2010 AALS Civil Procedure Section Newsletter

Fall 2010 Newsletter

2010 Annual Meeting Program

Impact of Electronic Revolution on Litigation

Saturday, January 8, 2011 1:30 p.m.

The civil procedure program at the annual meeting will be held on Saturday, January 8, 2011, beginning at 1:30, p.m. As of the time this newsletter is being prepared, the location of the program is still not known. Please pay careful attention to the locational information distributed via the AALS website and at the conference when you arrive. The program is entitled "The Impact of the Electronic Revolution on Litigation." Our four principal speakers are: (1) Jason Baron, Director of Litigation, Office of the General Counsel, National Archives and Records Administration; (2) Deborah Hensler, Judge John W. Ford Professor of Dispute Resolution and Associate Dean, Graduate Studies Stanford Law School; (3) Loren Kieve, Kieve Law Offices; and (4) Richard Marcus, Horace O. Coil ('57) Chair in Litigation, Hastings College of the Law. Lonny Hoffman from the University of Houston will moderate the panel.

Rather than following the traditional format of each speaker speaking, one after another, for an allotted period of time, in this year's program the moderator will direct the conversation among the participants. The program will have four main parts:

Part I: Technology's Impact on Litigation Practice: Most Significant Current Developments. In this part, each speaker will offer his or her perspective on the one or two most significant developments today in terms of technology's impact on litigation practice. Topics likely to be covered here include: e-discovery, cloud computing, legal advertising, e-networking, court access and, more generally, how technology is and will be transforming pre-trial and trial practice.

Part II: The State of Empirical Work Thus Far. In this part of the program, speakers will summarize and comment on the state of the empirical work that has been done so far in these subject areas, and will focus some attention commenting on differences in study results.

Part III: Recent (and Potential Future) Rule and Statutory Reforms. This part will then focus on what rule/statutory reforms have been passed, are being proposed, or are being considered to address the issues that arise in litigation practice as a result of the electronic developments we discussed above in Part I and which are implicated by the study findings in Part II.

Part IV: In the Classroom. Finally, in the last part of the program, each speaker will comment on what they think the developments and issues we have been discussing mean for law professors and students in the classroom.

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Newsletter Editor:
Linda Simard (Suffolk University Law School)

OTHER PROGRAMS OF INTEREST AT THE ANNUAL MEETING

Jonathan R. Siegel

(George Washington University Law School)

Wednesday, January 5
2:00 - 3:45 pm
Section on Civil Rights: The Many Faces of Iqbal: Pleadings, Supervisory Liability and Bivens.
The program will explore the impact of *Iqbal* on civil rights litigation. Coverage includes the special *Iqbal* pleading rules.

Thursday, January 6
9:00 am – 12:00 pm
Section on Jewish Law: Rabbinical Courts in American Law
An examination of rabbinical courts as a means of alternative dispute resolution.

7:00 – 9:00 pm
AALS Gala Reception
Because civil procedure professors like to party as much as anybody!

Friday, January 7
10:30 am – 12:15 pm
Section on Indian Nations and Indigenous Peoples: Tribal-State Court Cooperative Models and Arrangements
The program will discuss collaborative efforts between tribal and state courts.

4:00 – 5:45 pm
Section on Litigation (Co-Sponsored by Sections on Professional Responsibility and Civil Procedure): Current Issues in Judicial Disqualification: Assessing the Landscape Post-Caperton, Citizens United and the 2007 ABA Model Code for Judicial Conduct
The program will consider the law of judicial recusal in the wake of recent decisions.

Saturday, January 8
8:30 – 10:15 am
Section on Remedies: Rebirth of the Irreparable Injury Rule?
An examination of recent cases supporting the principle that irreparable injury is a prerequisite for injunctive relief.

10:30 am – 12:15 pm
Section on Conflict of Laws: Choice of Law and Complex Litigation
An examination of choice of law principles in class actions, particularly under the Class Action Fairness Act.

1:30 – 3:15 pm
Section on Civil Procedure: Impact of Electronic Revolution on Litigation
The main event! Examination of e-discovery, electronic technology at trial and in pre-trial proceedings, electronic records, and other impacts of technology on litigation.

SECTION ANNOUNCEMENTS

Vikram Amar

(University of California, Davis School of Law)

Business Meeting. There will be a business meeting at the conclusion of the Section's annual meeting program on January 8. The primary piece of business will be the nomination of individuals to serve on the 2011 Executive committee. At present, the Executive Committee expects to nominate Lonny Hoffman (Houston) to serve as the 2011 Chair Elect and Rebecca
Hollander-Blumoff (Wash. U.-St. Louis), Jonathan Siegel (George Washington), and Linda Simard (Suffolk) to serve as elected members of the 2011Executive Committee. Thomas Main (Pacific) and Vikram Amar (UC Davis) will serve on the 2011 Executive Committee *ex officio* as Chair and past- Chair respectively. The Executive Committee gives special thanks to Patrick Woolley, who served as past-Chair this year and provided the Executive Committee with wise guidance and invaluable institutional memory.

