1989 Developments in Federal Civil Practice Affecting Indiana Practitioners: Issues Of Diversity Reform; Pendent Party Jurisdiction; Summary Judgment; Impeachment by Prior Conviction; Sanctions; and Appeal

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I. INTRODUCTION

Indiana practitioners litigating in federal court encountered a number of significant developments in federal civil practice last year. These changes ranged from matters of subject matter jurisdiction, to sanctions, to appeals. This Article, as the second of an annual section on federal civil practice, will highlight the more important issues in an effort to assist local attorneys in their federal civil litigation.[1]

A number of developments occurred affecting the subject matter jurisdiction of the federal judiciary. Congress implemented significant changes including raising the amount in controversy requirement for diversity actions to exceed $50,000. Also, the Supreme Court seems to have altered the standards for invoking pendent party jurisdiction. Part Two of this Article will analyze these jurisdictional issues at some length.[2]

The next section of the Article will briefly re-visit the area of summary judgment, which was the main focus of last year's federal practice Article.[3] A sampling of Seventh Circuit opinions reveals that the local federal courts continue to embrace the warming trend towards summary judgment. However, in one case the Seventh Circuit reversed and remanded an action for the imposition of sanctions against the lawyer

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1. This is the second year that the Survey Issue has covered developments in federal civil practice. As last year's article discussed, this section of the Survey is aimed at helping Indiana practitioners keep abreast of significant developments in local federal civil practice. *See* Maley, *Developments in Federal Civil Practice Affecting Indiana Practitioners: Survey of Supreme Court, Seventh Circuit, and Indiana District Court Opinions*, 22 IND. L. REV. 103-04 (1989) [hereinafter Maley, *1988 Developments*]. These Articles concentrate on key decisions of the Seventh Circuit Court of Appeals, and highlight major developments at the national level as well as particularly instructive decisions of the local district courts. The focus is on federal civil practice and procedure. Substantive federal decisions and matters of criminal procedure are left to other forums.

2. *See infra* text accompanying notes 11-86.

3. *See* Maley, *1988 Developments*, *supra* note 1.

who sought and obtained summary judgment. This illustrates that summary judgment is a rose with some particularly nasty thorns if it is improperly used. Part Three will discuss these developments.[4]

A third area of development involves the power of federal judges to control the proceedings before them. In one case the Seventh Circuit, sitting *en banc*, decided by a sharply divided vote that a district court has the power to order a litigant to personally appear at a pre-trial conference for the purpose of discussing the posture of the case and settlement. In another case the court ruled that a "frequent filer's" access to the courthouse can be permissibly limited by establishing an executive committee to review all the plaintiff's submissions prior to accepting them for filing. These developments, which show the power of the federal judiciary to govern their proceedings, will be discussed in Part Four of this Article.[5]

The most significant ruling on federal evidence during the survey period came in *Green v. Bock Laundry Machine Co.*,[6] in which a divided Supreme Court held that Rule 609(a) of the Federal Rules of Evidence *requires* the federal courts to allow impeachment of a *civil witness* with evidence of prior convictions, regardless of unfair prejudice to the witness or the party offering the testimony. This landmark decision is critical not only at trial, but should be considered by practitioners at all stages of litigation, including pre-filing investigation and forum selection. In addition, as this Article went to print, Congress was presented with a proposed amendment to Rule 609 (a) that would nullify the effect of *Bock Laundry*. Part Five of the Article will analyze the decision as well as the proposed amendment and discuss their importance to Indiana lawyers.[7]

The sanctions arena, which is the subject of frequent commentary and discussion, also deserves mention in this year's Survey. The Seventh Circuit made a number of important rulings in this area, including its *en banc* decision in *Mars Steel Corp. v. Continental Bank, N.A.*,[8] in which the court finally established that it would apply a deferential standard of review of district court sanctions, rejecting a multi-tiered approach or a *de novo* standard used by other circuits. Other decisions of the Seventh Circuit and the local district courts illustrate the type of conduct that can lead to sanctions, and several opinions show that the Seventh Circuit, even when it does not officially sanction a lawyer, is not hesitant to criticize the failings of counsel. And, the Supreme

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4. *See infra* text accompanying notes 87-144.
5. *See infra* text accompanying notes 145-52.
6. 109 S. Ct. 1981 (1989).
7. *See infra* text accompanying notes 153-69.
8. 880 F.2d 928 (7th Cir. 1989).

Court ruled that attorneys, not their law firms, are the responsible party for sanctions imposed under Rule 11. These developments will be discussed in Part Six of this Article.[9]

Finally, the Seventh Circuit addressed several issues relating to taking appeals, and the Supreme Court decided that a district court's decision on the merits is a "final decision" from which appeal has to be timely taken, notwithstanding that the party's request for attorney fees has not yet been decided. These appellate issues will be analyzed in Part Seven of this Article.[10]

Some of the developments that this author deems of greatest importance will be discussed at length. Other issues will merely be raised so that practitioners are aware of them. The goal is to provide a comprehensive summary of a wide range of issues while at the same time giving an in-depth analysis of a few specific matters. The result, admittedly, is a lengthy Article, but hopefully one that serves the needs of many.

II. Developments in Subject Matter Jurisdiction

A. The Judicial Improvements and Access to Justice Act

On November 19, 1988, President Reagan signed into law the Judicial Improvements and Access to Justice Act.[11] The Act touched on a number of different subjects, ranging from provisions dealing with court interpreters to arbitration to jurisdiction of the Federal Circuit. The most important developments affecting Indiana practitioners, however, came in four areas: (1) an increase in the amount in controversy requirement for diversity jurisdiction; (2) a change in citizenship (for diversity purposes) of the legal representative of estates and of infants and incompetents; (3) a simplification of the procedures for removing diversity cases from state court to federal court; and (4) a modification of venue for actions against corporate defendants.[12]

1. The Amount in Controversy Requirement is Raised to Exceed $50,000.—The change in the Act that will likely have the greatest impact is the increase in the amount in controversy requirement from $10,000 to $50,000. In Section 201 of the Act, Congress amended section 1332 of Title 28 of the United States Code to read as follows:

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9. *See infra* text accompanying notes 170-214.
10. *See infra* text accompanying notes 215-30.
11. Pub. L. No. 100-702 (Nov. 19, 1988).
12. For an excellent discussion of the entire Act, see Siegel, *Changes in Federal Jurisdiction and Practice Under the New Judicial Improvements and Access to Justice Act*, 123 F.R.D. 399 (1989).

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between-
> (1) citizens of different States;
> (2) citizens of a State and citizens or subjects of a foreign state;
> (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
> (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.[13]

The increase to exceed $50,000 applies to any civil action "commenced in or removed to a United States district court on or after the 180th day after the date of enactment,"[14] which corresponds to actions filed on or after May 18, 1989.

One simple reason for the increase was inflation.[15] The amount in controversy was last raised in 1958, when Congress adjusted the threshold from $3,000 to $10,000. In order to keep up with inflation, it was estimated by the American Bar Association that an increase to $35,000 would be required simply to return, in real dollars, to the 1958 level.[16] Chief Judge Grady of the Northern District of Illinois has similarly observed that the change is simply keeping pace with inflation.[17]

The adjustment also reflects at least some intention to reduce caseloads.[18] For years there has been great debate over whether the Congress should sharply narrow or even abolish the federal courts' diversity jurisdiction, with each session seeing the introduction of at least one bill on the issue.[19] The increase to $50,000 can be viewed as a middle-of-the-road compromise, with proponents arguing that the change will result in a 40% reduction of the diversity caseload.[20] However, others contend that the impact will be far less, particularly in tort cases where prayers for damages are conjecture at best.[21] The change will at least have some impact on cases such as mortgage foreclosures and general

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13. 28 U.S.C.S. § 1332(a) (Law. Co-op. 1986 & Supp. 1989).
14. *Id.*
15. *See* H.R. 100-889 (Aug. 26, 1988), *reprinted in* 1988 U.S. CODE CONG. & ADMIN. NEWS 5982, 6005 [hereinafter *Legislative History*]. *See also* Siegel, *supra* note 12, at 408-09.
16. *Legislative History*, *supra* note 15, at 6005.
17. CHIC. DAILY L. BULL., May 17, 1989, at 1.
18. *See supra* note 15.
19. 14A C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3701, at 11-12 (2d ed. 1985) [hereinafter WRIGHT & MILLER].
20. *Legislative History*, *supra* note 15, at 6006.
21. Siegel, *supra* note 12, at 408.

contract claims, which often do not exceed $50,000 in controversy.[22]

The Indiana practitioner faced with possible diversity questions due to the increase can sort through the labyrinth by recalling the ten basic commandments of amount in controversy litigation, which can be summarized as follows:

1. The defense of lack of subject matter jurisdiction cannot be waived, so the court must raise it on its own motion if it appears lacking.[23]
2. The burden of proof to show that the amount in controversy exceeds $50,000 is on the party asserting jurisdiction.[24]
3. However, the test is whether it appears to a legal certainty that the claim is really for less than the jurisdictional threshold.[25]
4. The court may allow and examine affidavits, evidence, and even live testimony in making its ruling.[26]
5. The amount is measured by the value of the right sought to be enforced or the value of the objective of the suit.[27]

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22. *Supra* note 17. It should be noted that as this Article goes to print, the Federal Courts Study Committee is studying the possibility of further contracting diversity jurisdiction, perhaps to cover only complex multi-state litigation, interpleader, and suits to which aliens are parties. A final report from the Committee is due out in the Spring of 1990. *See* Tentative Recommendations of The Federal Courts Study Committee, *summarized in* 58 U.S.L.W. 2442 (Feb. 6, 1990).

23. *See* FED. R. CIV. P. 12(h)(3), which states: "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

24. *See* Gibbs v. Buck, 307 U.S. 66, 72 (1939); Lakeside Mercy Hosp. v. Indiana State Bd. of Health, 421 F. Supp. 193, 200 (N.D. Ind. 1976). Thus, "in cases originally commenced in federal court, plaintiff bears this burden; in removed cases, it is on the defendant." WRIGHT & MILLER, *supra* note 19, at 19-20. It should be noted that some courts tend to write that the burden is on the defendant (or plaintiff in a removal action) to show for a legal certainty that the amount in controversy is not met. *See, e.g.*, Iguana Co. Ltd. Partnership v. Baltimore Center for Performing Arts, 651 F. Supp. 1348, 1349 (D. Md. 1987). Given the relatively lenient standard for the party asserting jurisdiction, this appears to be more a matter of semantics than anything of great import.

25. *See* Saint Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 288-89 (1938); Loss v. Blankenship, 673 F.2d 942, 950 (7th Cir. 1982).

26. *See* WRIGHT & MILLER, *supra* note 19, at 26. The Seventh Circuit has cautioned, however, that "when the issue of jurisdictional amount is intertwined with the merits of the case, 'courts should be careful not to decide the merits, under the guise of determining jurisdiction, without the ordinary incidents of trial.'" *Loss*, 673 F.2d at 950-51 (citations omitted).

27. *See* Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 347 (1977); Local Div. 519, Amalgamated Transit Union, AFL-CIO v. LaCrosse Mun. Transit Util., 585 F.2d 1340, 1349 (7th Cir. 1978); Rothery Storage & Van Co. v. Atlas Van Lines Inc., 609 F. Supp. 554, 555 (N.D. Ill. 1985).

6. In diversity, the federal courts must look to applicable state law to determine the value of the right to be enforced.[28]
7. The amount in controversy is determined as of the time the action is commenced by the good faith claim of the plaintiff.[29]
8. Punitive damages and attorney fees, if claimed and available under applicable state law, are included in the amount in controversy; costs and interest are not.[30]
9. The amount of actual recovery is relevant only to costs.[31]
10. There are three major instances in which the amount might not be satisfied:
    a. the contract limits recovery;
    b. a rule of law limits recovery;
    c. independent facts show that the amount is not met.[32]

By applying these rules and locating relevant case law from the Seventh Circuit (cases dealing with the $10,000 level are, of course, just as instructive today), the local bench and bar should be able to readily address the anticipated increase of amount in controversy issues.[33] For those whose cases are dismissed for want of subject matter jurisdiction, they can take solace in Indiana's savings clause and re-file in state court, even if the statute of limitations has otherwise expired.[34]

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28. *See* Horton v. Liberty Mut. Ins. Co., 367 U.S. 348, 352-53 (1961).

