

# 1990 Federal Practice and Procedure Update for the Seventh-Circuit Practitioner

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## INTRODUCTION

Indiana practitioners litigating in federal court encountered significant developments in federal civil practice last year. The courts rendered a number of important decisions affecting nearly all aspects of federal litigation. This Article, as the third of an annual section on federal civil practice, highlights the more important issues in an effort to assist local attorneys in their federal civil litigation.<sup>1</sup>

This Article covers diverse topics including subject-matter jurisdiction, service of process, discovery, and post-judgment motions. The developments that this author deems of greatest importance and interest are discussed at length. Other issues are raised merely so that practitioners are aware of them.

The subjects are presented in the order in which they often arise in litigation. For ease of future reference, the following table of contents outlines the subjects discussed:

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1. This is the third year that the Survey Issue has covered developments in federal civil practice. See Maley, *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*, 23 IND. L. REV. 261 (1990) [hereinafter Maley, *1989 Developments*]; 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 (1989) [hereinafter Maley, *1988 Developments*]. These articles concentrate on key decisions of the Seventh Circuit Court of Appeals, and also 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.

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## I. DEVELOPMENTS IN SUBJECT-MATTER JURISDICTION

### A. Diversity Jurisdiction

Several important decisions during the survey period dealt with diversity jurisdiction. For instance, in *Carden v. Arkoma Associates*,<sup>2</sup> the United States Supreme Court held that for purposes of diversity, the citizenship of a limited partnership is determined by the citizenship of not just the general partners, but also of the limited partners. The case arose when a limited partnership organized under the laws of Arizona sued two Louisiana citizens in federal court in Louisiana. The defendants moved to dismiss, asserting that complete diversity was lacking because one of the plaintiff's limited partners was a Louisiana citizen.

The district court denied the motion to dismiss, and later entered judgment in favor of the limited partnership on the merits. The Fifth Circuit affirmed, reasoning that for diversity purposes a limited partnership's citizenship should be determined by the citizenship of the general partners only.<sup>3</sup>

The Supreme Court reversed in a hotly contested 5-4 decision. Writing for the majority, Justice Scalia first explained that the citizenship of the limited partnership in its own right is not to be considered in determining diversity. He noted that "[w]hile the rule regarding the treatment of corporations as 'citizens' has become firmly established, we have . . . just as firmly resisted extending that treatment to other entities."<sup>4</sup> Indeed, Congress stepped into the foray in 1958 by providing guidelines in 28 U.S.C. § 1332(c) as to how a corporation should be

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2. 110 S. Ct. 1015 (1990).

3. *Arkoma Assoc. v. Carden*, 874 F.2d 226 (5th Cir. 1988).

4. *Carden*, 110 S. Ct. at 1018.

treated for diversity purposes. However, “[n]o provision was made for the treatment of artificial entities other than corporations, although the existence of many new . . . forms of commercial enterprises . . . must have been obvious.”<sup>5</sup>

The majority thus deferred to Congress to determine which of the “wide assortment of artificial entities possessing different powers and characteristics, and composed of various classes of members with varying degrees of interest and control”<sup>6</sup> is “entitled to be considered a ‘citizen’ for diversity purposes . . . .”<sup>7</sup> The majority also held that the citizenship of all partners, limited and general, must be considered for diversity. The Court explained that “the approach of looking to the citizenship of only some of the members of the artificial entity finds even less support in our precedent than looking to the State of organization . . . .”<sup>8</sup> The Court thus “adhere[d] to [the] oft-repeated rule that diversity jurisdiction in a suit by or against the entity depends on the citizenship of ‘all the members,’ or ‘the several persons composing such association . . . .”<sup>9</sup>

Justice O’Connor, joined by Justices Brennan, Marshall, and Blackmun, dissented in a sharply worded opinion. To Justice O’Connor, the majority did not really leave the issue to Congress, “but rather decide[d] the issue and then invoke[d] deference to Congress to justify its newly formulated rule that the Court will, without analysis of the particular entity before it, count every member of an unincorporated association for purposes of diversity jurisdiction.”<sup>10</sup> She added that applying statutes to “situations not anticipated by the legislature is a pre-eminently judicial function.”<sup>11</sup> To Justice O’Connor, the appropriate standard would have been to look to who is really a party to the controversy, and, as suggested by the commentators, hold that the citizenship of limited partners should not be counted.<sup>12</sup>

The debate is academic for the foreseeable future, however, particularly because the majority included the usual conservatives, with now-retired Justice Brennan joining in the dissent. After *Carden*, all associations that are not “corporations” as the term is used in section 1332(c) will be deemed citizens of every state in which a member resides. It is

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5. *Id.* at 1022.

6. *Id.*

7. *Id.*

8. *Id.* at 1019.