Section website. The Section has a website at: http://www.tjsl.edu/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@tjsl.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@tjsl.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 jtidmars@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. Jeremy Counseller (Baylor) and Rory Ryan (Baylor) edit the **Civil Procedure Prof 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 2009-2010 Term, the Supreme Court decided several 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 all such rulings here, short descriptions/analyses of some of the most important ones follow:

In *Mohawk Industries v. Carpenter*, 130 S.Ct. 599 (2009), the Court ruled that disclosure orders alleged to be adverse to the attorney-client privilege do not qualify for immediate appeal under the so-called "collateral order" doctrine. Such disclosure orders can effectively be reviewed on appeal by means other than collateral order appeal. These other avenues include postjudgment review, in which appellate courts can remedy improper disclosure of privileged materials by vacating an adverse judgment and remanding for a new trial in which the protected materials and its fruits are excluded from evidence. Moreover, litigants faced with a particularly injurious or novel ruling by a district court concerning the attorney-client privilege can ask the district court to certify, and the court of appeals to accept, an interlocutory appeal involving a "controlling question of law" the prompt resolution of which "may materially advance the ultimate termination of the litigation" under 28 U.S.C. § 1292(b). Additionally, mandamus may be available in extraordinary circumstances where disclosure works a manifest injustice. The Court observed that the admonition that the class of collaterally appealable orders must remain "narrow and selective in its membership" has acquired special force in recent years. Justice Sotomayor wrote the opinion in which all Justices except Justice Thomas joined in full. Justice Thomas filed an opinion concurring in part and concurring in the judgment.

In *Hertz Corp. v. Friend*, 130 S.Ct. 1181 (2010), the Court resolved a question on which the federal Courts of Appeals had for many years taken various approaches -- how a corporation's principal place of business is to be determined for purposes of corporate citizenship relating to diversity under 28 U.S.C. § 1332(c)(1). The Court held in a unanimous opinion by Justice Breyer that the phrase "principal place of business" in § 1332(c)(1) refers to the place where a corporation's high level officers direct, control and coordinate the corporation's activities, i.e., its "nerve center," which will typically be found at its corporate headquarters. The Court reasoned that the language of the section makes clear that a single place be chosen, and that the place to be selected should be, because of the word "principal," the main or most important locale. Moreover, a place is not a state, but rather a location within a state, and that a corporation's nerve center is typically a single place. While the Court acknowledged that there may be no single test that satisfies all the administrative and purposive criteria implicated by the section's language and design, and that there will be hard cases under the "nerve center" test as under other tests, there needs to be a uniform interpretation of the statutory phrase, and the nerve center approach is the one that, on balance, best coheres with the congressional intent behind the provision and the words Congress used.

In *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*, 130 S.Ct. 1431 (2010), a fractured Court, reversing the Second Circuit, held that a New York law prohibiting class actions in suits seeking penalties or statutory minimum damages could not be applied in federal court. Justice Scalia, writing for himself and four other Justices (Chief Justice Roberts and Justices Stevens, Thomas and Sotomayor) found that the New York law

conflicted with Federal Rule of Civil Procedure (FRCP) 23 governing class actions, because Rule 23 addresses the question whether a suit may proceed as a class action by laying out the conditions under which a "class action may be maintained." The reasoning of the dissent and the Second Circuit, under which there was no conflict between the New York law and Rule 23 because eligibility for class treatment (the subject of the New York law) is distinct from certificability of a given class (the subject of Rule 23) was rejected; the line between eligibility and certificability is entirely artificial and in any event Rule 23 speaks to eligibility. Justice Scalia and four others also went on to find that Rule 23 was a valid rule under the federal Rules Enabling Act (REA), 28 U.S.C. § 2072(b), although Justice Stevens (a member of the majority as to result) did not join Justice Scalia's opinion concerning the precise scope of the requirement in the REA that a federal procedural Rule "not abridge, enlarge or modify any substantive right."

In *Stolt-Nielsen v. Animalfeeds International*, 130 S.Ct. 1758 (2010), the Court held, in a shipping dispute brought in New York, that imposing class arbitration on parties who have not agreed to authorize class arbitration is inconsistent with the Federal Arbitration Act (FAA), 9 U.S.C. § 1 et. seq.. The Court also ruled that the arbitration panel in the dispute exceeded its powers by finding power to proceed with class arbitration -- when the arbitration agreement was silent on the issue of class arbitration – when it based its decision to proceed on its own policy choice rather than on a rule of decision derived from the FAA or from Maritime or New York law. Justice Alito wrote the majority opinion. Justice Ginsburg wrote a dissent joined by Justices Stevens and Breyer. Justice Sotomayor took no part in the consideration or decision in the case. In another case covered by the FAA, the Court in *Rent-a-Center West, Inc. v. Jackson*, 130 S.Ct. 2772 (2010), confronted a situation in which an employee claimed that the arbitration agreement that his former employer required him to sign as a condition of employment was unconscionable and thus unenforceable under Nevada law. The Court ruled, 5-4, that where an agreement to arbitrate includes an agreement that the arbitrator will determine enforceability of the agreement, if a party challenges in particular the enforceability of that specific provision, the district court considers the challenge, but if a party challenges the enforceability of the arbitration agreement as a whole, the challenge is for the arbitrator. Justice Scalia wrote the majority opinion; Justice Stevens wrote a dissent joined by Justices Ginsburg, Breyer and Sotomayor.

And in *Krupski v. Costa Crociere S.p.A.*, 130 S.Ct. 2485 (2010), the Court held that "relation back" under FRCP 15(1)(C) depends on what the party *who is to be added* knew or should have known at the time of the original pleading, not on the *amending party's* knowledge or timeliness in seeking to amend the pleading. The Court was unanimous as to outcome; Justice Sotomayor wrote an opinion joined by seven others, and Justice Scalia filed an opinion concurring in part and concurring in the result.

LOWER FEDERAL AND STATE COURT DECISIONS OF INTEREST

Gary M. Maveal

(University of Detroit Mercy School of Law)

Mixed Mandamus Success in the Federal Circuits

2010 saw a spate of rulings on mandamus proceedings in U.S. Courts of Appeals. Two of three noteworthy petitions succeeded.