29. *See* Sarnoff v. American Home Prod. Corp., 798 F.2d 1075, 1078 (7th Cir. 1986); Tising v. Flanagan, 360 F. Supp. 283, 284 (E.D. Wis. 1973). In removal cases, the time of the removal notice governs. Richard Schilffarth & Assoc. v. Commonwealth Equity Svc., Inc., 715 F. Supp. 246, 247 (E.D. Wis. 1989).

30. *See* By-Prod Corp. v. Armen-Berry Co., 668 F.2d 956, 960-61 (7th Cir. 1982) (punitive damages); *Sarnoff*, 798 F.2d at 1078 (attorney fees). The express language of § 1332(a) excludes costs and interest from the equation. *See* 28 U.S.C. § 1332(a) (1982).

31. *See* Rosado v. Wyman 397 U.S. 397, 405 n.6 (1970); Guy v. Duff & Phelps, Inc., 625 F. Supp. 1380, 1382 (N.D. Ill. 1985). Section 1332(b) provides that when a diversity claimant ends up obtaining less than the jurisdictional amount, the district court may deny the plaintiff an award of costs, and may actually impose costs on the plaintiff instead. 28 U.S.C. § 1332(b) (1982).

32. *See* WRIGHT & MILLER, *supra* note 19, at 48-49.

33. The change in the amount in controversy, coupled with Indiana's recent abolishment of prayers for specific dollar amounts in personal injury or wrongful death actions filed in Indiana state courts, IND. R. TR. P. 8(A)(2), could result in some interesting scenarios. Say, for instance, that the parties are diverse and the plaintiff, having suffered a broken leg and some lost wages in a car accident, seeks to recover approximately $50,000 in damages. For tactical reasons the plaintiff's lawyer might want to be in state court where no specific money damages prayer would be made. The defense, however, might want to be in federal court, and would thus have to remove the action and take the awkward position that the claim is for more than $50,000. Imagine, then, the eventual settlement conference where the defense offers $25,000 claiming that the damages in no way reach the $50,000 asked for by plaintiff. Such scenarios could be quite interesting, to say the least.

34. *See* IND. CODE § 34-1-2-8 (1988); Huffman v. Hains, 865 F.2d 920, 923-25

2. Clarification of a Legal Representative's Citizenship.—The Act amends section 1332(c) to clarify that a legal representative of the estate of a decedent, an infant, or an incompetent shall be deemed a citizen only of the same state as the individual or estate being represented.[35] The original rule was that the representative's citizenship counted for diversity purposes.[36] In the late 1960's, however, the courts began to take notice of the requirements of section 1359, which forbids jurisdiction over actions "in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court."[37] The representative's own citizenship is now irrelevant in the diversity context.

Some courts addressing the issue prior to the amendment held that a "motive/function" test should be used to address such situations, while others, including the Seventh Circuit, opted for the "substantial stake" test.[38] Still others, including the American Law Institute ("ALI"),[39] proposed a *per se* rule by which the decedent's domicile would determine citizenship for diversity purposes.[40]

The amendment to section 1332(c) adopted by Congress follows the ALI proposal. The clarification will eliminate the need for the courts to wrestle further with these preliminary considerations and make it virtually impossible to manipulate diversity jurisdiction.[41] On the other hand, the rule might exclude parties from federal court who have le-

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(7th Cir. 1989); Torres v. Parkview Foods, 468 N.E.2d 580, 582-83 (Ind. Ct. App. 1984); Huffman v. Anderson, 118 F.R.D. 97, 100 (N.D. Ind. 1987).

35. The statute now reads as follows:

> For the purposes of this section and section 1441 of this title . . . the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

28 U.S.C. § 1332(c)(2) (1982).

36. *See* Siegel, *supra* note 12, at 409.

37. 28 U.S.C. § 1359 (1982). The Third Circuit first took note of the situation in McSparran v. Weist, 402 F.2d 867, 873 (3d Cir. 1968). There the court relied on the "assignment *or otherwise*" language to reject jurisdiction in a case in which an infant's representative was chosen solely to create diversity. *Id.* at 877 (emphasis added).

38. The split of authority is traced at length by the First Circuit in Pallazola v. Rucker, 797 F.2d 1116, 1121-26 (1st Cir. 1986).

39. *See* American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts*, § 1301(b)(4), at 11 (1969), *reprinted in* Field, *Jurisdiction of Federal Courts: A Summary of American Law Institute Proposals*, 46 F.R.D. 141, 143 (1969).

40. The ALI's proposal found judicial support from Judge Murnaghan of the Fourth Circuit. *See* Krier-Hawthorne v. Beam, 728 F.2d 658, 670-71 (4th Cir. 1984) (Murnaghan, J., dissenting).

41. *See* Pallazola, 797 F.2d at 1125 (discussing the ALI proposal).

gitimate reasons for appointing an out-of-state representative.[42] In any event, the amendment resolves an area of ambiguity. Like the amount in controversy increase, the amendment is effective for actions filed on or after May 18, 1989, and it has potential to exclude at least some actions that might have otherwise found their way to federal court based on diversity.

3. The Removal Provisions are Simplified.—The Act made several changes to removal procedures. The most significant change was an amendment placing an absolute limit on the time during which an action can be removed to federal court based on diversity jurisdiction. Specifically, section 1446(b) was amended to provide that "a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action." Prior to the amendment a defendant could attempt removal at any time during the pendency of a state action, so long as the removal papers were filed within thirty days of receipt of "a copy of an amended pleading, motion, order, or other paper from which it may first be ascertained that the case is one which is or has become removable. . . ."[43] Thus, the dismissal of a nondiverse party or similar circumstance occurring more than one year after commencement of an action, which formerly would have allowed removal, no longer opens the door to federal court.

This amendment does not contain an effective date and is thus presumptively applied from November 19, 1988, its enactment date.[44] It should also be noted that by the express language of the statute, the one year removal limitation applies only to diversity actions; claims may still be removed at any time within thirty days of any event, such as amendment of the complaint to add a federal claim, that would allow federal question jurisdiction.

Another change is that a bond is no longer required to be part of the removal papers.[45] In making this change, Congress amended section

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42. *Id.* at 1126.

43. 28 U.S.C. § 1446(b) (1982).

44. *See* Siegel, *supra* note 12, at 403.

45. Congress did this by deleting former subsection (d) to section 1446, which required each petition for removal to be accompanied by a bond for costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed. It is clear that bond is no longer required, despite the remaining inadvertent reference to "bond" in new section 1446(d) (old subsection (e)), which requires written notice of removal to the state court and adverse parties after the filing "of such petition for removal of a civil action and bond. . . ." 28 U.S.C. § 1446(d) (1982). The General Counsel for the Administrative Office of the United States Courts has written the Clerks of all the District Courts informing them that "it is clear that the removal bond requirement no longer exists." *See* Letter from William R. Burchill Jr., to Clerks of District Courts (Jan. 5, 1989) (discussing 1988 amendments to removal procedures) (on file at the Indiana Law Review office).

1447(c) to provide that if removal is determined to have been improper, the order remanding the case may require payment of just costs "and any actual expenses, including attorneys fees, incurred as a result of the removal." Congress injected the standards of Rule 11 into this equation by requiring that the initial "Notice of Removal" be signed "pursuant to Rule 11."[46] Thus, counsel considering removal must make the appropriate pre-filing investigation to avoid being hit with sanctions should the attempt to get into federal court fail.

4. *Venue of Actions Against Corporations is Modified.*—Finally, the Act also made important changes relating to the appropriate venue for actions against corporate defendants. Specifically, section 1391(c) of Title 28 was changed as follows:

> OLD section 1391(c):
> A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.
>
> NEW section 1391(c):
> For purposes of venue under this chapter, a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced. In a State which has more than one judicial district and in which a defendant that is a corporation is subject to personal jurisdiction at the time an action is commenced, such corporation shall be deemed to reside in any district in that State within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State, and, if there is no such district, the corporation shall be deemed to reside in the district within which it has the most significant contacts.

This amendment, which appears on the surface to have little effect, actually works an expansion of corporate venue in some settings and a curtailment in others.[47]

The expansion in available venues for actions against corporations will occur in those circuits in which the courts formerly interpreted the

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46. 28 U.S.C. § 1446(a) (1982). This changes prior practice under which the filing was made by verified petition.

47. It should be noted that the test of subdivision (c) applies only when the plaintiff has chosen to lay venue in the defendant's district of residence under section 1391(a) or (b). Subdivision (c) does not preclude the plaintiff from laying venue in his own district of residence in a diversity case under section 1391(a) or in the district where the claim arose under section 1391(a) or (b). *See* 28 U.S.C.A. § 1391, Commentary on 1988 Revision (Supp. 1989).

"doing business" requirement of the old section 1391(c) more restrictively than the "doing business" test of long arm statutes for personal jurisdiction.[48] These courts reasoned that the standard for personal jurisdiction has its foundation in constitutional principles of fairness and federalism, whereas venue limitations stem from somewhat different Congressional notions of fairness.[49] In one reported decision from a district court of this circuit, Judge Nordberg found this view persuasive.[50]

The recent amendment, however, follows the views of other courts and commentators that found the uniformity and simplicity of a consistent rule to be controlling.[51] Under the new rule, if personal jurisdiction is appropriate against the corporation, then venue is proper as well. This is a common sense amendment that will avoid litigation over this technical issue in the future. Although the venue change removes a weapon from the pre-trial corporate arsenal, defendants have little to complain about as they remain protected by the personal jurisdiction limitations of the Constitution.

The amendment also works to contract available venue in those rare cases in which a corporation licensed to do business in a state used to be deemed, for venue purposes, to do business in the entire state.[52] In a state such as Indiana having more than one district, a corporation based in, say, the Northern District could have been sued, for venue purposes, in the Southern District even if it had no contacts there. With the amendment adding the second sentence to section 1391(c), this will no longer occur.

B. A Change in Standards or the Death Knell for Pendent Party Jurisdiction?

During the survey period, the Supreme Court and the Seventh Circuit decided important cases relating to "pendent" and "pendent party" jurisdiction. These terms are commonly used to express the power of the federal courts to entertain state law claims based upon the existence of a related independent claim properly before the federal court. As is

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48. *See, e.g.*, Maybelline Co. v. Noxell Corp., 813 F.2d 901, 903-05 (8th Cir. 1987); Johnson Creative Arts, Inc. v. Wool Masters, Inc., 743 F.2d 947, 949 (1st Cir. 1984).

49. *See, e.g.*, *Maybelline Co.*, 813 F.2d at 904-05.

50. *See* Scotch Whisky Ass'n v. Majestic Distilling Co., 681 F. Supp. 1297, 1307 (N.D. Ill. 1988).

51. This view had been adopted by the Tenth Circuit in Houston Fearless Corp. v. Teter, 318 F.2d 822, 825 (1963), and by several well-respected commentators. *See* 1 J. MOORE, J. LUCAS, H. FINK, D. WECKSTEIN & J. WICKER, MOORE'S FEDERAL PRACTICE 1409-13 (2d ed. 1986); 15 WRIGHT & MILLER, *supra* note 19, at 123.

52. *See* Siegel, *supra* note 12, at 406-07.

discussed below, the Supreme Court seems to have altered the standard for invoking pendent party jurisdiction, and in doing so effectively abolished the concept altogether, leaving it to Congress to affirmatively demonstrate in its enactments that related state law claims may be maintained in federal court.

1. The Seventh Circuit's Previous Standards for Pendent Party Jurisdiction.—In January of 1989, the Seventh Circuit addressed the issues of pendent and pendent party jurisdiction in the case of *Huffman v. Hains.*[53] In that case a seller of stock had sued the buyer and an accountant alleging violations of federal securities laws. The seller added several state law claims including a malpractice action against the accountant. The state law claims against the accountant were based on the pendent jurisdiction concept set forth in the landmark case of *United Mine Workers v. Gibbs,*[54] wherein the Supreme Court held that federal courts have the discretionary power to hear related state law claims against federal defendants if the claims derive from a common nucleus of operative fact.[55]

In *Huffman*, the federal claims against the accountant were dismissed after settlement. Thereafter, the district court dismissed the pendent claim and an appeal was taken. The Seventh Circuit affirmed the dismissal of the state claim on the usual grounds that the district court had not abused its discretion in relinquishing pendent jurisdiction.[56] What is interesting about the opinion, however, is its discussion of pendent *party* jurisdiction, a close cousin to *Gibbs* pendent jurisdiction that the Supreme Court arguably altered later in the survey period.

