tears apart the realism-formalism paradigm, suggesting that the way many of us understand this well-worn distinction may be flat-out wrong. In a sophisticated and nuanced analysis, Tamanaha carefully debunks what he calls the "myth" about the legal formalists, showing, through extensive historical documentation, that many legal scholars and jurists rejected formalism and stated quite explicitly that realist principles guided legal decision-making, well-before the "realists" came to prominence.

Tamanaha then develops a robust vision of what he calls "balanced realism," which unites rule-bound and skeptical aspects of judging. On the one hand, judges do sometimes make choices and are influenced by their personal biases; on the other hand, judges abide by the law and render relatively predictable decisions that are consistent with prior law. Tamanaha also takes on recent quantitative studies of judging, using the evidence he has marshaled in favor of balanced realism to argue that the efforts by scholars to prove that judging is political has distorted their work and has overstated the role that politics play in judging.

Lucas A. Powe, Jr.'s **The Supreme Court and the American Elite, 1789-2008** (Harvard 2009) also sheds light on the relationship between formalism and realism. The book spans the time frame beginning with the drafting of the Constitution and ending with the 2008 decisions on the Guantanamo detainees' rights. In this book, Powe compellingly shows how major Supreme Court rulings, although framed in constitutional terms, accord with the wishes of powerful politicians of the day. Powe makes a

strong case for the political function of the Supreme Court as an important parallel player to the ruling political regime of the day, suggesting that even some of the most historically controversial decisions by the Court seem less controversial viewed against the political backdrop of their time. For those who are particularly interested in history and in the historical foundations of our country's legal system, noted historian Gordon S. Wood has published, to tremendous acclaim, **Empire of Liberty: A History of the Early Republic, 1789-1815** (Oxford 2009). The book is an exhaustive examination of the early years of the American republic. Wood offers a comprehensive history that offers a fresh perspective and integrates politics and law with the culture, society, and economy of the era.

Swinging the pendulum back to the formalist side of things, Frederick Schauer has published **Thinking Like a Lawyer: A New Introduction to Legal Reasoning** (Harvard 2009). First-year law students might find this a useful book to read, but this comprehensive and clear book is also aimed at a scholarly audience, offering an original exposition of basic legal concepts including rules, precedent, authority, analogical reasoning, the common law, statutory interpretation, legal realism, judicial opinions, legal facts, and burden of proof. Schauer suggests that the rule of law privileges values of stability, predictability, and constraint on individual decision-makers perhaps more than producing the best result in every case.

Turning to more discrete civil procedure topics, Martin H. Redish takes a novel approach to the class action in **Wholesale Justice: Constitutional Democracy and the Problem of the Class Action Lawsuit** (Stanford 2009). Far from offering a traditional civil procedure perspective on the rules and practice of class actions, Redish examines the class action from a political and democratic theory perspective, making the case that the modern class action is a threat to fundamental constitutional principles such as procedural due process and separation of powers. In a thoughtful, persuasive analysis, Redish suggests that on the micro level, class actions may deprive individuals of the opportunity to vindicate their substan-

tive rights, while on the macro level, class actions may undermine the idea of democratic accountability by dramatically changing substantive law. Redish explores the role of individual autonomy in democratic theory and its implications in the class action context. Redish concludes by suggesting a re-shaping of the class action in order to restore its original procedural purposes without violating important principles of American democracy.

In **The Law Market** (Oxford 2009), Erin A. O'Hara and Larry E. Ribstein tackle the increasingly global nature of commercial relationships and how this affects the question of what law governs in any particular dispute. Characterizing a purely territorial approach to choice of law as anachronistic, the authors marshal empirical data as well as political and economic analysis to support their claim for an existence of a market in law. The authors clearly and crisply explore the ability of parties to privately contract for the law of a particular jurisdiction, as well as the implications of this private contracting, in a variety of contexts, including business formation, consumer contracts, property transactions, and marriage. The book also considers the relationship between choice of law and choice of forum provisions in contracts, and explores the social problems that are sometimes created because of the law market. Finally, the authors propose that legislatures ought to debate and determine whether choice-of-law clauses ought to be respected rather than allowing this determination to be made on a case-by-case basis by judges.

Thomas O. McGarity explores federal agency preemption of state common law claims in **The Preemption War: When Federal Bureaucracies Trump Local Juries** (Yale 2008). McGarity's focus in this thoughtful and timely book is on the waning role of juries and judges at common law to regulate and to dispense corrective justice, in favor of federal agency oversight. McGarity begins with a recent history of preemption, focusing on the Supreme Court's determination that the deterrent function of the common law is similar enough to the regulation function of federal agencies to invoke preemption analysis. McGarity calls recent jurisprudence an ag-

gressive exercise of federal power to preempt traditional state claims. In exploring this shift, McGarity highlights the tension between consumers, companies, common law, and preemption; McGarity analyzes the relationship between what he calls the vertical politics of state versus federal power and the horizontal politics of governmental versus private sector power. Finally, McGarity suggest criteria for Congress, courts, and agencies to use in resolving preemption battles in a number of substantive areas.

UPCOMING CONFERENCES AND SYMPOSIA

Thomas Main

(University of the Pacific, McGeorge School of Law)

Principles of Aggregate Litigation, George Washington University Law School, Washington, D.C., March 12, 2010. For more details, consult the GW Law School Website in February of 2010.

Reflections on Iqbal: Discerning its Rule, Grappling with its Implications, Penn State University, The Dickinson School of Law, Carlisle, PA, March 26, 2010. For more details, see <http://law.psu.edu/events/Iqbal>.

Charting Your Course in a Shifting Field, AALS Mid-Year Meeting, New York City, NY, June 10-12, 2010. For more details, see http://www.aals.org/events_midyear.php.

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The Advisory Committee on Civil Rules will likely sponsor a conference on civil litigation at Duke in May 2010. For preliminary information, see pages 98-101 of the materials for the October 2009 meeting at http://www.uscourts.gov/rules/Agenda_Books.htm#civil.

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Volume 14, Issue 1 of the Lewis & Clark Law Review (forthcoming) will include several papers from a symposium on Iqbal. The issue combines perspectives from civil procedure, national security, constitutional law, immigration, and civil rights scholars.