The first involved civil rights claims by protestors at the 2004 Republican National Convention. Plaintiffs sought discovery of voluminous reports on potential security threats made by undercover police officers in the months preceding the convention. The trial court compelled the City of New York to produce the documents, but the Second Circuit granted a writ of mandamus. The Court found that a writ was the only effective means to prevent the harm from disclosure of the reports and that the City had shown a clear right to it. The trial court erred in finding that, although the law enforcement privilege applied to the records, it was overcome by the plaintiffs' need for access to them. *In re City of New York*, 607 F.3d 923 (2d Cir., June 9).

The second mandamus proceeding involved a challenge to a district court order compelling discovery of identities of anonymous online speakers. An action by Quixtar, Inc. (successor to the Amway Corporation) against Signature Mgmt. Team, LLC (TEAM) claimed that TEAM had orchestrated an Internet smear campaign to disparage Quixtar's business practices. On deposition, a TEAM employee claimed the First Amendment in refusing to identify anonymous speakers on several blogs. When the district court ordered the disclosure, three of the speakers sought mandamus.

The Ninth Circuit Court of Appeals denied the writ, finding that the identities of the blog posters were entitled to the same protections given other commercial speech – no more and no less because of their anonymity. It found no clear error in the district court's balancing of the plaintiff's need for the information against the speaker's First Amendment interests. The lower court was satisfied the statements in question made out a prima facie case of defamation. Though the Ninth

Circuit panel found that standard unreasonably strict as a rule for future cases, the fact that it had been met in this case made mandamus inappropriate. *In re Anonymous Online Speakers*, 611 F.3d 653 (9th Cir., July 12).

A third high-profile suit involved issues of post-judgment compliance with court orders addressing pollution of the Florida Everglades. The district court had directed EPA Administrator Lisa Jackson to appear and address the agency's compliance with its orders. When the district court denied the EPA's motion to substitute its Assistant Administrator for Water, the Eleventh Circuit granted mandamus. It found that mandamus was an appropriate remedy to allow high-ranking officials an avenue to avoid contempt and concluded that the record did not establish a special need for the personal appearance of Administrator. A dissenting judge felt that the extraordinary action of the district court was justified by the extensive record of the agency's disobedience of the court's order. *In re U.S. EPA*, 2010 U.S. App. LEXIS 22269 (11th Cir., October 28).

New Hampshire High Court Upholds Restraining Order Against Non-Resident who has no Contacts with the State

A non-resident husband with no contacts with the forum state can be enjoined from engaging in threats or abuse against his wife. The Supreme Court of New Hampshire so held in *Hemenway v. Hemenway*, 159 N.H. 680, 992 A.2d 575 (January 29).

A majority of states have enacted statutes allowing spouses fleeing abusive homesteads in one state to seek protective orders in their new state of residence – even if it is only temporary. In *Hemenway*, the plaintiff alleged her husband's threats against her in two other states were the reason she moved to New Hampshire. She won an *ex parte* temporary restraining order against him. Citing *Pennoyer v. Neff* and its dictum that states always have the power to determine the civil status of their inhabitants, the high court found the state had power to declare the plaintiff's status as "protected" against the defendant's abuse under its laws against domestic assault. However, it vacated that part of the injunction that imposed an affirmative obligation upon the husband to surrender his weapons.

Chief Justice of Florida Supreme Court Directs Trial Courts to Ensure Open Access to Foreclosure Proceedings

Responding to complaints from the Florida Press Association, the Florida Supreme Court's Chief Justice reminded lower courts of their duty to ensure that foreclosure proceedings remained open to the public. The media had documented a number of complaints where pro se litigants, reporters and observers were told that foreclosure cases were conducted in chambers or that only attorneys were authorized to attend court sessions.

On November 17, Chief Justice Charles T. Canady wrote the chief judges of the state's 20 circuit courts to uphold the presumption in favor of open courts by appropriate supervision of their trial judges, court clerks, and bailiffs. The order is available online at http://www.aclu.org/files/assets/2010-11-17-CanadyLetter.pdf.

Substitution of Plaintiff has Substantive Aspect under *Erie*

If a party dies while the action is pending, Fed.R.Civ.P. 25(a) allows the court to substitute the decedent's successor or representative upon a motion made within 90 days. The Eight Circuit addressed the *Erie* implications on such motions in *Torres v. Bayer Corp.,* 616 F.3d 778 (8th Cir., August 10).

Plaintiff Melinda Torres died in California while her products liability action against Bayer Corporation was pending in Minnesota. After Bayer filed a suggestion of the death, her attorney filed a motion to substitute Nicole Hampton and Stephanie O'Neal, her daughters and sole heirs, as co-plaintiffs. After the two women signed a joint affidavit attesting to their status, the district court ruled they had failed to demonstrate their legal authority to pursue Torres' claim. They then filed a "Proof of Heirship," attaching their birth certificates and affidavits stating Torres had left no will and that no estate was opened because this claim was her only asset. The district court again found the motion lacking because there was no evidence on Torres' marital status. It relied upon California's Code of Civil Procedure §377.32(a)(5), which requires applicants for substitution to show that "no other person has a superior right" to do so. Hampton and O'Neal made yet another filing in response to the trial judge's invitation: they submitted the program from Torres' memorial service and reiterated by further affidavit that they were her sole descendents. The district court denied their motion.

On appeal, the Eight Circuit held that the trial court abused its discretion in relying upon the California Code provision. It concluded that the state law was not applicable for two reasons. First, Fed.R.Civ.P. 25(a) was the pertinent rule regulating the mechanics of substitution of parties under *Hanna v. Plummer*. Secondly, even if there was no direct conflict between Rule 25 and the corresponding California provision, there were federal interests to be served in following the former and no realistic chance that doing so would promote forum shopping.