According to the Seventh Circuit, "[P]endent *party* jurisdiction arises when a plaintiff brings a federal claim in federal court against one party, and brings a related state-law claim against *another* party without an independent basis of federal jurisdiction."[57] "Unlike pendent claim jurisdiction, there is still some debate over whether the federal courts have the power to exercise pendent party jurisdiction,"[58] and as a result the

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53. 865 F.2d 920 (7th Cir. 1989).

54. 383 U.S. 715 (1966).

55. *Id.*

56. *Huffman*, 865 F.2d at 923. The discretionary relinquishment of pendent jurisdiction has been described by the Seventh Circuit as "almost unreviewable." Graf v. Elgin, Joliet & Eastern Ry. Co., 790 F.2d 1341, 1347 (7th Cir. 1986). Such a decision to "relinquish pendent jurisdiction before the federal claims have been tried is, as we have said, the norm, not the exception, and such a decision will be reversed only in extraordinary circumstances." Disher v. Information Resources, 873 F.2d 136, 140 (7th Cir. 1989).

57. *Huffman*, 865 F.2d at 922 (emphasis in original).

58. *Id.*

doctrine has been called an "embattled" concept by the Seventh Circuit.[59] Nonetheless, as the court discussed in *Huffman*, the Seventh Circuit has allowed district courts to exercise pendent party jurisdiction in certain circumstances.[60]

The "subtle and complex" question of pendent party jurisdiction has been analyzed in the Seventh Circuit by use of a two-step analysis:

> First, the court must examine whether the constitutional power to exercise such jurisdiction exists. Second, the court must examine whether Congress has limited the court's power to exercise pendent party jurisdiction in the specific statutory provision conferring federal jurisdiction in that case. The constitutional power to exercise pendent party jurisdiction exists if the federal claim is not frivolous, the federal and state claims derive from a common nucleus of operative fact, and the federal and state claims are the kind that the plaintiff would ordinarily be expected to try . . . in one judicial proceeding. *The statutory power to exercise pendent-party jurisdiction depends upon whether Congress in the [particular statutory grant at issue] has . . . expressly or by implication negated pendent party jurisdiction.*[61]

The second step of this analysis, which the Seventh Circuit carefully traced in *Huffman* but did not apply due to affirmation on discretionary grounds, is based on the Supreme Court's 1976 decision in *Aldinger v. Howard*.[62] In *Aldinger*, the Supreme Court, though rejecting the exercise of pendent party jurisdiction in that particular case under 28 U.S.C. section 1343(3) and 42 U.S.C. section 1983, wrote that "[o]ther statutory grants and other alignments of parties and claims might call for a different result."[63] The *Aldinger* Court explained its decision, writing:

> Two observations suffice for the disposition of the type of case before us. If the new party sought to be joined is not otherwise subject to federal jurisdiction, there is a more serious obstacle to the exercise of pendent jurisdiction than if parties already before the court are required to litigate a state-law claim. Before it can be concluded that such jurisdiction exists, a federal court must satisfy itself not only that Art. III permits it [by using the common nucleus of operative facts test], *but that*

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59. *Id.* (citing Citizens Marine Natl. Bank v. United States Dept. of Commerce, 854 F.2d 223, 226 (7th Cir. 1988)).

60. 865 F.2d at 922.

61. *Id.* at 922-23 (quotations and citations omitted) (emphasis added).

62. 427 U.S. 1 (1976).

63. *Id.* at 18.

Congress in the statutes conferring jurisdiction has not expressly or by implication negated its existence.[64]

By these final words, the Supreme Court seemed to be laying down a standard for the federal courts to follow in determining, under a second prong of pendent party analysis, whether Congress has negated the possibility of such jurisdiction. Indeed, this was exactly the second standard described by the Seventh Circuit thirteen years later in *Huffman*.[65]

2. The Supreme Court's Most Recent Decision on Pendent Party Jurisdiction.—This crucial aspect of pendent party analysis, however, has arguably been altered by a sharply divided Supreme Court decision during the survey period. Specifically, in *Finley v. United States*,[66] a five to four Court ruled that pendent party jurisdiction did not exist under the Tort Claims Act. On the surface, such a narrow decision involving the Tort Claims Act would seem to have little impact on federal jurisdiction as a whole. A close reading of the case, however, reveals that the Court has probably sounded the death knell for the "subtle and complex" concept of pendent party jurisdiction, or at least drastically altered its standards.

In *Finley*, a plane carrying Barbara Finley's husband and two children struck electric power lines and crashed, leaving no survivors. Finley sued the Federal Aviation Administration in federal court under the Tort Claims Act,[67] and later moved to amend her complaint to include state law claims against non-diverse state defendants. The district court allowed the amendment on the basis of pendent party jurisdiction. On interlocutory appeal, however, the Ninth Circuit reversed and held that pendent party jurisdiction was not available under the Tort Claims Act, which provides federal court jurisdiction over civil actions against the United States for certain torts of federal employees. The Supreme Court granted certiorari to resolve a split in the circuits on the issue.[68]

a. The majority opinion.—Affirming the Ninth Circuit and writing for the five member majority, Justice Scalia focused on the second prong of the pendent party test.[69] He did this by first specifically assuming, without deciding, that the constitutional criterion for pendent party

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64. *Id.* (emphasis added).

65. In fact, the *Huffman* court specifically quoted the language from *Aldinger* underlined above. 865 F.2d at 923.

66. 109 S. Ct. 2003 (1989).

67. 28 U.S.C. § 1346(b) (1982).

68. 109 S. Ct. at 2005.

69. Justice Scalia was joined by Chief Justice Rehnquist, the author of Aldinger, and Justices White, O'Connor, and Kennedy. Justice Blackmun filed a short dissent, while Justice Stevens, joined by Justices Brennan and Marshall, authored a lengthy dissent that is highly critical of the majority. *Id.*

jurisdiction is analogous to the criterion for pendent claim jurisdiction; that is to say, that the "common nucleus of operative facts" line of analysis from *Gibbs* applies equally.[70] Justice Scalia then began his analysis of the legislative prong, writing, "Our cases show . . . that with respect to the addition of parties, as opposed to the addition of only claims, we will not assume that the full constitutional power has been congressionally authorized, and will not read jurisdictional statutes broadly."[71] He highlighted the Court's decisions in *Zahn v. International Paper Co.*,[72] *Owen Equipment & Erection Co. v. Kroger*,[73] and *Aldinger*,[74] in which the Court each time rejected the pendent party concept as applied to the particular statute in question.

The majority opinion then examined the "posture in which the federal claim is asserted,"[75] but dismissed as no consequence the "mere factual similarity" present between the state and federal claims.[76] The Court then acknowledged the difference between Mrs. Finley's action and prior cases in that she could only bring the Federal Tort Claim in federal court due to exclusivity of jurisdiction.[77] The majority, however, held that such a factor alone is "not enough, since we have held that suits against the United States under the Tucker Act . . . brought only in federal court . . . cannot include private defendants."[78]

The *Finley* Court next looked to the text of the jurisdictional statute at issue. Because the Tort Claims Act confers jurisdiction over "civil actions on claims against the United States" rather than something like "civil actions on claims that include requested relief against the United States," the majority concluded that "against the United States" means against the United States and no one else."[79] The Court then concluded on a policy note, writing that whatever they had said "regarding the

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70. *Id.* at 2007. Justice Scalia later wrote that the majority had no intent to limit or impair the *Gibbs* line of cases, even though the majority labelled *Gibbs* "a departure from prior practice." *Id.* at 2010.

71. *Id.* at 2007.

72. 414 U.S. 291, 301 (1973).

73. 437 U.S. 365, 372 (1978).

74. 427 U.S. 1 (1976).

75. *Finley*, 109 S. Ct. at 2007.

76. *Id.* at 2008.

77. Federal jurisdiction may be said to be exclusive when Congress has provided that an action may only be maintained in federal court, whereas concurrent jurisdiction means that the action is properly heard in federal or state court.

78. 109 S. Ct. at 2008 (citing United States v. Sherwood, 312 U.S. 584 (1941)).

79. *Id.* The Court then easily discounted plaintiff's argument that a 1948 revision in the language of the FTCA changing "claim against the United States" to "civil actions on claims against the United States" somehow indicated a jurisdictional expansion. Rather, according to the Court, the revision simply followed the adoption of the use of the term "civil action" in the Federal Rules of Civil Procedure. *Id.* at 2009-10.

scope of jurisdiction conferred by a particular statute can of course be changed by Congress."[80] "What is of paramount importance," the majority wrote, "is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts."[81] The Court closed its opinion as follows: "All our cases - *Zahn*, *Aldinger*, and *Kroger* - have held that a grant of jurisdiction over claims involving particular parties does not itself confer jurisdiction over additional claims by or against different parties. Our decision today reaffirms that interpretive rule; the opposite would sow confusion."[82]

b. The dissenting opinions.—To the dissenters, however, the majority merely increased the confusion. Indeed, the prime complaint of both dissenting opinions is that the majority altered the standards for evaluating the legislative prong of the analysis without offering a clear substitute. Justice Blackmun, for instance, relying on the same language from *Aldinger* as the Seventh Circuit did in *Huffman*, explained his position as follows:

> If *Aldinger v. Howard* required us to ask whether the Federal Tort Claims Act embraced an '*affirmative* grant of pendent party jurisdiction,' [as the majority suggests], I would agree with the majority that no such specific grant of jurisdiction is present. But, in my view, that is not the appropriate question under *Aldinger*. I read the Court's opinion in that case, rather, as requiring us to consider whether Congress has demonstrated an intent to *exempt* 'the party as to whom jurisdiction pendent to the principal claim' is asserted from being haled into federal court. And, as those of us in dissent in *Aldinger* observed, the *Aldinger* test would be rendered meaningless if the required intent could be found in the failure of the relevant jurisdictional statute to mention the type of party in question, 'because all instances of asserted pendent-party jurisdiction will by definition involve a party as to whom Congress has impliedly "addressed itself" by not expressly conferring subject-matter jurisdiction on the federal courts.'[83]

Justices Stevens, joined by Justices Marshall and Brennan, similarly complained that the *Finley* majority had adopted a "sharply different approach" without "even so much as acknowledging our statement in *Aldinger* that before a federal court may exercise pendent party juris-

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80. *Id.* at 2010.

81. *Id.*

82. *Id.*

83. *Id.* at 2010-11 (Blackmun, J., dissenting) (quotations and citations omitted) (first emphasis added, second in original).

diction it must satisfy itself that Congress 'has not expressly or by implication *negated* its existence. . . .'"[84]

c. Analysis of the decision.—There is at least room for disagreement with the majority's opinion. Without expressly adopting a new standard, the Court seems to have changed the focus of the legislative prong of the analysis from a search for *negative* legislative evidence tending to refute pendent party jurisdiction, as appeared to have been proposed in *Aldinger*, to a much more difficult search (for the party invoking such jurisdiction) for *affirmative* legislative evidence tending to show an actual intent by Congress to grant such power over pendent party claims. Such a shift in standards would be contrary to that followed by the Seventh Circuit, as shown in *Huffman*, as well as in other decisions and the dissenting opinions in *Finley*.[85]

Moreover, the Court effectively removed the posture of the state claim as a factor in the analysis. It is difficult to imagine what type of posture might suffice for pendent party jurisdiction in light of the situation in *Finley* where the federal tort claim, unlike diversity or other claims involving concurrent jurisdiction and maintainable in a state or federal forum, could only be brought in federal court.

Thus, while the *Finley* decision may well be correct as a matter of policy and principle that pendent party jurisdiction should not be exercised in such a situation, it seems that the Court had to tip-toe around what seemed to have been the governing standard to reach its decision. If the Court really intended to change the standard, it is unfortunate that it did not expressly say so.