9. *Id.* at 1021 (citations omitted) (quoting *Chapman v. Barney*, 129 U.S. 677, 682 (1889), and *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 456 (1900)).

10. *Carden*, 110 S. Ct. at 1023 (O’Connor, J., dissenting).

11. *Id.*

12. *Id.* (citing various law review articles).

possible, as the dissent suggests, that the decision is a result of the concern over expanding diversity jurisdiction at a time when "our federal courts are already seriously overburdened."<sup>13</sup> However, as the dissent points out, the "concern is more illusory than real in the context of unincorporated business associations"<sup>14</sup> because "unincorporated associations may gain access to the federal courts by bringing or defending suit as a Rule 23 class action, in which case the citizenship of the members of the class would not be considered."<sup>15</sup>

The Seventh Circuit addressed a similar issue in *Northern Trust Co. v. Bunge Corp.*,<sup>16</sup> where the court essentially held that a corporation is not always a "corporation" under the diversity statutes. The basic facts of the case are necessary to understand the jurisdictional issue. The Bunge Corporation had entered into a stock purchase agreement to buy the stock of another corporation. Under the purchase agreement, Northern Trust was the agent for each of the seller's stockholders. The agreement contained a provision warranting that the seller had certain intellectual-property rights, and that the purchase price of the shares would be adjusted for any liabilities or claims arising out of the breach of such warranties.

Subsequently, a separate dispute arose over whether the seller had infringed a patent of an unrelated entity. The Bunge Corporation advised Northern Trust of the matter, and indicated that the dispute might give rise to a price adjustment under the purchase agreement. Bunge thereafter demanded compensation pursuant to the price-adjustment provision. Northern Trust, acting in its capacity as agent for the sellers, then filed a diversity action in federal court seeking a declaratory judgment that the price-adjustment provisions were inapplicable. The complaint recited that Northern Trust was a citizen of Illinois and Bunge Corporation a citizen of New York. The Bunge Corporation filed a counterclaim against Northern Trust.<sup>17</sup>

After eighteen months of litigation, the district court entered judgment against Northern Trust. The court held that Northern Trust was liable in its individual capacity, but noted that the judgment eventually would be satisfied by the individual sellers who would indemnify Northern Trust.<sup>18</sup>

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13. *Id.* at 1027.

14. *Id.* (citing *Federal Diversity Jurisdiction - Citizenship for Unincorporated Associations*, 19 VAND. L. REV. 984, 991-92 (1966)).

15. *Id.*

16. 899 F.2d 591 (7th Cir. 1990).

17. *Id.* at 593.

18. *Id.*

On appeal, the parties continued to assume that diversity was present. At oral argument, however, the Seventh-Circuit panel inquired whether one or more of the sellers that was represented by Northern Trust might share New York citizenship with the defendant such that complete diversity would be destroyed. Subsequent briefing on the issue was ordered, and both parties asserted that jurisdiction was proper. The Seventh Circuit, though, disagreed and dismissed the action without prejudice.<sup>19</sup>

The Seventh Circuit began by noting the maxims that federal courts are courts of limited jurisdiction, and that complete diversity must be present among the plaintiffs and defendants. The court then wrote that whether complete diversity is present is usually straightforward, but when “a lawsuit involves groups of individuals or parties representing groups of individuals . . . the determination is more complicated.”<sup>20</sup> The court then gave an excellent review of the rules that govern such situations, which is summarized as follows:

- federal courts must look to the individuals being represented rather than their collective representative to determine diversity;<sup>21</sup>
- two statutory provisions codify this rule for specific situations:
  - 28 U.S.C. § 1332(c)(1) establishes that in direct actions against insurers in which insureds are not joined, the insurer is deemed a citizen of the same state as the insured;<sup>22</sup> and
  - 28 U.S.C. § 1332(c)(2) mandates that legal representatives of estates of decedents, infants, or incompetents are deemed to be citizens of the person represented;<sup>23</sup>
- partnerships and limited partnerships are not considered citizens of any state, with the citizenship of the partners being determinative;<sup>24</sup>
- certain exceptions exist to the rule that associations do not have citizenship of their own, such as:
  - corporations are citizens of their state of incorporation and principal place of business under 28 U.S.C. § 1332(c)(1);<sup>25</sup>

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19. *Id.* at 598.