The Court concluded that California law would apply to determine who could substitute for Torres as her successor in interest, but that Rule 25 applied to prescribe the procedure of how to apply to do so.

Virginia Supreme Court Affirms $5 Million Judgment in Action Originally Pled as $74,000 Claim to Defeat Removal

Many unpublished federal district court opinions were issued this year on removability of claims seeking $74,000. Plaintiffs get the benefit of their pleadings on the amount in controversy and the fact that they refuse to agree not to seek additional damages is not alone evidence of bad faith pleading. See *Hamilton v. OSI Collection Services, Inc.*, 2010 U.S. Dist. LEXIS 111846 (D.S.C.,October 20). A recent case from Virginia suggests the state is one where plaintiffs amend pleadings to seek additional damages after the running of the one-year limit on removal in 28 U.S.C. §1446(b).

In *Whitaker v. Heinrich Schepers GMBH &Co. KG*, the plaintiff moved to amend his $74,000 ad damnum clause after a year had passed – to $2.5 million. After the trial court denied the motion on grounds of bad faith, plaintiff submitted his claims to a bench trial and the court awarded $74,000. The state's high court reversed that judgment in 2008 for abuse of discretion in denying the amendment. It found the defendant was on notice long before the one-year limit had expired that Whitaker's damages exceeded $75,000 and that its delay - not plaintiff's bad faith - had precluded removal. 276 Va. 332; 661 S.E.2d 828 (2008).

On remand, plaintiff Whitaker was allowed to amend his claim for damages and won a $5 million jury verdict. On a second appeal, the Virginia Supreme Court found no error in the trial court's refusing to strike Plaintiff's jury demand. After a thorough examination of the record, it determined that the Plaintiff's submission to the first bench trial did not constitute a waiver of the right to jury that extended to the retrial. The trial court had found that Plaintiff had waived jury trial as an accommodation to the court and in recognition of the reality that he was then trying a claim capped at $74,000. *Whitaker v. Heinrich Schepers GMBH &Co. KG,* 2010 Va. LEXIS 267 (November 4).

UPDATE ON TRIBAL COURT DECISIONS

Professor Robert J. Miller

(Lewis & Clark Law School
Chief Justice, Grand Ronde Court of Appeals)

There are approximately 250 tribal court systems operating across the United States, and they decide thousands of cases a year. I will highlight here some recent cases touching on issues of Civil Procedure.

Tribal governments enjoy the same sovereign immunity protection from litigation as federal and state governments. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). Every year, in dozens of cases, tribes and tribal entities attempt to dismiss federal, tribal, and state court suits based on the courts' lack of subject matter jurisdiction due to tribal sovereign immunity. For example, in *Mississippi Band of Choctaw Indians v. Peeples*, 37 Indian Law Reporter 6004 (Mississippi Choctaw Sup. Ct. Oct. 14, 2009), in an interlocutory appeal of a wrongful termination lawsuit, the Supreme Court granted the Tribe's motion for summary judgment based on sovereign immunity. *Id.* at 6005.

In *Watson v. Watson*, __ Am. Tribal Law __, 2010 WL 363057 (Navajo Sup. Ct. Jan. 21, 2010), the Navajo Nation Supreme Court was faced with questions concerning child and spousal support. The couple had been married in 1964 and legally separated in 1988 with court ordered spousal and child support obligations. After thirteen years of non-payment, Ruby Watson filed for divorce in 2001 and sought the past due alimony and child support. The children were now 31 and 32 years old. The Court relied on the Navajo Child Support Enforcement Act, 9 Navajo Nation Code § 1714, which allows the defense of statutes of limitation after a "child reaches the age of 18." *Watson*, at *6 & 8. The Court also relied on the doctrine of laches, which is an affirmative defense under Navajo Rules of Civil Procedure 8(c)(2)(G). In light of the fact that the appellant waited thirteen years to sue for payments due under the 1988 separation order, the Court held that the claims for child support and alimony payments were barred by statute of limitations and laches. *Id.* at *7-8 & 11.

The Court also had to address the principle of the law of the case because it had already decided aspects of this case in 2005. *Watson v. Watson*, 8 Nav. R. 638, 6 Am. Tribal Law 644 (Navajo Sup. Ct. 2005). In 2010, the Court stated that the "law of the case doctrine is one of procedure, not jurisdiction, and we will not apply it where its application will result in an unjust decision." 2010 WL 363057, at *6. The Court then held that it "can always review prior decisions made in the same case involving the same parties." *Id.*

The Navajo Supreme Court interpreted the application of Navajo Rules of Civil Procedure 12(b)(6) in the context of a dismissal of a guardianship petition. *In the Matter of A.M.K.*, SC-CV-38-10 (Navajo Sup. Ct. Oct. 8, 2010), at http://www.navajocourts.org/NNCourtOpinions2010/14InreAMK.pdf. In that case, the Court reversed the Family Court's dismissal of the petition for failure to state a claim upon which

relief can be granted. The Family Court had noted the lack of Navajo caselaw on Rule 12(b)(6) and relied on numerous federal cases. *Id.* at 7. The Supreme Court held that general principles on the sufficiency of complaints should not be applied to the printed form petition the Family Court provided for *pro se* litigants to fill out, especially in light of the fact that the form provided only two lines for *pro se* petitioners to state their claim. *Id.* at 8-9.