Yet the dissenting opinions provide enough authority for the lower courts to draw the conclusion that the standard was effectively changed. Indeed, there is already authority recognizing the shift.[86] Given that this is the case, one must seriously question whether pendent party jurisdiction survives today. It is this writer's opinion that the death knell has been rung, and that, as the majority suggests, only Congress can stop the reverberations.

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84. *Id.* at 2020 (Stevens, J., dissenting) (emphasis added). Both dissenting opinions also attacked the majority's reliance on *Sherwood* (involving the Tucker Act and the Court of Claims) concerning the posture and context of the case. Justice Blackmun, for instance, wrote that *Sherwood* turned on the history of the Court of Claims' jurisdiction, which history Blackmun found no parallel for in tort claims against the United States in a tribunal without the power to litigate the liability of private tortfeasors. *Id.* at 2011 (Blackmun, J., dissenting).

85. *Id.* at 2015-18 (Stevens, J., dissenting).

86. *See* Staffer v. Bouchard Transp. Co., Inc., 878 F.2d 638, 643 n.5 (2d Cir. 1989) (noting effect of *Finley*); TENTATIVE REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *summarized* in 58 U.S.L.W. 2442, 2445 (Feb. 6, 1990) (The Committee notes effect of *Finley* and suggests that Congress step in to overrule the decision by legislation).

III. Summary Judgment Revisited: the Warming Continues, With One Exception

As last year's federal practice Article discussed at some length, there has been a substantial warming towards summary judgment in the federal courts.[87] This change in attitude stems from the Supreme Court's trilogy of decisions in *Celotex Corp. v. Catrett*,[88] *Anderson v. Liberty Lobby, Inc.*,[89] and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*.[90] A review of this year's summary judgment decisions reveals that the courts of the Seventh Circuit continue to embrace the Supreme Court's mandate to dispose of factually unsupported claims when appropriate.

A. The General Standards For the Non-movant

As to the non-movant's burden of proof under *Celotex*, the Seventh Circuit authored several opinions reaffirming the rule that the non-movant cannot stand by quietly when a proper summary judgment motion has been filed. The general standard was succinctly stated by Judge Manion in *Zayre Corp. v. S.M. & R. Co.*,[91] when he wrote:

> Summary judgment is appropriate where no genuine issue of material facts exist and the moving party is entitled to judgment as a matter of law. The moving party bears the initial burden of showing that no genuine issue of material fact exists. Once the moving party has demonstrated the absence of any genuine factual issues, the nonmoving party may not merely rest upon the allegations or denials in its pleadings but must present specific facts showing that a genuine issue exists for trial.[92]

Similar but much stronger language is found in *Herman v. City of Chicago*,[93] where the court, in affirming summary judgment in a civil rights action, wrote that a "district court need not scour the record to make the case of a party who does nothing."[94] The Seventh Circuit bluntly remarked that "courts will not discover that the movant slighted contrary information if opposing lawyers sit on their haunches; judges may let the adversary system take its course."[95] The lesson from such

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87. *See* Maley, *1988 Developments*, *supra* note 1.
88. 477 U.S. 317 (1986).
89. 477 U.S. 242 (1986).
90. 475 U.S. 574 (1986).
91. 882 F.2d 1145, 1148 (7th Cir. 1989).
92. *Id.*
93. 870 F.2d 400 (7th Cir. 1989).
94. *Id.* at 404.
95. *Id.*

cases is clear: anticipate summary judgment motions and do not treat them lightly.

B. Summary Judgment In Motive or Intent Cases

In a number of cases the Seventh Circuit held that summary judgment was proper, notwithstanding the fact that the litigation turned on issues of motive or intent. For instance, in *Corrugated Paper Products, Inc. v. Longview Fibre Co.*,[96] the court affirmed Judge Miller's entry of summary judgment in a third party beneficiary contract case that turned on the intent of the contracting parties when executing the contract. Under the governing state law, the court had to determine whether the two contracting parties intended to confer a benefit upon the purported third party beneficiary.[97]

The Seventh Circuit explained that the purported beneficiary had come forward with no evidence that both contracting parties intended to confer such a benefit. In fact, the court explained, the defendant offered deposition testimony from three employees that consistently refuted the claim of intent to benefit the plaintiff. "If credited," the court wrote, "this testimony alone would seem to dispose of [plaintiff's] contention that it is a third-party beneficiary. . . ."[98] "However," the Seventh Circuit cautioned, "this evidence relates to [defendants'] state of mind, was solely in [their] control . . . and might have been disbelieved by a jury in its evaluation of credibility." Because of this, the court noted that it was "not immediately clear whether this evidence in itself may serve as a basis for summary judgment."[99]

The *Corrugated Paper* court, however, then answered this question in the affirmative. While noting that a court "must be circumspect in granting summary judgment based solely on the defendant's categorical denial that the requisite mental state existed," the Seventh Circuit concluded that where the plaintiff has had the opportunity to depose the defendant to test his veracity, but has failed to "'shake' the defendant's version of the facts or to raise issues of credibility, summary judgment for the defendant may ordinarily be granted."[100] This is so unless the plaintiff has come forth with other significant probative evidence on the mental state at issue.

The following passage from the *Corrugated Paper* opinion sums up the current status of summary judgment in "state of mind" cases in the Seventh Circuit:

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96. 868 F.2d 908 (7th Cir. 1989).
97. *Id.* at 912.
98. *Id.* at 913.
99. *Id.* at 913-14.
100. *Id.* at 914.

> It is well-settled that summary judgment may be granted where the controlling issue is whether or not the movant acted with a particular mental state. Although the movant's testimony about the existence of a particular mental state may not be dispositive, the movant is entitled to summary judgment if the burden is on the nonmovant to establish the state of mind and the nonmovant has failed to come forward with even circumstantial evidence from which a jury could reasonably infer the relevant state of mind.
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> Where, as here, the movant's witnesses have been examined by the nonmovant in depositions, the nonmovant ordinarily must identify specific factual inconsistencies in the witness' testimony in order to withstand a motion for summary judgment. The opposing party may not merely recite the incantation, "Credibility," and have a trial on the hope that a jury may disbelieve factually uncontested proof.[101]

The importance of this and other recent Seventh Circuit cases dealing with summary judgment and motive or intent issues[102] cannot be overlooked. Many of the cases heard by the federal courts involve state of mind issues, and counsel on each side will want to formulate their strategy early in the litigation to either obtain or defend summary judgment accordingly.

1. The Quality of Proof - Beware of the Requirements of Rule 56(e).—Rule 56(e) of the Federal Rules of Civil Procedure speaks to the quality of evidence that must be used in supporting and defending motions for summary judgment. It reads:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in

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101. *Id.* (footnote and quotations omitted). *Cf.*, Persinger v. Marathon Petroleum Co., 699 F. Supp. 1353, 1363 (S.D. Ind. 1988) (district court, in granting summary judgment, rejects conclusory argument that one of the non-movant's affidavits was "open to serious question." The court wrote that a "motion for summary judgment *cannot* be defeated merely by an opposing party's incantation of lack of credibility over a movant's supporting affidavit.") (emphasis in original).

102. *See* McMillan v. Svetanoff, 878 F.2d 186, 188 (7th Cir. 1989) (affirming summary judgment in an action brought under 42 U.S.C. sections 1981 and 1983, noting that "while we approach the question of summary judgment with 'special caution' in discrimination cases, we will not hesitate to affirm the grant of summary judgment where the plaintiff presents no indication of the defendant's motive or intent to support his or her position."); Morgan v. Harris Trust & Savings Bank of Chicago, 867 F.2d 1023, 1026 (7th Cir. 1989) (affirming summary judgment in Title VII action, court writes that summary judgment "will not be defeated simply because issues of motive or intent are involved.").

> evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the[ir] mere allegations or denials . . . but the adverse party's response, by affidavits or [otherwise] must set forth specific facts showing that there is a genuine issue for trial.[103]

Several decisions from the survey period illustrate the care that must be taken to follow Rule 56(e) in submitting proof to support and defend motions for summary judgment.

Perhaps the best example is *Mid-State Fertilizer v. Exchange National Bank*,[104] a banking case in which the Seventh Circuit, through Judge Easterbrook, affirmed summary judgment in favor of the lender. Because of the significance of the opinion to summary judgment practioners, a thorough discussion of the case is warranted.

The plaintiff-borrower, Mid-State Fertilizer company, sold fertilizer in Illinois. In order to meet its daily outflows until it could collect from customers, it sought and obtained revolving credit from the Exchange Bank. The bank promised to lend Mid-State 70% of its inventory and receivables, while Mid-State agreed to direct its customers to make all payments to a lock box the bank would control. The bank would retrieve the checks and deposit them into a "blocked account" from which it alone could withdraw the cash. The bank would then apply the payments to the loan and apply the surplus to Mid-State's own savings account. This arrangement was a variant of factoring which banks call "asset based financing."[105]

All was well until Mid-State Fertilizer began to fall into hard times. The bank first limited the amount it would extend as credit, and later discovered that some of Mid-State's customers had bypassed the lock box and made payment of one million dollars directly to Mid-State. Mid-State defaulted on its loans, could not find other financing, and went into liquidation under Chapter 7 of the Bankruptcy Code.[106]

The federal litigation began, not by the bank suing the borrower for fraud, breach of contract, or the like, but by the defaulted borrower filing an action against the bank for state law contract claims, as well

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103. Fed. R. Civ. P. 56(e).
104. 877 F.2d 1333 (7th Cir. 1989).
105. *Id.* at 1333-34.
106. *Id.* at 1334.

as federal RICO[107] and Bank Holding Company Act[108] claims. The district court granted summary judgment on the federal claims and exercised its discretion to dismiss the pendent state law claims. The Seventh Circuit affirmed as to all claims,[109] but its discussion of summary judgment proof for the Bank Holding Act claim is what makes *Mid-State Fertilizer* a noteworthy opinion for federal practitioners in all types of civil litigation.

Mid-State's Bank Holding claim was based on the bank anti-tying statutes that forbid linking the extension of credit to other bank services. One such section prohibits a bank from extending credit on the condition that the borrower refrain from obtaining credit or services at another bank.[110] The statute, however, expressly allows the bank to impose such a condition on the borrower's credit if it is "reasonably impose[d]. . . to assure the soundness of the credit."[111] Mid-State argued that the bank violated this anti-tying statute by requiring the lock box and blocked account arrangement. Based on affidavits of the bank that such arrangements are common and necessary when dealing with small businesses in the volatile agricultural industry, the district court granted summary judgment for the bank on the anti-tying claims.[112]

In affirming summary judgment on this issue, Judge Easterbrook began by noting that the statutory words that the bank could "reasonably impose" certain conditions sound like a factual question that would ordinarily preclude summary judgment.[113] Indeed, Mid-State, in response to the bank's summary judgment affidavits stating that these lockbox arrangements are common and necessary in such credit arrangements, thought that it had preserved the factual issue by submitting an affidavit from a respected scholar and a former director of the Exchange Bank itself.[114] The Seventh Circuit, however, agreed with the district court that the affidavit was deficient under Rule 56(e) because it did not recite "'any of the specific facts or steps in his reasoning.'"[115]

This is an important holding, for on its surface the affidavit, given by an apparently reputable and qualified expert in the field, seemed to put the key factual points at issue. The affiant had recited that, in his

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107. 18 U.S.C. §§ 1962(a), 1964(c) (1988).
108. 12 U.S.C. §§ 1972, 1975 (1988).
109. *Mid-State*, 877 F.2d 1333.
110. 12 U.S.C. § 1972(1)(E) (1988).
111. *Id.*
112. 877 F.2d at 1338.
113. *Id.* at 1337.
114. *Id.* at 1337-38.
115. *Id.* at 1339 (quoting Mid-State Fertilizer Co. v. Exchange Nat'l Bank, 693 F. Supp. 666, 670 (N.D. Ill. 1988)).

opinion, the loan arrangement including the lock box was not necessary to assure repayment, was not necessary to assure the soundness of the credit, and was not an appropriate traditional banking practice.[116] Finally, the expert wrote that his opinions were based on his education, training, experience, as well as his review of pleadings and documents in the case.[117]