20. *Id.* at 594.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

- shareholders who bring derivative suits can establish diversity based on their own citizenship even though they are suing on behalf of the corporation under *Doctor v. Harrington*;<sup>26</sup>
- members of a class in a class action are deemed to have the same citizenship as the class representative under *Snyder v. Harris*;<sup>27</sup> and
- trustees of express trusts who have legal title to trust property and who sue in their own names can establish diversity based on their own citizenship rather than that of the trust's beneficiaries under *Navarro Savings Association v. Lee*<sup>28</sup> and *Goldstick v. ICM Reality*.<sup>29</sup>

The Seventh Circuit then held that Northern Trust did not fall into any of these recognized exceptions to the rule that a representative is to be considered a citizen of the states of the principals it represents. Although Northern Trust is a corporation, the court held that "Northern [Trust] in its capacity as a representative is a distinct entity."<sup>30</sup> The court wrote:

The statutory provision that entitles a corporation to participate in a suit in federal court based on the corporation's own citizenship is grounded in the notion that the corporation's shareholders are deemed to be citizens of the state in which the corporation is incorporated. *Marshall v. Baltimore & Ohio R. Co.*, 16 How. 314, 328 (1854). Thus the statute is designed to cover those suits in which the interest of the corporation's own shareholders may be affected because of some impact on the corporation's net assets. In initiating this lawsuit Northern did not seek to protect any interest of its own shareholders. Rather, Northern sought to fulfill its fiduciary duties as an agent for the sellers of the stock. . . . In the eyes of the law a person who sues or is sued in a representative capacity is distinct from that person in his individual capacity. *Alexander v. Todman*, 361 F.2d 744, 746 (3d Cir. 1966). This is no less true where the "person" suing is a corporation. Accordingly, the fact that

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26. *Id.*; see *Doctor v. Harrington*, 196 U.S. 579 (1905).

27. *Northern Trust*, 899 F.2d at 594; see *Snyder v. Harris*, 394 U.S. 332 (1969).

28. *Northern Trust*, 899 F.2d at 594; see *Navarro Savings Ass'n v. Lee*, 446 U.S. 458 (1980).

29. *Northern Trust*, 899 F.2d at 594; see *Goldstick v. ICM*, 788 F.2d 456 (7th Cir. 1986).

30. *Northern Trust*, 899 F.2d at 594.

the Northern Trust Company, an Illinois corporation, is deemed a citizen of Illinois for diversity purposes is suits affecting the interests of its own shareholders does not mean that it will be deemed a citizen of Illinois in its capacity as an agent representing the interests of others.<sup>31</sup>

The Seventh Circuit added that Northern Trust had not sued in its own name and it did not have legal title to any property that was the subject of the suit.<sup>32</sup> The court then held that jurisdiction was lacking because, although none of the seventy-seven sellers of stock was from the same state as the defendant, only three of those sellers could independently satisfy the amount-in-controversy threshold. The court concluded:

Northern in its capacity as representative must establish that it satisfies the conditions of the diversity statute. For purposes of that statute Northern is deemed to have the same citizenship and amount in controversy as each of the individuals it purports to represent. Since some of those individuals do not satisfy both requirements of the diversity statute, the district court did not have jurisdiction over this action.<sup>33</sup>

Both *Carden* and *Northern Trust* thus illustrate that extreme care must be taken to ensure that diversity jurisdiction is present in such situations.<sup>34</sup> As the Seventh Circuit has noted on other occasions, the courts are to be vigilant in policing the limits of their jurisdiction.<sup>35</sup> Indeed, the district courts of this circuit have been reminded of the "importance of scrupulous adherence to the jurisdictional limitations of the federal courts."<sup>36</sup> As expressed in *Griffith v. Sealtite Corp.*, "An

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31. *Id.* at 594-95.

32. *Id.*

33. *Id.* at 597. Another panel of the Seventh Circuit addressed this same issue several months later in *Griffith v. Sealtite Corp.*, 903 F.2d 495 (7th Cir. 1990), writing that "[m]ultiple plaintiffs with separate and distinct claims must each satisfy the jurisdictional amount; they cannot aggregate 'claims where none of the claimants satisfies the jurisdictional amount.'" *Id.* at 498 (quoting *Zahn v. International Paper Co.*, 414 U.S. 291, 294-95 (1969)).

34. See also *National Ass'n of Realtors v. National Real Estate Ass'n*, 894 F.2d 937 (7th Cir. 1990) (action brought by an incorporated association on behalf of its members, which was neither a derivative suit nor a class action and that did not involve injury to the association's own property, could not be based on diversity when citizenship of any member was the same as the defendant); *Griffith*, 903 F.2d at 495 (court allows appellant to raise jurisdiction for first time on appeal, and finds amount-in-controversy minimums lacking).

35. *Matchett v. Wold*, 818 F.2d 574, 575 (7th Cir. 1987).