In *Twin v. HCN Grievance Review Board*, __ Am. Tribal Law __, 2010 WL 4454166 (Ho-Chunk Trial Ct. Oct. 8, 2010), the Ho-Chunk trial court heard an appeal from an administrative decision of the Nation's Grievance Review Board in which Kenneth Twin was awarded $10,000 in lost pay and benefits due to due process violations of the tribal Personnel Policies and Procedures Manual (PPM). The court first had to decide the retroactive effect, if any, of the Employment Relations Act. The court cited several U.S. Supreme Court cases that stated that laws are not normally construed to have retroactive effect unless the language of the new act requires it. The tribal court stated that those cases were not binding on the court but that it did find them persuasive. *Id.* at *9. The court then refused to apply the new law retroactively and decided the case under the PPM. The court also had to address collateral estoppel, issue preclusion, in deciding various issues raised by the parties. The court applied the well-known elements of issue preclusion and prevented the tribal parties from relitigating issues they had previously litigated. *Id.* at *12-13.

The same court granted summary judgment in *Ho-Chunk Nation Home Ownership Program v. Thundercloud*, __ Am. Tribal Law __, 2010 WL 3489316 (Ho-Chunk Trial Ct. Aug. 24, 2010). In this case, the court applied Ho-Chunk Nation Rules of Civil Procedure 55 (the tribe's summary judgment rule) and cited *Celotex* and FRCP 56 to deny a motion for summary judgment because the movant had failed to demonstrate the absence of a genuine issue of material fact. *Id.* at *2-5.

The Cherokee Nation Supreme Court addressed arbitration issues in *Sitzman v. Cherokee Nation Enterprises*, SC-09-04 (Cherokee Sup. Ct. July 8, 2010), at http://www.cherokeecourts.org/LinkClick.aspx?fileticket=SSh_M43qcbA%3d&tabid=2388&mid=5070. Here, a tribal employee had been injured on the job and brought a claim pursuant to the Cherokee Nation Worker's Compensation Act. The Cherokee Nation Enterprises' medical expert concluded that Sitzman was 11% permanently disabled but she disagreed and filed for arbitration under the tribal Uniform Arbitration Act. The arbitrator ruled in Sitzman's favor and admitted, over objection, a medical report by Sitzman's expert witness that she was 25% disabled. Cherokee Nation Enterprises appealed to the tribal district court because it claimed the arbitrator erred by admitting and considering the opinion of Sitzman's expert witness. The relevant tribal statute states that a "calculation of permanent partial disability shall be made by the designated third party administrator or the physician of the employer's choice." Cherokee Nation Worker's Compensation Act § 47(A)(3). The district court concluded the arbitrator erred by admitting the opinion of Sitzman's expert.

The Supreme Court reviewed the admissibility of Sitzman's expert opinion *de novo* as a question of statutory interpretation. The Court then searched the Act for the intent of the overall legislative scheme for workers compensation and divined from other sections of the Act an express intent to allow dissatisfied employees to appeal adverse decisions under the Arbitration Act. *Sitzman*, at 6. The Court held that there would be no reason to provide for arbitrations if the arbitrator could only hear the evidence provided by the tribal entity and that that interpretation would render the right to arbitration useless. *Id.* Furthermore, the Arbitration Act expressly allows arbitrators to "determine the admissibility, relevance, materiality and weight of any evidence." The Uniform Arbitration Act As Adopted 25-03 § 15. Consequently, the Supreme Court vacated the decision of the district court and remanded the proceedings to enter judgment based on the arbitrator's award.

In *Socula v. Colville Confederated Tribes*, 37 Indian Law Reporter 6043 (Colville Reservation Ct. App. Apr. 1, 2010), the Court held that Socula's due process rights had been violated when the trial court entered a default judgment against her for failure to appear for a hearing on a civil traffic infraction. *Id.* at 6044. The Court found that the trial court had mailed the notice of hearing to an address it had on file for Socula and not to her actual address which was correctly listed on the traffic ticket she received. *Id.*

The Chehalis Tribal Court of Appeals denied a motion for an interlocutory appeal in *Confederated Tribes of the Chehalis Indian Reservation v. Hillstrom*, CHE-CIV-8/06-191 & 192 (Chehalis Tribal Ct. App. April 5, 2010), at http://www.nics.ws/Chehalis/Confederated%20Tribes%20of%20the%20Chehalis%20Indian%20Reservation%20v.%20Hillstrom.pdf. The Tribe's Appellate Rules only allow for appeals from trial court judgments that are not yet final in very limited situations. An interlocutory appeal is allowed "only if the Chehalis Court of Justice has committed an obvious error which: (a) Would render further proceedings useless; or (b) Substantially limits the freedom of a party to act." Chehalis Tribe Appellate Rules 6.03.020. In this case, the defendants tried to appeal the trial court's grant of partial summary judgment for the Tribe. The Court of Appeals denied the motion for an interlocutory appeal because defendants' did not carry their burden to overcome the numerous prudential reasons for only allowing appeals of final judgments, and because they failed to make the showing required by the tribal

appellate rule.

STATUTORY DEVELOPMENTS

K. Lee Adams

(Atlanta's John Marshall Law School)

Recent statutory developments reflect the long shadow of the USSC's decisions in Bell Atlantic v Twombly and Ashcroft v Iqbal (known to Civil Procedure aficionados as "Twiqbal").[i] Most prominent, perhaps, are the efforts by Congress to legislatively override the USSC's announcement of new pleading standards in Twombly and Iqbal, which have languished in Committee throughout 2010. The Senate's *Notice Pleading Restoration Act* of 2009 (S. 1504, 111th Congress s (2009)) and the House *Open Access to Courts Act* of 2009 (H.R. 4115, 111th Cong. (2009)) were referred to Committee in 2009 and have not budged. H.R. 4115 would restore the Conley pleading standard through language used in the case (may not dismiss unless "beyond doubt that the plaintiff can prove no set of facts in support of the claim") and would reject "plausibility" as a standard for judicial review of motions to dismiss.[ii] S.B. 1504 would prohibit a court from dismissing an action other than on the basis stated in Conley by reference to the case itself.[iii] It is highly unlikely given the massive legislative agenda of the lame duck session that these bills will pass in 2010. Reintroduction of these or similar legislative efforts in the 112th Congress may occur, but are unlikely to see much movement if the 2009-2010 experience is any guide. Moreover, newspapers reported at the time these bills were put forward that there appeared to be division along party lines as to the necessity or appropriateness of any pleading bill.[iv] Thus, the turnover of power in the House of Representatives may mean there is no Congressional push to alter the standard announced by the USSC in *Iqbal*. This leaves litigants in federal court with the Twombly-Iqbal pleading standard.