On close examination, however, the Seventh Circuit ruled that the affidavit did not comply with the Rule 56(e) requirement that affidavits shall "'set forth facts.'"[118] In the case of experts, the *Mid-State* court wrote that this requires a "process of reasoning beginning from a firm foundation," and not just a final opinion.[119] The court expounded on the issue, writing, "Professor Bryan [the affiant] would not accept from his students or those who submit papers to his journal an essay containing neither facts nor reasons; why should a court rely on the sort of exposition the scholar would not tolerate in his professional life?"[120]

Moreover, the Seventh Circuit wrote, the court should not rely on such an affidavit "when the declaration makes no sense."[121] According to Judge Easterbrook, Professor Bryan's assertion that a lock box is inappropriate in essence "accuses the bank of irrational conduct - not a common assumption for an economist."[122] "Anyway," the court wrote, "how can payments from customers direct to the bank not be 'traditional' when that is the cornerstone of factoring and asset-based leading?"[123]

Relying on the *Matsushita* branch of the Supreme Court's trilogy of summary judgment decisions, Judge Easterbrook further noted that "if the factual context renders [the] claim implausible—if the claim is one that simply makes no economic sense—[the plaintiffs] must come forth with more persuasive evidence to support their claim than would otherwise be necessary."[124] Easterbrook concluded that the affiant "might have been able to demonstrate that his conclusions rest[ed] on a sound foundation even though they appear[ed] fantastic, but he did not try."[125]

In concluding his opinion, Judge Easterbrook explained why he had gone to such lengths to attack the affidavit, writing, "We have gone into detail not because essential to sustain [the district court's] decision

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116. *Id.* at 1338-39.
117. *Id.* at 1339.
118. *Id.*
119. *Id.*
120. *Id.* at 1339.
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.* (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. at 587).
125. *Id.* at 1340.

but because ukase[126] in the guise of expertise is a plague in contemporary litigation."[127] In this case,

> [the affiant] offered the court his CV rather than his economic skills. Judges should not be buffaloed by unreasoned expert opinions. . . . 'The importance of safeguarding the integrity of the [judicial] process requires the trial [or appellate] judge, when he believes that an expert's testimony has fallen below professional standards, to say so, as many judges have done.' [The affiant] cast aside his scholar's mantle and became a shill for Mid-State; [the district court], by observing that the emperor has no clothes, protected the interests of the judicial system.[128]

While Judge Ripple separately concurred to express his opinion that "all that needs to be said with respect to the role of the affidavit" was to reiterate the district court's conclusion that the affidavit failed for want of specific facts,[129] the *Mid-State* case shows that the Seventh Circuit is not hesitant to follow the teachings of *Matsushita* that the courts may look into the factual context of the proffered evidence to determine whether such evidence should even be considered. Just as importantly, the majority and concurring opinions teach that the "specific facts" requirements of Rule 56(e) must be followed in summary judgment. Judge Easterbrook went well out of his way to profess his opinions on these issues, and local federal practitioners would be well advised to heed his teachings, regardless of whether one agrees with them on a policy level.

Also instructive is *Randle v. LaSalle Telecommunications, Inc.*,[130] in which the Seventh Circuit affirmed summary judgment in a section 1981 claim and explained that certain evidence proffered by the plaintiffs could not be considered under Rule 56(e) because it was hearsay. Rule 56(e), it should be recalled, states that summary judgment affidavits "shall set forth such facts *as would be admissible in evidence.*"[131] This admissibility requirement, which has been given a flexible interpretation in many instances,[132] was strictly construed to exclude hearsay deposition testimony in *LaSalle Telecommunications.*[133]

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126. "Ukase" is defined as a Russian edict or order emanating from the government and having the force of law. *New Webster Dictionary of the English Language* 906 (1971).

127. 877 F.2d at 1340.

128. *Id.* (quoting Deltak, Inc. v. Advanced Systems, Inc., 574, F. Supp. 400, 406 (N.D. Ill. 1983), vacated on other grounds, 767 F.2d 357 (7th Cir. 1985)) (citations omitted).

129. *Id.* at 1341 (Ripple, J., concurring).

130. 876 F.2d 563 (7th Cir. 1989).

131. FED. R. CIV. P. 56(e) (emphasis added).

132. *See, e.g.*, Reed v. Ford Motor Co., 679 F. Supp. 873, 874 (S.D. Ind. 1988)

In one of the proffered depositions, the plaintiff testified that a LaSalle employee had told her that one of LaSalle's executives had once stated: "[I]f he had his way he wouldn't deal with any of them [women or blacks]. . .[sic]"[134] In another affidavit a witness testified that the same executive and other LaSalle personnel had "reached a consensus that steps would be taken" to discriminate against the plaintiff's company.[135]

The Seventh Circuit, however, rejected such evidence as hearsay, writing, "Rule 56(e) requires that supporting evidentiary affidavits "shall set forth facts as would be admissible in evidence." Based on this requirement, our cases have stressed that we are unable to consider hearsay statements that are not otherwise admissible at trial. The same limitation applies to deposition testimony based on inadmissible hearsay."[136] Thus, the *LaSalle Communications* opinion teaches that lawyers must proffer non-hearsay testimony at the summary judgment stage. If counsel has no choice but to rely on arguable hearsay, it would be wise to be prepared to demonstrate that such evidence will be admissible at trial under an appropriate hearsay exception. If it is simply a matter of locating the appropriate witness to relay the evidence and counsel needs more time, the remedy is found in Rule 56(f), which allows the court to grant a continuance to permit affidavits to be obtained or depositions to be taken, "or discovery to be had or. . . make such other order as is just."[137]

2. The Truth or the Consequences.—The final summary judgment opinion to be discussed gives the plaintiff's bar some reason for cheer in the midst of the summary judgment trend that typically favors defendants. In *Goka v. Bobbitt*,[138] the Seventh Circuit reversed summary judgment in a prisoner's civil rights action against two prison officials. This, in and of itself, is not particularly noteworthy. What is deserving of comment, however, is the fact that the Seventh Circuit ordered the district court to consider on remand whether sanctions should be imposed

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(noting that Rule 56(e) "does not require an unequivocal conclusion that the evidence will be admissible at trial as a condition precedent to its consideration on a summary judgment motion.").

133. 876 F.2d at 563.

134. *Id.* at 570 n.4.

135. *Id.*

136. *Id.* (citations omitted).

137. FED. R. CIV. P. 56(f). Note, however, that the failsafe device of Rule 56(f) must be promptly invoked before the trial court if it appears that additional time will be needed. As the Seventh Circuit made clear in *Goldberg v. Household Bank*, 890 F.2d 965, 968 (7th Cir. 1989), "an appellate brief is the wrong place to raise, for the first time, an argument that things moved too expeditiously in the district court."

138. 862 F.2d 646 (7th Cir. 1988).

against defense counsel who had successfully obtained summary judgment below.[139]

In *Goka*, the defense counsel moved for and obtained summary judgment despite her presumed knowledge of a genuine issue of material fact.[140] Counsel's knowledge was shown by conflicts in the parties' depositions on a key factual issue.[141] Defense counsel nonetheless argued that under *Celotex* her duty was to identify only those portions of the record that supported the defendants' position, even though "there exist[ed] evidence to the contrary of which defendants [were] aware."[142] The Seventh Circuit made clear, however, that such an argument is untenable given Rule 56's purpose "to isolate and dispose of *factually unsupported* claims or defenses."[143]

Moreover, the court held that such conduct implicates consideration of sanctions. The court wrote:

> When a party has obtained knowledge through the course of discovery, or otherwise, that a material factual dispute exists and yet proceeds to file a summary judgment motion, in hopes that the opposing party will fail or be unable to meet its burden in responding to the motion, he defeats that purpose; and, more importantly, violates the rules of procedure which govern the conduct of trial, specifically Rule 11.[144]

The *Goka* decision teaches the obvious, and it is unfortunate that it took appellate court review to rectify the situation in that particular case. Nonetheless, the case serves as a good reminder that litigation is more than just a game in which the player with the best tactics prevails. Rather, lawyers at all times must shoulder and respect the ethical responsibilities that go with being an officer of the court. If that means telling a client that summary judgment is impossible given the record, then so be it.

Counsel considering summary judgment should not be overly worried about *Goka* and its implications if a proper pre-filing review of the record and applicable law is undertaken. On the other hand, those who ignore the mandate of Rule 11 and choose not to conduct such a review do so at considerable risk and detriment not only to themselves, but,

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139. *Id.* at 652.
140. *Id.* at 651.
141. *Id.* at 650-51.
142. *Id.* at 650.
143. *Id.* at 650 (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 323-24) (emphasis supplied by Seventh Circuit).
144. *Id.*

as *Goka* illustrates, also to their client, the opponent, and the system of justice we are duty-bound to uphold.

IV. The Power of the Federal Courts to Control the Litigation Before Them

Two Seventh Circuit decisions from the survey period illustrate the power of the federal courts to control the parties and counsel that come before them. This Article will only briefly highlight the decisions so that practitioners are aware of them. The basic principles from the cases could be relevant in any number of imaginable scenarios.

First, in *G. Heileman Brewing Co. v. Joseph Oat Corp.*,[145] a sharply divided Seventh Circuit, sitting *en banc*, held that district courts are entitled to order *parties* who are represented by counsel to appear before them in person at pre-trial conferences for the purposes of discussing the posture and settlement of a case. The six to five decision produced five separate dissents and thus resembled the final result in many Supreme Court cases.[146]

The central issue was whether "the authority to order parties as well as attorneys, to appear" resides in the courts notwithstanding the language of Rule 16(a)(5) of the Federal Rules of Civil Procedure, which provides that "the court may . . . direct the attorneys for the parties . . . to appear before it for a conference . . . for such purposes as . . . facilitating the settlement of the case." The corporate defendant that was sanctioned for failing to send a corporate representative to a pre-trial conference argued that Rule 16 prevents a district court from requiring more than the party's attorney to be present.

A majority of the Seventh Circuit rejected this argument, however, holding instead that the courts have significant procedural authority outside the explicit language of the Federal Rules. The court reasoned that "[t]he wording of the rule and the accompanying commentary make plain that the entire thrust of the amendment to Rule 16 was to urge judges to make wider use of their powers and to manage actively their dockets from an early stage."[147] The majority then concluded that the district court had not abused its discretion in ordering such attendance, and that the imposition of sanctions was appropriate for the defendant's failure to produce such a representative.[148]

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145. 871 F.2d 648 (7th Cir. 1989) (en banc).

146. Judge Kanne authored the majority opinion, and was joined by Chief Judge Bauer and Judges Cummings, Wood, Cudahy, and Flaum. Judges Posner, Coffey, Easterbrook, Ripple, and Manion all filed separate dissenting opinions in which all but Judge Posner were joined by some of their colleagues.

147. 871 F.2d at 652.

148. *Id.* at 656-57.

The dissenting opinions launched a variety of objections to the majority's holding. Perhaps the most interesting, for purposes of this Article, is Judge Posner's comment that "it is the rare attorney who will invite a district judge's displeasure by defying a request to produce the client for a pretrial conference."[149] This is especially true today now that a majority of the court has given the district courts broad powers to require such attendance.

A critical analysis of the decision is beyond the scope of this Article, and such reviews will no doubt be given by numerous commentators.[150] What is important is that practitioners ensure that their clients comply with such orders, and that counsel can now consider seeking such an order in appropriate cases. As many of the opinions in *Heileman Brewing* discuss, the district courts can effectively use such devices to promote settlement. Whether this is appropriate on a policy level is relevant in the Seventh Circuit only to the extent that it impacts the district court's discretionary decision whether to require such attendance or not. The power to do so is now firmly established in this circuit; as a result there will probably be more use of such an order.

A second case illustrating the power of the courts involves the tools available to slow repetitive filings of a "frequent filer." In the case of *In Re Davis*,[151] the Seventh Circuit approved of a district court's injunction requiring a frequent litigant to submit proposed filings to an executive committee of the judges for screening. The Seventh Circuit held that such a procedure does not impermissibly bar the courthouse door to the plaintiff. Rather, the court reasoned, such a procedure is consistent with the courts' "inherent power and constitutional obligation to protect their jurisdiction from conduct which impairs their ability to carry out Article III functions."[152]

The *Davis* case thus further illustrates the power of the federal courts to control the litigation before them. Practitioners opposing such a frequent filer may be able to seek reprieve pursuant to that clear power.