36. *Newman-Green, Inc. v. Alfonzo-Larrain*, 854 F.2d 916, 923 (7th Cir. 1988) (en banc).

early resolution of [jurisdictional issues] w[ill] . . . save[] much judicial time and expense to the parties."<sup>37</sup>

Practitioners are thus well advised, particularly in multi-party or representative/association-type actions, to take the time to pin down the precise factual and legal foundation of jurisdiction before filing in federal court. If the opponent and the district court do not raise any jurisdictional defects, the Seventh Circuit surely will, particularly in light of the specificity required in the jurisdictional statements required to be filed on appeal.<sup>38</sup>

### B. Amendment of Defective Pleadings to Show Jurisdiction

Fortunately, not all cases with jurisdictional issues result in dismissals. For instance, in *International Brotherhood of Boilermakers v. Local Lodge D354*,<sup>39</sup> the Seventh Circuit allowed defective allegations of a complaint to be amended on appeal even though jurisdiction would have been lacking as the complaint was originally framed. The plaintiff named Local D354 as the defendant in its action, but this entity no longer existed at that time due to a decertification election.

As is its wont, the Seventh Circuit raised the issue on its own during oral argument. In its subsequent decision, it noted that although "it is

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37. *Griffith*, 903 F.2d at 499.

38. See 7TH CIR. R. 3(c) and 28(b), which require detailed jurisdictional statements to be filed with the notice of appeal and the appellate briefs.

The *Northern Trust* decision also shows that the courts will look beyond the language of a statute to find jurisdiction lacking. The language of 28 U.S.C. § 1332(a) states that the district courts shall have jurisdiction of "all civil actions" when diversity is present and the amount-in-controversy requirement is met. 28 U.S.C. §§ 1332(a) (1990). Section 1332(c)(1) then states that for the purpose of § 1332 and 1441, "a corporation shall be deemed to be a citizen of any State by which it has been incorporated and for the State where it has its principal place of business, except that in any direct action against the insurer [special rules apply] . . ." *Id.*

A strong argument could be made that Northern Trust's action was properly in the federal courts, for surely it was among the group of "all civil actions" over which § 1332(a) says the district courts "shall" have jurisdiction. Moreover, Northern Trust certainly is a "corporation" for purposes of § 1332(c). Because § 1332(c)(1) only has one exception (for direct-action insurance cases), it would seem that no other exception (such as for actions by corporations that do not benefit or protect the shareholders) was contemplated by Congress. The Seventh Circuit often writes that statutes and rules are to be interpreted according to their plain meaning. Indeed, Judges Cummings, Easterbrook, and Eschbach, who decided *Northern Trust*, all joined in a recent *en banc* dissent authored by Judge Manion that was premised upon the "plain language" rule. See *Varhol v. National Railroad Passenger Corp.*, 909 F.2d 1557 (7th Cir. 1990) (Manion, J., dissenting). One could legitimately argue that the plain language of § 1332 mandates federal courts to exercise jurisdiction over an "action" such as the one maintained by *Northern Trust*.

39. 897 F.2d 1400 (7th Cir. 1990).

critical for obvious reasons that proper parties be named in lawsuits, the doubt in this case can be satisfactorily resolved.”<sup>40</sup> The court explained that the plaintiff should have named the successor Local as defendant, but nonetheless allowed amendment to cure the defect under 28 U.S.C. § 1653, which states, “Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.”<sup>41</sup>

The court added:

Though subject-matter jurisdiction of course cannot be waived, it is noteworthy that the Local and its officers never questioned the district court’s jurisdiction to determine this controversy until the panel raised the question at oral argument in this appeal. When, as here, the merits have already been decided and factual questions do not need to be resolved regarding prejudice to the correctly named defendant, it would be a meaningless gesture to remand so that plaintiff could amend its pleading under Rule 15 . . . . Instead the sensible course is for this Court to permit amendment under 28 U.S.C. § 1653. Therefore, we shall consider the complaint as amended to cover the present . . . Local . . . . [This is allowable], for the amendment here represents the facts as they existed at the commencement of the suit . . . .<sup>42</sup>

The *Local D354* decision thus shows that defective jurisdictional allegations can be cured, even on appeal. The protection of section 1653, however, extends only to “allegations of jurisdiction,” and thus does not apply to situations in which jurisdiction does not actually exist.<sup>43</sup>

### C. Jurisdiction to Interpret Settlement Agreements

When litigation is settled, the parties usually enter into a written settlement agreement specifying the terms of the settlement, and such agreements are often sent to the district judge for signature. When disputes later arise as to what the agreement means, there is often a question of whether the district judge has the power to interpret the agreement.

This issue was addressed by the Seventh Circuit in *United Steelworkers v. Libby, McNeill & Libby*.<sup>44</sup> The parties had signed a settlement

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40. *Id.* at 1402.

41. 28 U.S.C. § 1653 (1990).

42. *International Brotherhood of Boilermakers*, 897 F.2d at 1402-03 (citations omitted).

43. *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 831 (1989) (emphasis in original).