Another federal civil procedure bill, *The Federal Courts Jurisdiction and Venue Clarification Act of 2009*, remains in doubtful status in the Senate Judiciary Committee.[v] This bill would, among other provisions, clarify problematic portions of 28 USC 1332, including treatment of permanent resident aliens and corporations with foreign contacts for diversity jurisdiction purposes and indexing amount in controversy requirements. Clarification of 28 USC 1332(a) is especially warranted, as the long-standing problem created by the language on state citizenship of permanent resident aliens has produced a split in the Circuits.[vi] Although the *Jurisdiction and Venue Clarification Act* passed the House of Representatives by voice vote in September,[vii] it has yet to be placed on the agenda in the Senate. A similar piece of legislation died in the 109th Congress, and it appears likely that this bill will meet the same fate.

Although not strictly speaking "new" developments, some state rules of civil procedure may take on new importance in light of the current federal pleading standard under Twombly/Iqbal. In a 2007 paper which today looks prescient, Professor Lonny Hoffman did an empirical study of the Texas civil rule on pre-suit discovery.[viii] Professor Hoffman argued that "widespread" use of pre-suit discovery in Texas aids in satisfying formal pleading requirements. Scott Dodson suggests in a recent paper that state systems with pre-suit discovery mechanisms may provide an alternative to "information asymmetry" in federal court under the Twombly/Iqbal pleading standard.[ix] Professor Dodson discusses the liberal availability of pre-suit discovery in states such as Texas and Alabama which may be used to determine whether a plaintiff may appropriately bring a legal action in those states.[x] Other states, such as Ohio, Pennsylvania, and (more controversially) New York, permit pre-suit discovery where necessary to filing a complaint.[xi] Although there are limitations to this type of discovery (especially to prevent pre-suit discovery from becoming a "fishing expedition") some other common-law jurisdictions also permit general pre-suit discovery to meet pleading obligations.[xii]

Alternatively, jurisdictions may permit pre-suit discovery in certain specified types of actions. For a prominent example, amendments to the Canadian province of Ontario's *Securities Act* created a shareholder cause of action for corporate misrepresentation in 2005. The Act provides that such a suit requires leave of court upon determination that the investor's action is undertaken "in good faith" and with a "reasonable possibility of success." This provision has been interpreted to include a right to pre-suit discovery by corporate shareholders.[xiii] Closer to home, since the 1990s Florida procedure has required pre-suit investigation, including discovery, in medical negligence cases. The pre-suit procedures, including ADR, are accompanied by severe restrictions on the use of pre-suit information in any later action.[xiv] Given the current pleading pressures on litigants in federal court, state legislatures may in turn begin to feel some pressure in the coming year to expand the availability of pre-suit discovery in their state civil procedure regimes by one of these pre-suit discovery mechanisms.

Yet another example of the long arm of federal procedure is manifest in state reaction to the "restyling" of the Federal Rules of Civil Procedure in 2007 and the Time Computation project of 2009. In July of this year the Kansas Code of Civil Procedure was largely conformed to the restyled Federal Rules, including changes to time computation.[xv] This legislation was a massive

project, the result of a 2-year review of the Kansas Code of Civil Procedure undertaken by the Kansas Judicial Council Civil Code Advisory Committee. The Advisory Committee also considered other federal rules amendments that Kansas had not adopted and incorporated those which the Committee felt were "compatible" with Kansas practice.[xvi] The Advisory Committee noted that Kansas civil procedure rules were "patterned after" the Federal Rules to assist in "uniformity of practice" within the state, and that the newly conformed civil practice code reflected the same aims as the Federal restyling project: increasing clarity without altering substance, and providing for electronic communications between attorneys and the court. For a detailed discussion of the new Kansas Civil Procedure code, see James Concannon, 79 *Journal of the Kansas Bar Association* 20 (June 2010). Other states, such as Montana, are currently undergoing the review process to conform their civil rules to recent federal changes.[xvii] Given the significant scope of the state restyling or conformance projects, we can expect a slow movement of states to join in comprehensive revisions of their civil procedure rules over the next few years.

UPDATE ON FEDERAL RULES OF CIVIL PROCEDURE

Linda Sandstrom Simard

(Suffolk University Law School)

On December 1, 2010, several changes to the Federal Rules of Civil Procedure became effective. As noted below, the most significant aspects of the amendments involve expert witness discovery and summary judgment procedure.

There are two significant changes to Rule 26. First, the amendments extend work product protection in two respects: (1) to protect draft expert reports and disclosures, regardless of the form in which the draft is recorded; and (2) to protect most communications between attorneys and 26(a)(2)(B) experts. The latter category of work-product protection does not extend to communications concerning the expert's compensation or the facts, data, and assumptions provided to the expert by the party's attorney. Second, the amendments to Rule 26 provide that an expert witness who is not required to provide a report (because the witness is not retained or specially employed to provide expert testimony and is not an employee who regularly gives expert testimony) must disclose the subject matter of his or her testimony and summarize the facts and opinions to which the witness expects to testify.