V. Rule 609(a) Requires the Federal Courts to Allow Impeachment of a Civil Witness with Prior Convictions: What Effect on Federal Civil Practice?

Rule 609 addresses the question of how, when, and what types of criminal convictions can be used to impeach a witness in federal court. Its somewhat awkward language reads as follows:

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149. *Id.* at 657 (Posner, J., dissenting).

150. *See, e.g.*, Reidinger, *Then It's Settled - 7th Circuit Upholds Rule 16 Order*, 75 A.B.A. J. 92 (July 1989) (showing significance of case).

151. 878 F.2d 211 (7th Cir. 1989).

152. *Id.* at 212 (quoting In re McDonald, 109 S. Ct. 993, 996 n.8 (1989)).

> (a) For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the *defendant*, or (2) involved dishonesty or false statement, regardless of the punishment.
>
> (b) Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed . . . unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect . . .[153]

In the civil context, this Rule has caused problems in interpretation because the Rule's use of the word "'defendant' creates inescapable ambiguity."[154] The central question that has divided courts and commentators is whether Rule 609(a) requires prior convictions to be admitted in civil cases without any discretionary balancing by the district judge.

Because of a split in the circuits on this point,[155] the Supreme Court recently took up the issue and resolved the matter for good, or at least until such time that Congress approves of a proposed amendment to the rule. In *Green v. Bock Laundry Machine Co.*,[156] the Court, by a six to three vote, squarely held that the felony balancing test of Rule 609(a) for the "defendant" applies only in criminal actions.[157] Moreover, the Court ruled that the discretionary balancing standard of Rule 403 is inapplicable to convictions in civil actions because of Rule 609's mandatory "shall be admitted" language.[158]

Thus, after *Bock Laundry*, the federal district courts hearing civil actions have *no* discretion to prohibit impeachment with felonies or crimes of dishonesty or false statement that are less than ten years old. The only discretion the judge retains in civil cases is for crimes more

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153. FED. R. EVID. 609(a), (b) (emphasis added).

154. Green v. Bock Laundry Machine, Co., 109 S. Ct. 1981, 1995 (1989) (Blackmun, J., dissenting).

155. *See* Brown v. Flury, 848 F.2d 158 (11th Cir. 1988) (discussing split in the circuits).

156. 109 S. Ct. 1981 (1989).

157. 109 S. Ct. at 1993.

158. Rule 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

than ten years old under Rule 609(b). This is obviously an important case for trial lawyers. It confirms the wisdom of two recent opinions from the Seventh Circuit,[159] and in so doing strips trial judges of their discretion in this controversial area.

The holding is also important to local practitioners in the early preparation of their cases. One subject that should be considered prior to filing any action is whether a party's witnesses will be subject to mandatory impeachment under *Bock Laundry*. If any civil witness has a felony conviction or a conviction for a crime of dishonesty or false statement, and if such conviction is less than ten years old, counsel must know this and plan accordingly. Competent opposing counsel will certainly learn this through discovery and might be able cloud the real issues at trial by impeaching the witness.

One factor to be evaluated is whether the *Bock Laundry* holding makes the federal forum less desirable in those cases in which counsel has a choice between state or federal court. In order to make this determination, counsel must be aware of the Indiana (or other applicable state) rule on impeachment by prior conviction. In Indiana, for instance, the case law "emphasizes the nature of the offense and its tendency to reflect upon veracity, [and thus] differs from the federal rule, which emphasizes seriousness of the offense and remoteness."[160] The Indiana rule, which was established in 1972 in the case of *Ashton v. Anderson*,[161] is that prior convictions are admissible for impeachment purposes if (1) the crime involved dishonesty or false statement, or (2) the conviction was for an "infamous" crime such as murder, rape, arson, burglary, robbery, kidnapping, forgery, and wilful and corrupt perjury.[162] Just as in federal courts, the trial judge has no discretion in admitting these particular crimes.[163]

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159. *See* Campbell v. Greer, 831 F.2d 700 (7th Cir. 1987) (two judges holding that trial court has no discretion in civil actions on this issue, with one judge separately concurring to argue that the issue did not need to be reached in that particular case); Hernandez v. Depeda, 860 F.2d 260 (7th Cir. 1988) (following *Campbell*).

160. 12 R. MILLER, INDIANA PRACTICE - INDIANA EVIDENCE § 609.111, at 578 (1984) [hereinafter MILLER, INDIANA EVIDENCE].

161. 258 Ind. 51, 279 N.E.2d 210 (1972).

162. *See* MILLER, INDIANA EVIDENCE, *supra* note 160, at 568-69. The Indiana Court of Appeals determined in 1989 that an attempt to perform any of the infamous crimes is also admissible under *Ashton*. *See* Adams v. State, 542 N.E.2d 1362, 1366-67 (Ind. Ct. App. 1989). The *Adams* court reasoned that the heinousness of an infamous crime such as rape "is not lessened merely because the rapist was prevented from completed the rape." *Id.*

163. *Ashton*, 258 Ind. at 61, 279 N.E.2d at 216 (stating there is "little wisdom in permitting the exclusion of such evidence to rest in the sound discretion of the trial court.").

Thus, the bar is left with the following summary of the status of impeachment by prior convictions in Indiana and federal forums:

1. *Type of crime*:

In Indiana, only the eight infamous crimes and crimes of false statement or dishonesty are used for impeachment.

In federal court, *any* crime punishable by imprisonment in excess of one year, as well as any crime of false statement or dishonesty can be used for impeachment.

2. *Remoteness of the crime*:

In Indiana, it is irrelevant whether the crime is more than ten years old. The trial court *must* admit it if it is covered by *Ashton*.[164]

In federal court, the trial court must admit the 609(a) crime if it is less than ten years old. If the crime is more than ten years old, the court has discretion.

The net effect of this is that after *Bock Laundry*, there are certain crimes that must be admitted in federal court that would not be usable in state court. For instance, a drug-related offense that carries more than a one year imprisonment *must* be admitted in federal court if that crime occurred less than ten years ago. In Indiana, however, such a crime is *not* admissible because it is not an infamous crime nor a crime of dishonesty or false statement under *Ashton*.[165]

The Indiana courts have held that a number of offenses do not qualify as dishonesty or false statement crimes under *Ashton*. These include assault, malicious trespass, prostitution, escape, possession of a gun without a permit, failure to pay child support, and assisting a criminal.[166] However, to the extent that any of these crimes are punishable by imprisonment of more than one year,[167] they would be admissible in federal court. Thus, a witness having such a conviction would not be impeached in Indiana, but would be in federal court.

If, on the other hand, the witness has a conviction that is more than ten years old, the federal forum may be more desirable if it appears that a good argument can be made that the probative value of the

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164. *See* Cox v. State, 419 N.E.2d 1279, 1283 (Ind. 1981) (requirement of FED. R. EVID. 609 that crime be less than ten years old does not apply in Indiana state courts).

165. *See* Johnston v. State, 517 N.E.2d 397, 401 (Ind. 1988) ("Obviously drug offenses are not included in this list of impeachable offenses.").

166. *See* MILLER, INDIANA EVIDENCE, *supra* note 160, § 609.103, at 118 (Supp. 1989) (collecting cases).

167. Counsel faced with a witness having such a conviction should check the appropriate statute to determine the length of punishment and hence its admissibility in federal court.

conviction is outweighed by its prejudicial effect under Rule 609(b). Remoteness of conviction is not a factor in Indiana state courts, so counsel should consider the federal forum if such a scenario is presented.

Thus, the *Bock Laundry* rule will be felt at all stages of litigation. In cases that could turn on the credibility of a witness with a prior conviction and where concurrent federal and state jurisdiction exists over the claim, the desirability of the state or the federal forum should be considered.

As this Article went to print, the Supreme Court had just issued a proposed amendment to Rule 609(a) that would, in essence, negate the effect of its *Bock Laundry* decision. On January 26, 1990, the Court sent its proposed amendment to Congress for consideration. The proposed rule would read as follows:

Rule 609. Impeachment by Evidence of Conviction of Crime

> (a) General Rule.—for the purpose of attacking the credibility of a witness,
>
> (1) evidence that a witness *other than an accused* has been convicted of a crime shall be admitted, *subject to Rule 403*, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and
>
> (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.[168]

Pursuant to 28 U.S.C. § 2074, this amendment becomes law on December 1, 1990, if Congress does not affirmatively take action to reject the amendment.[169]

Thus, effective December 1, 1990, Rule 609(a) will change to allow district courts to use the balancing test of Rule 403 in admitting non-false statement felonies in civil actions, unless, of course, Congress rejects the amendment. Congress should and probably will adopt the changes; it must take affirmative action to do otherwise, which is easier said than done.

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168. *See* Communication from the Chief Justice Of The United States Transmitting An Amendment To The Federal Rules of Evidence (Jan. 26, 1990) (emphasis added) [hereinafter "Proposed Amendment to Rule 609"].

169. *See* 28 U.S.C.A. § 2074 (West Supp. 1989); Commentary on 1988 Revision to 28 U.S.C.A. § 2074 (West Supp. 1989) (discussing Rule-making procedures).

Even if the changes are implemented, however, counsel should still pay special attention to Rule 609. There will still be differences in the type of crimes available for impeachment in federal and state courts, and the remoteness of the crime will remain a consideration only in federal court. Counsel should still consider whether any witnesses have prior convictions and determine the probabilities that such convictions will be admissible in the given forum.

VI. Sanctions in the Seventh Circuit

Rule 11 of the Federal Rules of Civil Procedure provides that a lawyer's or a party's signature on any paper filed in district court

> constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Since its amendment in 1983, Rule 11 has been the subject of numerous reported cases nationwide, as well as the topic of frequent commentary and discussion.[170] During the Survey period, the Seventh Circuit addressed Rule 11 many times, and in one *en banc* decision the court finally settled on a standard of appellate review for district court decisions on the issue. This section of the Article will outline the standards for Rule 11 in this circuit, will highlight some procedural developments in the area, and will then briefly set forth some examples of the type of conduct that can invoke the wrath of Rule 11.

A. Standards

Rule 11 proscribes two types of conduct: the filing of frivolous papers and the filing of papers for any improper purpose. The "improper purpose" aspect of the Rule is governed by a subjective standard, while the "frivolousness" clause invokes an objective evaluation.[171] The ob-

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170. For a brief sampling of articles on the subject, see Carter, *The History and Purposes of Rule 11*, 54 Fordham L. Rev. 4 (1985); Marcotte, *Rule 11 Changes - Blessing or Curse?*, 72 A.B.A. J. 34 (Sept. 1, 1986); Schwarzer, *Sanctions Under the New Federal Rule 11 - A Closer Look*, 104 F.R.D. 181, 183 (1985); Comment, *Critical Analysis of Rule 11 Sanctions in the Seventh Circuit*, 72 Marq. L. Rev. 91 (1988).

171. *See generally* Mars Steel Corp. v. Continental Bank N.A., 880 F.2d 928, 933 (7th Cir. 1989). For an in-depth discussion of these aspects of the Rule in the Seventh Circuit, see Comment, *Critical Analysis of Rule 11 Sanctions in the Seventh Circuit*, 72 Marq. L. Rev. 91, 101-07 (1988).

jective analysis for frivolousness asks whether the filer made a reasonable inquiry into the facts and the law.[172] If either the objective or subjective aspect of the Rule is violated, the district court is required to impose a sanction.[173]

In fashioning the appropriate sanction, the district court has discretion to choose from a number of possibilities, including an award of expenses and attorneys fees.[174] As the Seventh Circuit has written, "Available sanctions range from such judicial actions as an off-the-record reprimand to reprimand on the record, to monetary assessments or penalties."[175] The type of sanction should relate to the severity of the violation, and monetary assessments are not necessarily required.[176]

While these standards have become settled in the Seventh Circuit in recent years, the appropriate standard for the appellate court to review the district court's decision had been a subject of debate among the panels of the Seventh Circuit itself. Some panels held that a deferential standard of appellate review was appropriate,[177] while others used a *de*

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172. *See, e.g.*, Insurance Benefit Adm'rs Inc. v. Martin, 871 F.2d 1354, 1357-58 (7th Cir. 1989). The inquiries a district court must make in determining whether an attorney's conduct has violated the frivolousness clause have been summarized by the Seventh Circuit as follows:

> To determine whether the attorney made a reasonable inquiry into the facts of a case, a district court should consider: whether the signer of the documents had sufficient time for investigation; the extent to which the attorney had to rely on his or her client for the factual foundation underlying the pleading, motion, or other paper; whether the case was accepted from another attorney; the complexity of the facts and the attorney's ability to do a sufficient pre-filing investigation; and whether discovery would have been beneficial to the development of the underlying facts. . . .
>
> To determine whether the attorney in question made a reasonable inquiry into the law, the district court should consider: the amount of time the attorney had to prepare the document and research the relevant law; whether the document contained a plausible view of the law; the complexity of the legal questions involved; and whether the document was a good faith effort to extend or modify the law.