44. 895 F.2d 421 (7th Cir. 1990).

agreement and submitted it to the judge, who also signed it. The action was subsequently dismissed by the court pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure. Two years later, one of the parties moved the district judge to clarify the settlement agreement, but the motion was denied.

The Seventh Circuit affirmed, reasoning that the district court had no jurisdiction to interpret the agreement. According to the Seventh Circuit, "If the parties want the district judge to retain jurisdiction they had better persuade him to do so."<sup>45</sup> However, "[a]ll that is necessary is that it be possible to infer that he did intend to retain jurisdiction - that he did not dismiss the case outright, thereby relinquishing jurisdiction."<sup>46</sup> Because the settlement agreement was not an agreed judgment, and because nothing in the agreement "indicate[d] that the parties intended for the district judge to exercise supervision over the completion of the agreement,"<sup>47</sup> the Seventh Circuit held that jurisdiction was lacking.

The court added:

While asking a judge to approve and sign a negotiated settlement agreement may be a fairly common and acceptable practice (perhaps based more on tradition and courtesy than the Federal Rules of Civil Procedure), it does not constitute a grant of retained jurisdiction.

We certainly do not mean to give the impression that a district court cannot interpret the language of its own orders or judgments. To the contrary, it is without question that it can. Thus, to the extent that a settlement agreement is incorporated into a court's final judgment or order, the district court retains jurisdiction to interpret that agreement and order its enforcement.<sup>48</sup>

Thus, when negotiating settlement agreements, practitioners should consider whether the district judge's supervision is needed for a certain period of time. Assuming that the judge is willing to retain such jurisdiction, the agreement must expressly indicate this. Otherwise, the court lacks jurisdiction, and the agreement can only be interpreted by a new declaratory judgment or breach of contract action.

Such a new action must have its own independent basis of federal jurisdiction. For instance, if an antitrust action is settled for, say,

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45. *Id.* at 423 (quoting *McCall-Bey v. Franzan*, 777 F.2d 1178, 1187 (7th Cir. 1985)).

46. *Libby, McNeill*, 895 F.2d at 423 (quoting *McCall-Bey*, 777 F.2d at 1188).

47. *Libby, McNeill*, 895 F.2d at 423 n.3.

48. *Id.* at 423 (citation omitted).

\$100,000 without the court retaining jurisdiction, and if the parties are not diverse, then any new action to enforce the settlement contract cannot lie in federal court. Similarly, if in the same situation the federal claim is compromised for less than \$50,000 and jurisdiction is not retained, then the action to enforce the settlement contract cannot lie in federal court, even if the parties are diverse.

#### *D. Removal*

Several removal issues were decided during the survey period. These are merely highlighted so that practitioners are aware of the developments:

1. The right to remove is not waived by opposing a motion for a temporary restraining order in state court; waiver is only an issue when "the suit is fully tried before the statutory period has elapsed and the defendant then files a petition for removal."<sup>49</sup>

2. A district court's order remanding a removed action to state court on the basis of waiver is reviewable by way of mandamus, notwithstanding section 1447(d)'s prohibition against review of an "order remanding a case to the State court . . . ."<sup>50</sup>

3. Section 1446(b)'s prohibition that "a case may not be removed on the basis of [diversity] . . . more than one year after commencement of the action" is jurisdictional and cannot be waived.<sup>51</sup>

4. The 30-day limit for filing a removal petition, although not jurisdictional, is mandatory and is a ground for remand unless waived.<sup>52</sup>

#### *E. The Party's Over for Pendent-Party Jurisdiction, At Least for a While Anyway*

This author reported in last year's Article that after the United States Supreme Court's decision in *Finley v. United States*,<sup>53</sup> the very

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49. *Rothner v. City of Chicago*, 879 F.2d 1402, 1415-16 (7th Cir. 1989). *See also* *Rose v. Giamatti*, 721 F. Supp. 906, 922-23 (S.D. Ohio 1989).

50. *Rothner*, 879 F.2d at 1405-15.

51. *Foiles by Foiles v. Merrell Nat'l Laboratories*, 730 F. Supp. 108 (N.D. Ill. 1989) (declining to follow *Gray v. Moore Business Forms, Inc.*, 711 F. Supp. 543 (N.D. Cal. 1989)).

52. *Houldson v. State Farm Fire & Casualty*, No. TH89-232-C, slip op. at 2-3 (S.D. Ind. Jan. 2, 1990) (citing *Northern Ill. Gas Co. v. Airco Indus. Gases*, 676 F.2d 270, 273 (7th Cir. 1982)).