Amendments to Rule 56 are intended to improve the procedure for presenting and deciding summary judgment motions and bridge the gap that has developed between the text of the rule and the actual practice. These amendments are not intended to change the summary judgment standard or burdens. While many features of the amended rule carry over from the old text, several changes to the rule are worthy of note. The amended rule 56 requires a party asserting that a fact is or is not genuinely disputed to support the assertion by providing a pinpoint citation to the record; by showing that the materials cited by an opposing party do not establish the absence or presence of a genuine dispute; or by showing that an adverse party cannot produce admissible evidence to support the fact. While evidence need not be in admissible form at the summary judgment stage, the amended rule expressly allows a party to challenge evidence offered to support or dispute a fact if that evidence cannot be presented in a form that would be admissible at trial. The amended rule sets out the court's options when an assertion of fact has not been properly supported by a party or responded to by an opposing party and expressly allows a court to grant summary judgment for a nonmovant, to grant summary judgment on grounds not raised by a party, or to raise summary judgment sua sponte (after identifying to the parties material facts that may not be genuinely in dispute).

Other points of interest
The Civil Rules Advisory Committee met several times during the year. Topics under consideration include an active study of pleading requirements in the wake of Bell Atlantic v. Twombly and Ashcroft v. Iqbal (see the Administrative Office web site at http://www.uscourts.gov/rules for a comprehensive report on pleading), proposals to simplify Rule 45, and consideration of the need to amend Rule 26c to express good practices.
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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)

In her new book, **The Ideological Origins of American Federalism** (Harvard 2010), Alison LaCroix explores the history of federalism in our country from an ideological perspective. She traces the development of theory about

different models of power sharing between the states and a national, central authority. LaCroix's in-depth analysis of the federal judiciary and federal jurisdiction will be of particular interest to the civil procedure teacher and scholar. Specifically, he offers a comprehensive historical analysis of the ideological frameworks that produced the Judiciary Acts of 1789 and 1801. She situates the judiciary and jurisdiction at the center of debates about the scope and nature of federal power, suggesting that the Judiciary Acts were at the heart of Revolutionary and early republican conflicts over how to construct a centralized federal union that simultaneously allowed states to retain and exert sovereignty. In particular, LaCroix suggests that historical struggles over concurrent jurisdiction between state and federal courts reveals critical developments in the efforts to balance state and national power. LaCroix offers a fascinating vision of jurisdiction as a critical "battlefield" for some of the most important questions about our form of government in the United States. Additionally, for those who are interested in early American history and the ongoing debate about the relationship between state and federal power, a new book by noted historian Pauline Maier, **The People Debate the Constitution, 1787-1788** (Simon & Schuster 2010), provides a remarkable and engaging in-depth exploration of the ratification process of the United States Constitution.

Moving ahead several centuries, Greg Lastowka explores internet games and their governance in **Virtual Justice: The New Laws of Online Worlds** (Yale 2010). Rather than focusing exclusively on how the internet can affect jurisdictional questions about where someone can or can't be sued, Lastowka dives more completely into online worlds to explore their culture, norms, and laws. With an estimated 100 million or more people interacting in virtual worlds in 2009, Lastowka suggests that virtual worlds are fundamentally new sorts of places. Internet users act through virtual avatars in virtual worlds, but quite often real – and significant – money is involved. Therefore, disputes arise over actions in these worlds that may involve non-virtual dimensions; Lastowka takes as his particular focus how legal institutions in the real world are coping with the numerous problematic intersections between virtual and real worlds. He offers an extremely thorough exploration of the history and culture of online worlds before turning his attention explicitly to legal issues, including, but not limited to, jurisdiction over disputes. Lastowka draws interesting connections between these virtual worlds cases and the more classic jurisdictional questions that arise from online enterprise generally speaking.

In **Citizen, Courts, and Confirmation: Positivity Theory and the Judgments of the American People** (Princeton 2009), James L. Gibson and Gregory A. Caldeira explore the legitimacy of the United States Supreme Court through the lens of the confirmation process for Supreme Court justices, providing exhaustive empirical data about public opinion of the Supreme Court both before, during, and after the nomination and confirmation of Supreme Court Justice Samuel Alito. In particular, these political scientists take a look at the ways in which legitimizing symbols of the judiciary can help promote positive public opinion about the court system, even when courts face controversial issues and offer disagreeable opinions. Gibson and Caldeira consider ways in which legitimizing symbols of the judiciary help to set courts apart from other branches of government. The "positivity bias" generated by these symbols helps provide a frame that allows people to view courts as nonpolitical, rather than partisan, ideological, or policy-based.

Presenting a very different, unique, and original perspective on the role of judicial symbols, Judith Resnik and Dennis Curtis explore icons of justice and the design of judicial spaces in **Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms** (Yale 2010). This lovely book reproduces a host of compelling artistic images, from drawings of Mesopotamian dispute resolution to paintings by Reynolds and Rubens to photographs of modern courthouses and modern sculptures of Lady Justice. The authors use these images of the icons of justice to trace the development of courts and the relationship between courts, government power, and democracy. This non-traditional take on a critical subject provides important insights about the way that visual representations have helped to cultivate and alter ideas of justice through the ages.

Finally, providing a compelling look at civil litigation involving a particular subject matter area that's close to home, Amy Gajda's **The Trials of Academe: The New Era of Campus Litigation** (Harvard 2009) explores courts' increasing willingness to step in to adjudicate disputes arising in the academic arena. Cases stemming from the classroom behavior of professors, administrative decisions by universities, and misconduct of students all figure prominently in Gajda's analysis of the ways in which the academy can be embroiled in legal disputes. Gajda presents a lively and engaging picture of the changing nature of litigation in a particular field that is of interest both from a procedural and a substantive perspective.