Brown v. Federation of State Medical Bds., 830 F.2d 1429, 1435 (7th Cir. 1987).

173. Rule 11 specifically states that if a filing is signed in violation of the Rule, "the court, upon motion or upon its own initiative, shall impose . . . an appropriate sanction." FED. R. CIV. P. 11. The Seventh Circuit has indicated that a finding that a sanction is warranted requires only that "some remedial action be taken by the court." *Martin*, 871 F.2d at 1359.

174. *See* FED. R. CIV. P. 11 (directing court to impose an "appropriate sanction"); *Martin*, 871 F.2d at 1359 (choice of sanction is left to court's discretion).

175. 871 F.2d at 1359.

176. *Id.*

177. *See, e.g.*, R.K. Harp Investment Corp. v. McQuade, 825 F.2d 1101, 1103 (7th Cir. 1987); *In re* Central Ice Cream Co., 836 F.2d 1068, 1072 (7th Cir. 1987); Borowski v. DePuy Inc., 850 F.2d 297, 304 (7th Cir. 1988).

novo standard for some issues.[178] In order to achieve harmony on the issue, the Seventh Circuit heard the issue *en banc* last July in the case of *Mars Steel Corp. v. Continental Bank N.A.*[179]

The *Mars Steel* court, by a six to four vote, held that "[f]rom now on, this court will use a deferential standard consistently - whether sanctions were imposed or not, whether the question be frivolousness on the objective side of Rule 11 or bad faith on the subjective side."[180] Writing for the majority, Judge Easterbrook followed the reasoning of six other courts of appeals that employ deferential review across the board. The thrust of his opinion was that the decision making process on a Rule 11 petition is inherently fact sensitive, and that such evaluations are best handled at the district court level. As he explained: "District Judges have the best information about the patterns of their cases, information appellate judges could duplicate only at great cost in time."[181]

While the issue had attracted attention from many, including several bar associations which filed *amicus* briefs,[182] and while it is certainly important, the fact that the matter was finally resolved may well be more significant, in a sense, than the actual resolution that was reached. As one of the lawyers in the case remarked, "From our standpoint, as long as they made a decision, that's good, [because] [s]ometimes it's better to decide."[183] And as the four judges who would have adopted a *de novo* standard seemed to admit, "[T]he name given to the standard of review may be more symbolic than outcome determinative."[184]

It should be noted that the Supreme Court has agreed to hear the issue of what standards of review are to be used by appellate courts in Rule 11 cases. In fact, as this Article went to press, the Court had just heard argument on the issue in *Cooter & Gell v. Hartmarx.*[185] Should the Court proceed to reach this issue, a decision could be expected before the end of the current term. One of the parties in the Supreme Court case argued that the Court should adopt the deferential standard

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178. *See, e.g.*, Brown v. Federation of State Medical Bds., 830 F.2d 1429, 1434 (7th Cir. 1987); S.A. Auto Lube, Inc. v. Jiffy Lube Int'l Inc., 842 F.2d 946, 948 (7th Cir. 1988); Beeman v. Fiester, 852 F.2d 206, 209 (7th Cir. 1988).

179. 880 F.2d 928, 930 (7th Cir. 1989).

180. *Id.*

181. *Id.* at 933.

182. The Indiana State Bar Association, for instance, joined with the Seventh Circuit, Illinois State, Chicago Federal, and Chicago bar associations to file a brief supporting a tiered system of review. *See* 32 RES GESTAE 549, 549-50 (May 1989).

183. CHIC. DAILY L. BULL., July 21, 1989, at 1.

184. 880 F.2d at 940 (Flaum, J., concurring).

185. *See* summary of argument in 58 U.S.L.W. 3539, 3539-40 (U.S. Feb. 27, 1990) (No. 89-275).

of review embraced by the Seventh Circuit and most other courts of appeals.[186]

In any event, the *Mars Steel* decision should be praised on the grounds that it temporarily settles the appropriate standard of appellate review for sanctions cases in the Seventh Circuit. However, the effect of the deferential standard remains to be seen. One of the lawyers in the case opined that practitioners will have to be careful about appealing sanctions issues because the Seventh Circuit is going to rely more on the lower court decision.[187] On the other hand, the judges who voted for *de novo* review argued that uniformity among the circuit's trial judges would be hampered by deferential review.[188]

Whatever the standard of review, uniformity will always be lacking because some district judges utilize Rule 11 vigorously, while others control counsel and parties coming before them in other ways. Even though sanctions must be imposed if a violation is found, the trial judge in essence retains the power to bypass this requirement by not finding a violation or by imposing something as light as an off the record reprimand. The standard of appellate review will not change this; only an incredible matrix of "sanctions guidelines" resembling the less than straightforward federal sentencing guidelines could even attempt to do so. In short, trial judges deal with sanctions issues on a case by case basis. To the extent that the *Mars Steel* majority based their holding on this fact, their opinion seems well reasoned.

What, then, is the local practitioner to make of this change? Two suggestions appear warranted. First, so long as careful consideration is given to each filing, which is in essence what Rule 11 reaffirms, there should be no reason for concern. Second, if a specific sanctions issue arises before a district judge, it would be wise to learn that particular jurist's general philosophy on sanctions. Two sources are published opinions on the issue and the everyday reputation of the judge with local practitioners. While uniformity arguably might not exist on different floors of the courthouse, it probably does within any given chambers.

B. Procedural Issues

Several decisions from the Survey period addressed important procedural issues in the sanctions arena. In order to apprise lawyers of these developments, this section of the Article will briefly summarize those holdings. Further analysis of the decisions is left to counsel faced

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186. *Id.*
187. CHIC. DAILY L. BULL., July 21, 1989, at 1.
188. 880 F.2d at 940 (Flaum, J., concurring).

with such issues. The more significant teachings can be outlined as follows:

1. There is no due process right to discovery with respect to an imposition of sanctions;[189]
2. There is no requirement for a hearing before the imposition of sanctions;[190]
3. It is left to the trial court's discretion whether to allow discovery in connection with a Rule 11 award;[191]
4. Rule 11 is not an affirmative defense that needs to be pleaded in the initial responsive pleading;[192]
5. A Rule 11 motion can be brought after a party reasonably discovers the frivolity or improper purpose of a filing;[193]
6. A district court faced with possible sanctions under its various powers such as Rule 11, Rule 37, and U.S. Code Title 18 section 1927 must state the authority upon which it makes each sanction so that review may be had accordingly;[194]
7. Although the district court need not issue long, detailed orders in every sanctions case, the district court must state with some specificity the reasons for the imposition of the sanction and the manner in which the sanction was computed, with the award being quantifiable with some precision and properly itemized in terms of the perceived misconduct and the sanctioning authority;[195]
8. Sanctions may be imposed on a *pro se* litigant;[196]
9. When attorneys are sanctioned, they can appeal under the collateral order doctrine prior to final judgment in the underlying litigation if the order appealed from conclusively determined the disputed sanctions question;[197]

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189. Borowski v. DePuy, Inc., 876 F.2d 1339, 1341 (7th Cir. 1989).

190. *Id.* One commentator has noted that discovery or a full-blown evidentiary hearing is allowed only under extraordinary circumstances. *See* Comment, *Critical Analysis of Rule 11 Sanctions in the Seventh Circuit*, 72 MARQ. L. REV. 91, 111 (1988).

191. *Borowski*, 876 F.2d at 1343 (Cudahy, J., concurring in part and dissenting in part).

192. Seehawer v. Magnecraft Elec. Co., 714 F. Supp. 910, 916 (N.D. Ill. 1989) (in striking an affirmative defense that in essence pleaded the text of Rule 11, the court, after noting no cases had been located on the issue, held that "Rule 11 cannot by itself constitute an affirmative defense.").

193. *Id.* (noting that placing a burden on defendants to affirmatively plead Rule 11 sanctions in their answer could effectively deny relief to those defendants who reasonably discover the violation of the Rule long after the initial pleadings phase).

194. Insurance Benefit Adm'rs, Inc. v. Martin, 871 F.2d 1354, 1361 (7th Cir. 1989).

195. *Id.* at 1362.

196. Goldberg v. Weil, 707 F. Supp. 357, 362 (N.D. Ill. 1989).

197. Rogers v. National Union Fire Ins. Co., 864 F.2d 557, 559 (7th Cir. 1988) (citing Frazier v. Cast, 771 F.2d 259 (7th Cir. 1985)).

10. When non-party attorneys appeal a sanctions order, they must name themselves on the notice of appeal as they are the real party in interest as to the sanctions appeal; failure to do so is not excusable because it deprives the appellate court of jurisdiction;[198]
11. The finality of an order in the underlying litigation is *not* affected by the pendency of a motion for sanctions,[199] and,
12. Withdrawal of a frivolous complaint or a frivolous appeal does not prevent an award of sanctions.[200]

Procedural matters such as these will no doubt continue to receive courts' attention as the law of sanctions develops in this circuit.

The most important procedural ruling on Rule 11 in the national arena was handed down by the Supreme Court in late 1989. In *Pavelic & Leflore v. Marvel Entertainment Group*,[201] the Supreme Court held that Rule 11 sanctions may be imposed only upon individual attorneys or parties who sign papers and not on law firms. In writing for the eight-member majority, Justice Scalia determined that Rule 11's language is unambiguous and must be given its plain meaning.

Specifically, Scalia wrote that when Rule 11 says that a sanction is to be imposed "upon the person who signed it. . . ," it means that the individual who signed the paper is the party responsible for the sanction. This is so, the Court ruled, because Rule 11 mandates that every pleading, motion, or paper must be signed by the attorney, and that signature constitutes a certificate by the signer that the paper is well grounded in fact and law. Moreover, the Court noted that holding individual attorneys liable for their own conduct better serves the deterrence purposes of Rule 11.[202]

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198. *Rogers*, 864 F.2d at 559-60; Federal Trade Comm'n v. Amy Travel Serv., Inc., 875 F.2d 564, 566 (7th Cir. 1989); Reynolds v. East Dyer Dev. Co., 882 F.2d 1249 (7th Cir. 1989).

199. Cleveland v. Berkson, 878 F.2d 1034, 1036 (7th Cir. 1989) (noting that the issue had not been squarely addressed in the Seventh Circuit).

200. Margulin v. CHS Acquisition Corp., 889 F.2d 122 (7th Cir. 1989).

201. 110 S. Ct. 456 (1989).