53. 490 U.S. 545 (1989).

existence of pendent-party jurisdiction was in grave doubt.<sup>54</sup> Pendent-party jurisdiction arises when a plaintiff brings a federal question or diversity claim in federal court against one party, and brings a related state-law claim against another related party without an independent basis of federal jurisdiction. The doctrine had been called "embattled" by the Seventh Circuit,<sup>55</sup> and in *Finley* the Supreme Court effectively abolished the concept by requiring an affirmative grant of such jurisdiction in the federal statute that provides the basis of the main claim. Prior to *Finley*, the standard was whether the federal statute *negated* the exercise of pendent-party jurisdiction.<sup>56</sup>

During the survey period, several cases addressed the issue of whether third-party indemnity actions that lack an independent jurisdictional basis can be maintained after *Finley*. Although some of the cases continue to find jurisdiction present in these settings,<sup>57</sup> the better-reasoned decisions (at least after *Finley*) hold that *Finley* forecloses this form of ancillary jurisdiction.<sup>58</sup> Indeed, as pointed out in last year's Article, even the Federal Courts Study Committee noticed *Finley* and suggested legislation to make pendent-party jurisdiction a statutory matter.<sup>59</sup> And, as this Article went to press, Congress recognized the effect of *Finley* by passing such legislation.<sup>60</sup>

In the Seventh Circuit, several judges of the Northern District of Illinois have apparently overlooked the full ramifications of *Finley*. For instance, in *Armstrong v. Edelson*,<sup>61</sup> Judge Holderman held that pendent-party jurisdiction may be exercised over state-law claims involving third parties when the main federal claim was based on the federal RICO statute. His discussion of the issue omits any reference to the different standard established in *Finley*:

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54. See Maley, 1989 *Developments*, *supra* note 1, at 270-76.

55. See *Huffman v. Hains*, 865 F.2d 920, 922 (7th Cir. 1989).

56. *Id.* at 922-23; see also Maley, 1989 *Developments*, *supra* note 1, at 270-76.

57. See, e.g., *King Fisher Marine Serv., Inc. v. 21st Phoenix Corp.*, 893 F.2d 1155 (10th Cir. 1990); *Huberman v. Duane Fellows, Inc.*, 725 F. Supp. 204 (S.D.N.Y. 1989); *Olan Mills, Inc. v. Hy-Vee Food Stores, Inc.*, 731 F. Supp. 1416 (N.D. Iowa 1990).

58. See, e.g., *Aetna Casualty & Surety Co. v. Spartan Mechanical Corp.*, 738 F. Supp. 664 (E.D.N.Y. 1990); *Community Coffee Co. v. M/S Kriti Amethyst*, 715 F. Supp. 772 (E.D. La. 1989). See also *Staffer v. Bouchard Transp. Co.*, 878 F.2d 638, 643 n.5 (2d Cir. 1989) (noting effect of *Finley*); *Gould v. Pumel & Assoc., No. IP88-494-C*, slip op. at 7 (S.D. Ind. Oct. 19, 1989) (following *Finley* and holding that pendent-party jurisdiction was unavailable over state-law claims).

59. See Maley, 1989 *Developments*, *supra* note 1, at 276 (citing *Tentative Report of the Federal Courts Study Committee*, summarized in 58 U.S.L.W. 2442, 2445 (Feb. 6, 1990)).

60. See *infra* notes 68-74 and accompanying text.

61. 718 F. Supp. 1372 (N.D. Ill. 1989).

The second factor . . . is whether Congress has *limited or negated* pendent jurisdiction in the RICO statute. . . . Nothing in the language of RICO indicates that Congress *intended to preclude* a plaintiff from bringing an action under a state consumer fraud statute as a pendent claim to a RICO claim.<sup>62</sup>

After *Finley*, however, the search is for affirmative evidence of legislative intent to include pendent-party claims. Thus, the holding in *Armstrong* is based on out-dated standards.

A decision from Judge Bua of the Northern District of Illinois contains the same type of analysis. In *Carter v. Dixon*,<sup>63</sup> an arrestee and his wife brought claims against officers alleging a violation of his civil rights and a loss of her consortium. After removal, the defendants moved to dismiss the wife's state-law consortium claims, arguing that pendent-party jurisdiction was unavailable. The court denied the motion, following the pre-*Finley* standards set forth in *Huffman v. Hains*,<sup>64</sup> a Seventh Circuit decision that this author used in last year's survey Article to show the effect that *Finley* would have in the Seventh Circuit.<sup>65</sup>

The district court inquired whether the statute granting jurisdiction over the civil rights claims "expressly or by implication *negated* the exercise of jurisdiction."<sup>66</sup> Of course, nothing in the civil rights statutes or the removal statutes had such negative divestitures of jurisdiction, so the court assumed pendent-party jurisdiction over the wife's state-law claims.