UPCOMING CONFERENCES

AND SYMPOSIA

Thomas Main

(McGeorge School of Law)

Third-Party Litigation Finance in the United States. Northern Kentucky Law Review Spring 2011 Symposium, February 19, 2011. Contact: Jennifer Kreder. Details at http://chaselaw.nku.edu/spring_symposium.php

Official Wrongdoing and the Civil Liability of the Federal Government and Officers. The University of St. Thomas Law Journal Symposium, March 18, 2011. Contact Gregory Sisk at gcsisk@stthomas.edu for details.

The Principles and Politics of Aggregate Litigation: CAFA, PLSRA, and Beyond. The 24th Annual Corporate Law Center Symposium, University of Cincinnati College of Law, April 1, 2011. Contact: Barbara Black. Details at http://www.law.uc.edu/institutes-centers/corporate-law-center/activities-partnerships/symposia/2011

Actuarial Litigation: How Statistics Can Help Resolve Mass Torts, Insurance Law Center and the University of Connecticut School of Law. April 15, 2011. Contact Alexandra Lahav at alexandra.lahav@law.uconn.edu for details.

Book Symposium, *Civil Procedure and the Legal Profession,* 79 Fordham Law Review __ (forthcoming April 2011). Contact: Howard Erichson.

Law & Society Association Annual Meeting. June 2-5, 2011 (San Francisco). The annual meeting will offer many presentation topics of interest to proceduralists. Among other presenters, The International Collaborative Research Network on Collective Litigation will present preliminary results of their comparative case study research on class actions and group litigation. Details at http://www.lawandsociety.org/ann_mt_gen.htm

International Association of Procedural Law World Congress on Procedural Justice, July 25-30, 2011 (Heidelberg, Germany). Details at http://www.iapl-2011-congress.com/indexeng.html

The 5th Annual Conference on the Globalization of Class Actions. Annual conferences co-sponsored by Stanford Law School and the Oxford Centre for Socio-Legal Studies. Fifth Annual Conference organized by Ianika Tzankova of the University of Tilburg. December 9, 2011 (The Hague). Contact: Deborah Hensler. Details forthcoming at http://globalclassactions.stanford.edu/events (The 4th Annual Conference was recently held at Florida International University College of Law; details at http://go.fiu.edu/3bf)

FROM STATORY DEVELOPMENTS SECTION:

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[i] *Twombly*, 127 S.Ct 1955 (2007); Iqbal, 129 S.Ct. 1937 (2009).
[ii] See H.R. 4115, sec. 2 (sponsored by Reps. Lamar Smith and Howard Coble).
[iii] See S. 1504 (sponsored by Senators Reid, Specter, and Feingold).
[iv] The *Washington Independent* reported that Republicans maintained that the USSC's decisions in Twombly and Iqbal helped to reduce frivolous lawsuits and their burdensome discovery obligations. "Has the Supreme Court Undermined Civil Rights Enforcement?", *Washington Independent*, Dec. 17, 2009.

[v] *Federal Courts Jurisdiction and Venue Clarification Act of 2009*, H. R. 4113, 111th Cong. (2009).
[vi] See *Saadeh v Farouki*, 107 F.3d 52 (D.C. Cir. 1997); *Singh v Daimler Benz*, 9F.3d 303 (3d Cir. 1993); *Intec USA, LLC v Engle*, 467 F.2d 1038 (7th Cir. 2006).
[vii] http://www.govtrack.us/congress/bill.xpd?bill=h111-4113.
[viii] Lonny S. Hoffman, "Access to Information, Access to Justice: The Role of Presuit Investigatory Discovery," 40 *U. Mich. J.L. Reform* 217 (2007).
[ix] Scott Dodson, "Federal Pleading and State Presuit Discovery", 14 *Lewis & Clark L. Rev*. 43 (2010) (available at http://ssrn.com/abstract=1568082.
[x] Id., at 57 (citing Tex. R. Civ. P. 202.1 & 202.4 and Ala. R. Civ. P. 27).
[xi] Id., at 58-59.
[xii] See, e.g., Bernard Cairns, *Australian Civil Procedure*, 6th ed. (Sydney: LawBook Co. 2005) 335-336 (discussing pre-suit discovery for pleading purposes in the Australian states of South Australia, Victoria, and Western Australia, as well as the Australian Capital Territory, Northern Territory and Federal Court).
[xiii] See *Silver v. IMAX Corp.*, 2009 CanLII 72334, [2009] O.J. No. 5573 and [2009] O.J. No. 5585 (interpreting *Securities Act*, R.S.O. 1990, sec. 138.8 (Ontario)). It is important to note that the general pleading standard prevailing in Canada is similar to that described by the USSC in *Conley*. See ibid.
[xiv] See Fla. Stat. 766.106 & 766.203-205; *Cohen v Dauphinee*, 739 So.2d 68 (Fla. 1999).
[xv] Kan. House Bill 2656 amended every section of the first three articles of the Kansas Code of Civil Procedure, effective July 1, 2010Kan. Stat. Ann. 60-101.
[xvi] See Kansas Judicial Council Civil Code Advisory Committee Comments, Dec. 4, 2009 (available at http://www.kansasjudicialcouncil.org/Documents/Studies%20and%20Reports/2010%20Reports/Civil%20Code%20Time%20Computation%20Report.pdf).
[xvii] See Proposed Civil Rule Changes, available at (http://courts.mt.gov/supreme/proposed_rules/civil-procedure.mcpx).