202. 110 S. Ct. at 458-60. The decision in *Melrose v. Shearson/American Cypress Inc.*, No. 88-2008, 2260, slip op. (7th Cir. Dec. 29, 1989) is interesting in that the Seventh Circuit affirmed an award of sanctions against a law firm in *Melrose*, just 24 days after the Supreme Court's decision in *Pavelic & Leflore*. The *Melrose* court, however, did not initially cite to *Pavelic & Leflore* or in any other fashion indicate an awareness of the Supreme Court's holding. It must be presumed, then, that neither the parties nor the Seventh Circuit were aware of the new Rule 11 decision placing liability for sanctions on attorneys rather than firms. However, on February 8, 1990, the Seventh Circuit issued an amended opinion discussing the effect of *Pavelic*. The court noted that it was unclear whom the district court had sanctioned when it stated that sanctions were awarded against

C. Examples of Sanctionable Conduct

Given that there will probably never be any concise set of abstract rules for sanctions due to the fact sensitive nature of the inquiry,[203] it is appropriate to sample the types of conduct that have invoked the wrath of the courts under Rule 11. Another laundry list reveals the following sanctionable activity during the Survey period:

1. Sanctions were awarded and affirmed where a motion to reconsider contained no new evidence or arguments;[204]
2. Sanctions were awarded and affirmed for an attorney's *ex parte* communication with a magistrate;[205]
3. Sanctions were awarded where a patentholder's attorney failed to conduct a reasonable prefiling inquiry to determine whether distributors could have sold allegedly infringing devices;[206]
4. Summary judgment was reversed and remanded for consideration of sanctions where the defense counsel presumably had knowledge of a genuine issue of material fact precluding summary judgment;[207]
5. Sanctions were imposed on a party for filing a frivolous request for sanctions;[208] and,
6. Counsel for an appellant was sanctioned where an appeal was found to be frivolous under Rule 38 of the Federal Rules of Appellate Procedure. The court specifically assessed the sanction against the attorney because it found his brief to be comprised of misleading arguments and legally inaccurate propositions.[209]

"Shearson's counsel." The Seventh Circuit thus remanded the case to determine which attorneys from the firm were liable. The Seventh Circuit made clear that after *Pavelic & Leflore*, individual attorneys are the ones accountable under Rule 11, even if they purport to sign on their firm's behalf. *Id.*

203. Mars Steel Corp. v. Continental Bank, N.A., 880 F.2d 928, 933 (7th Cir. 1989).

204. Magnus Elec., Inc. v. Masco Corp., 871 F.2d 626, 630 (7th Cir. 1989) (sanction award made by Judge Duff of the Northern District of Illinois).

205. *Id.* at 632.

206. Autotech Corp. v. NSD Corp., 125 F.R.D. 464 (N.D. Ill. 1989).

207. *See supra* notes 138-44 and accompanying text.

208. Foy v. First Nat'l Bank of Elkhart, 868 F.2d 251, 258 (7th Cir. 1989) (involving sanctions at appellate level under FED. R. APP. P. 38).

209. Williams v. United States Postal Serv., 873 F.2d 1069, 1075 (7th Cir. 1989). *See also* Gorenstein Enter. v. Quality Care-USA, 874 F.2d 431, 437-38 (7th Cir. 1989) (frivolous appeal); Ross-Berger Cos. v. Equitable Life Assurance, 872 F.2d 1331, 1340-41 (7th Cir. 1989). In several other opinions the Seventh Circuit, on its own motion, chastized counsel for filing inadequate briefs. In one case, for instance, Judge Posner

Finally, in perhaps the most instructive opinion of the Survey period in this area, the Seventh Circuit denied an otherwise meritorious motion for sanctions under Rule 38 of the Federal Rules of Appellate Procedure where the party seeking sanctions filed a full-fledged brief on the merits. In *Brooks v. Allison Division of General Motors*,[210] the employer had successfully obtained summary judgment at the district court on a fair representation and employment discrimination claim. In disposing of the claims, Judge Steckler relied on the fact that the complaint was clearly untimely because it was filed more than five years after the alleged discrimination and four years after the EEOC's right to sue letter.[211]

Nonetheless, the plaintiff appealed *pro se*. His appellate brief neither cited legal authorities nor specified error in the district court's decision. The one-page narrative of argument constituted a "naked" submission and was deemed frivolous *per se* by the Seventh Circuit. Accordingly, the employer asked for sanctions.[212]

The Seventh Circuit, however, denied the request for sanctions for the sole reason that the employer had filed a full-fledged printed brief on the merits. The Seventh Circuit found this to be "a waste of General Motors' money and [the court's] time." The court noted that a sanction for a frivolous filing is in the nature of a tort remedy for negligence, and that as such the victim must take reasonable steps to mitigate its damages. Accordingly, the court found that the full-fledged brief was unnecessary in such a case and denied the motion for sanctions for failure to mitigate damages.[213]

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wrote the following:

> A brief observation, finally, on the brief submitted to this court by [plaintiff's] counsel, Mr. Burt L. Dancey of Pekin, Illinois. The brief is execrable. The argument portion is a paltry six pages of extra-large type, with nary a citation. Mr. Dancey was heard to grumble that this court had allotted him a mere ten minutes to present his argument. He was lucky that we did not dismiss the appeal for failure to present issues properly. It is not enough for an appellant in his brief to raise issues; they must be pressed in a professionally responsible fashion. *See FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1025-26 (7th Cir. 1988) (collecting cases). That was not done here, and we warn that the penalty for a perfunctory appeal brief can be dismissal of the appeal. *Mitchel v. General Elec. Co.*, 689 F.2d 877 (9th Cir. 1982).

Pearce v. Sullivan, 871 F.2d 61, 64 (7th Cir. 1989). *See also* Jones v. Hamelman, 869 F.2d 1023, 1032 (7th Cir. 1989) (court writing that it is not "unreasonable to expect carefully drafted briefs clearly articulating the issues and the precise citation of relevant authority for the points in issue. . . ."); Cochran v. Celotex Corp., 125 F.R.D. 472, 473-74 (C.D. Ill. 1989) (openly chastising counsel for writing an *ex parte* letter to the court).

210. 874 F.2d 489 (7th Cir. 1989).

211. *Id.* at 490.

212. *Id.*

213. *Id.* at 490-91.

The *Brooks* opinion is important because it reconfirms that the whole purpose of the rules providing for sanctions is to expedite the disposition of cases. As the Seventh Circuit said in *Mars Steel*, "The duty to the legal system [imposed by such rules] is to avoid clogging the courts with paper that wastes judicial time and thus defers the disposition of other cases, or by leaving judges less time to resolve each case, increasing the rate of error."[214] According to the Seventh Circuit, an action such as the filing of a full-blown brief on the merits in a frivolous case such as *Brooks* thwarts the very purpose of the sanctions rules.

VII. Appellate Issues

Finally, there were several developments relating to appeals that should be noted. First, in *Torres v. Oakland Scavenger Co.*,[215] the Supreme Court held that the courts of appeals cannot waive the jurisdictional requirement that parties be named in an appeal, even for good cause shown. In that case the district court dismissed a discrimination action filed by Torres and 15 other plaintiffs. Their attorney timely appealed. However, in preparing the notice of appeal, the lawyer's secretary, through a clerical error, failed to name Torres as an appellant. The Ninth Circuit accordingly held that it lacked jurisdiction over Torres' claim under Rule 3(c) of the Federal Rules of Appellate Procedure.[216]

Resolving a split in the circuits on this issue, the Supreme Court held that Rule 3(c)'s requirement that the notice of appeal "shall specify the party or parties taking the appeal" is *mandatory and jurisdictional*.[217] The Court went so far as to reject the argument that the attorney's use of "*et al*" in the notice was sufficient for Torres,[218] even though there was arguably no prejudice to the appellee as a result.[219]

The *Torres* decision was immediately felt in the Seventh Circuit. For instance, in one case the court dismissed an appeal of a sanctions award against an attorney where the attorney had not named himself as the real party in interest in the notice of appeal.[220] The Seventh Circuit relied on *Torres* and rejected the argument that the court had any

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214. Mars Steel Corp. v. Continental Bank, N.A., 880 F.2d 928, 932 (7th Cir. 1989).

215. 108 S. Ct. 2405 (1988).

216. 108 S. Ct. at 2407.

217. *Id.* at 2407-08.

218. *Id.* at 2409.

219. *Id.* at 2410 (Brennan, J., dissenting).

220. Federal Trade Comm'n v. Amy Travel Serv., Inc., 875 F.2d 564 (7th Cir. 1989). In early 1990, however, the Seventh Circuit held that *Torres* did not govern where a notice of appeal failed to accurately set forth the judgment or order from which appeal was taken. *See* Chaky v. Lare, No. 89-3151, slip op. (7th Cir. Feb. 1, 1990).

discretion to disregard the omission of the attorney's name from the notice of appeal.

Other decisions of importance include the following:

1. The Supreme Court resolved a conflict in the circuits by holding that a district court's decision on the merits is a "final decision" from which appeal must be timely taken even though the recoverability of attorneys fees remains to be decided in the district court;[221]
2. A party obtaining dismissal of an opponent's claim has standing to appeal insofar as the dismissal is without prejudice; such a party is aggrieved in a practical sense because there can be further litigation on the issue unless the dismissal is with prejudice;[222]
3. Aggrieved parties are to appeal from the final order or judgment rather than the order on a post-judgment motion; however, an appeal from such a post-judgment motion will be allowed when:
   a. The judgment intended to be appealed is final;
   b. It is clear what judgment is involved;
   c. The motion and appeal were timely, and;
   d. There is no prejudice to the other party;[223]
4. A district court is without power to extend the short time period for making or serving a motion to alter or amend judgment under Federal Rule of Civil Procedure 59(e), and an untimely 59(e) motion does not toll the time for filing appeal;[224]
5. A failure to object to a Magistrate's report made under a special master reference operates as a waiver of the right to object on appeal;[225] and,
6. A motion for prejudgment interest filed after entry of judgment operates as a Rule 59 motion to alter or amend judgment. Thus, under Appellate Rule 4(a)(4), a notice of appeal filed during the pendency of such a prejudgment interest motion is void.[226]

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221. Budinich v. Becton Dickinson & Co., 108 S. Ct. 1717 (1988).

222. Disher v. Information Resources, Inc., 873 F.2d 136, 139 (7th Cir. 1989); LaBuhn v. Bulkmatic Transp. Co., 865 F.2d 119, 121-22 (7th Cir. 1988).

223. Petru v. City of Berwyn, 872 F.2d 1359, 1361 (7th Cir. 1989).

224. Green v. Bisby, 869 F.2d 1070, 1072 (7th Cir. 1989). This point has been settled for some time, but seems to be a common trap for the unwary. The dismal result is that neither the district court nor the court of appeals has any jurisdiction.

225. Provident Bank v. Manor Steel Corp., 882 F.2d 258 (7th Cir. 1989), *reh'g en banc den.*

226. Osterneck v. Ernst & Whitney, 109 S. Ct. 987 (1989).

Finally, on the procedural level, the Seventh Circuit added a new rule governing notices of appeal. The most significant change made by new Circuit Rule 3(c) is the requirement that the appellant must serve a jurisdictional statement on all opposing parties *at the time of filing the notice of appeal.*[227] The purpose of this new rule "is to allow the court of appeals to screen its incoming appeals for jurisdictional defects at an early stage of the appellate process."[228] This changes former practice under which the first jurisdictional statement was not required until the filing of the briefs.

New Circuit Rule 3(c) will also likely provide a good deterrent effect because it will force counsel to pin down the jurisdictional foundation for their appeal at an early stage, thus increasing the chances that an inappropriate appeal will be discovered by the aggrieved party before appeal rather than by the opponent and the court at a later date.

To date, the Seventh Circuit has taken a stern approach to Circuit Rule 3(c). For instance, in *Despenza v. O'Leary*,[229] the court dismissed the appeals of *pro se* litigants who failed to file timely jurisdictional statements pursuant to Circuit Rule 3(c), and who failed to comply with show cause orders requiring such statements within 14 days. In its two paragraph *per curiam* opinion, the *Despenza* court did not discuss the Rule at any length, but instead treated it as a jurisdictional prerequisite.[230]

The *Despenza* case and new Rule 3(c) show once again that the Seventh Circuit requires strict compliance with its rules. Practitioners filing appellate briefs in the Seventh Circuit must scrutinize an up-to-date version of the Appellate and Circuit Rules and ensure that each and every rule is followed.

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227. This portion of the new rule reads as follows:

> The appellant must serve on all parties a jurisdictional statement and file it with the clerk of the district court at the time of the filing of the notice of appeal or with the clerk of this court within seven days of filing the notice of appeal. The jurisdictional statement shall comply with the requirements of Circuit Rule 28(b). If the appellee disagrees with the jurisdictional statement in that it is not complete and correct, the appellee shall provide a complete one to the court of appeals clerk within 21 days after the date of the filing of the notice of appeal.

Seventh Circuit Rule 3(c).

228. Memorandum from Thomas F. Strubbe to Circuit Rules Recipients (Jan. 24, 1989) (on file in the *Indiana Law Review* office).

229. 889 F.2d 113 (7th Cir. 1989).

230. In a sharply worded dissent, Judge Ripple argued that the majority's decision was unnecessarily harsh because parties represented by counsel are given two opportunities to comply with the Rule. 889 F.2d at 114-15 (Ripple, J., dissenting).