The *Carter* opinion is interesting because the court noted the *Finley* decision in a footnote, but wrote that *Finley* "did not totally reject the concept of pendent party jurisdiction,"<sup>67</sup> and that *Finley* was based "on its interpretation of the particular statute conferring federal jurisdiction in that case . . . ."<sup>68</sup> Both statements are true, but do not provide any logical support for the *Carter* holding.

First, as discussed in last year's Article, the Supreme Court effectively abolished pendent-party jurisdiction, not by saying, "This concept is dead," but by subtly altering the standards for invoking the doctrine. It was pointed out last year that this somewhat indirect approach to altering the concept was unfortunate. Indeed, the post-*Finley* decisions that have failed to incorporate the murky details of its holding show

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62. *Id.* at 1376 (emphasis added).

63. 727 F. Supp. 478 (N.D. Ill. 1990).

64. 865 F.2d 920 (7th Cir. 1989).

65. See Maley, 1989 *Developments*, *supra* note 1, at 271-73.

66. *Carter*, 727 F. Supp. at 479 (emphasis added).

67. *Id.* at 479 n.1.

68. *Id.*

that a more direct, up-front opinion would have been helpful. Nonetheless, the standards *were* changed.

Second, that the *Finley* court was interpreting the "particular statute conferring federal jurisdiction in that case"<sup>69</sup> is of no moment, for that is what must occur in every pendent-party setting. Moreover, if anything, the particular statute involved in *Finley* was a better candidate for pendent-party jurisdiction because, unlike the civil rights claims brought in *Carter* under 42 U.S.C. § 1983 that can be maintained in state or federal court, federal tort claims under 28 U.S.C. § 1346 can only be maintained in *federal court*. In *Finley*, then, the court's decision forced the two related claims to be pursued in separate forums. In the *Carter* setting, though, the related claims can always be pressed together in state court.

Thus, *Carter* and *Armstrong* are, in this writer's opinion, at odds with the Supreme Court's decision in *Finley*. Indeed, although the Seventh Circuit has not addressed the new *Finley* standards to date, it has, in one of its few citations to *Finley*, noted that "a majority of the Supreme Court has recently expressed disfavor for pendent-party claims."<sup>70</sup>

Practitioners in the Seventh Circuit are again warned of the subtle but dramatic effect of *Finley*. It remains this author's opinion that after *Finley*, the notion of implying pendent-party jurisdiction is not a viable concept. The *Finley* search for affirmative evidence should always be fruitless, for no such jurisdiction would need to be implied if the statutory basis of federal jurisdiction contained an affirmative grant of jurisdiction over related state law claims involving third parties.

As this Article went to press, Congress entered the foray by adopting the Federal Courts Study Committee's proposals and passing legislation on the subject (further showing that *Finley* did, in fact, effectively abolish pendent-party jurisdiction). Specifically, as part of the Judicial Improvements Act of 1990,<sup>71</sup> Congress authorized the district courts to exercise "supplemental jurisdiction" over claims lacking an independent jurisdictional basis but that are sufficiently related to the federal claims.

The legislation provides in part:

Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims

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69. *Id.*

70. *Heritage Bank & Trust Co. v. Abdnor*, 906 F.2d 292, 302 (7th Cir. 1990) (affirming a discretionary dismissal of pendent-party claims).

71. Judicial Improvements Act of 1990, Pub. L. No. 101-650 (Dec. 1, 1990) (to be codified at 28 U.S.C. § 1367).

that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.<sup>72</sup>

This new provision, which was signed into law by President Bush on December 1, 1990, gives the courts discretion to decline to exercise supplemental jurisdiction for reasons such as the presence of a novel or complex issue of state law, the predominance of the state claim over the federal claim, the dismissal of the federal claims, or other "compelling reasons" in "exceptional circumstances."<sup>73</sup> The section also tolls applicable limitations periods for thirty days for the dismissal of any supplemental claim.<sup>74</sup> These are both common sense provisions that will guide the district courts in exercising discretion to dismiss supplemental claims, and will ensure that such claims can then be refiled in state court without limitations problems.

The new section applies, by its own language, "to civil actions commenced on or after the date of the enactment of this Act."<sup>75</sup> Thus, the doctrine of pendent jurisdiction, including pendent-party jurisdiction, will be viable for all actions filed on or after the date of such enactment. However, for actions filed prior to the passage of the Act, *Finley* remains binding law such that pendent-party jurisdiction is unavailable.<sup>76</sup> Congress could have chosen to make the new Act retroactive, but it clearly did not.

Only two jurisdictional defenses to supplemental jurisdiction remain. The first is to assert that, as a factual matter, the state claim is not sufficiently related to the federal claim for purposes of Article III. Recall that the courts have generally spoken in terms of a "common nucleus of operative facts" as being the appropriate test here.<sup>77</sup> Because the new section seems to defer to the courts' standards in this respect, this standard should remain applicable.<sup>78</sup>

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72. *Id.* § 310(a).

73. *Id.* § 310(c).

74. *Id.* § 310(d).

75. *Id.* § 310(e).

76. See *Konradi v. United States*, 919 F.2d 1207, 1214 (7th Cir. 1990) (holding that *Finley* is to be applied retroactively).

77. See *Maley*, 1989 *Developments*, *supra* note 1, at 270-76.

78. Note that the new section does not state when a claim is sufficiently related for Article III purposes, it simply states that supplemental jurisdiction exists if the claims "are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 310 (Dec. 1, 1990) (to be codified at 28 U.S.C. § 1367).

The second defense, and the more difficult one, is to argue that supplemental jurisdiction is legally impermissible under Article III of the Constitution. Recall that the *Finley* court simply assumed for the sake of discussion that a federal court can exercise jurisdiction over pendent-party claims without violating Article III. The very notion of federal courts hearing pendent-party claims has been criticized as exceeding the "case or controversy" limits of the Constitution, and led the Seventh Circuit to call pendent-party jurisdiction an "embattled concept" in 1989.<sup>79</sup>

That Congress has expressly authorized the courts to exercise such jurisdiction is an implicit indication that Congress finds no limitations to the concept in Article III. Whether the Supreme Court would agree were it ever to reach the issue is unknown. A full analysis of the issue is beyond the scope of this Article. For now, it is enough to simply point out that despite the new Act, there are possible defenses to supplemental jurisdiction.

#### F. Concurrent Jurisdiction

Finally, the Supreme Court resolved two lingering issues of whether particular federal-based claims can be maintained in state as well as federal court. In *Tafflin v. Levitt*,<sup>80</sup> the Court held that the state courts share concurrent jurisdiction with the federal courts over federal RICO actions. Later in *Yellow Freight System, Inc. v. Donnelly*,<sup>81</sup> the Court similarly held the Title VII employment discrimination actions brought under 42 U.S.C. § 2000e may be maintained in federal or state court. The decisions are important to Indiana practitioners in that they offer an alternative forum for such actions.

## II. SERVICE OF PROCESS

Imagine this scenario: A lawsuit against multiple parties is filed shortly before the statute of limitations expires, and attempts are made at service. All of the defendants are properly served except for one. However, in the barrage of appearances and motions for enlargement of time to answer or respond, and due to the responsibilities of an otherwise demanding caseload, the plaintiff's attorney is not aware of the failed service on the last defendant. Finally, some 125 days after the action was initiated, and now well after the expiration of the limitations period, the last defendant moves to dismiss, arguing that service was required within 120 days of the complaint.

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79. *Huffman*, 865 F.2d at 920.

80. 110 S. Ct. 792 (1990).

81. 110 S. Ct. 1566 (1990).

The scenario is not improbable, and in past years was not a matter of great concern in federal court. Practitioners could usually rely on the district court's power to retain the action but quash the defective service, particularly when there was a reasonable prospect that the defendant would be served.<sup>82</sup>

Any such feeling of security is no longer warranted, however, for Rule 4(j) of the Federal Rules of Civil Procedure mandates that if effective service is not obtained within 120 days of filing and the plaintiff cannot show good cause why such service was not made within that period, the action must be dismissed without prejudice.<sup>83</sup> Although Rule 4(j) has been in existence since 1983, its impact was never greater in the Seventh Circuit than during the survey period.

For instance, in *Floyd v. United States*,<sup>84</sup> the Seventh Circuit held that when an attorney's reason for not obtaining service within 120 days was the attorney's "busy schedule, combined with the unexpected absence of his secretary," good cause had not been shown for failing to effect timely service.<sup>85</sup> The court thus affirmed the dismissal of the action, even though it operated as an absolute bar because the limitations period had expired.<sup>86</sup>

In so doing, the Seventh Circuit outlined the standards for finding "good cause" under the Rule, which are summarized as follows:

- "Good cause" determinations entail discretionary decisions that will not be disturbed absent an abuse of discretion.<sup>87</sup>
- Dismissal is not mandated in every case in which the delay in service is caused in part by attorney inadvertence.<sup>88</sup>
- Simple attorney neglect, without the presence of extenuating factors such as sudden illness or a natural disaster, cannot constitute the sole basis for good cause.<sup>89</sup>

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82. See, e.g., *Montalbano v. Easco Hand Tools*, 766 F.2d 737, 740 (2d Cir. 1985); *Novak v. World Bank*, 703 F.2d 1305, 1310 (D.C. Cir. 1983).

83. The rule reads, "If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. This subdivision shall not apply to service in a foreign country pursuant to subdivision (i) of this rule." FED. R. CIV. P. 4(j).

84. 900 F.2d 1045 (7th Cir. 1990).

85. *Id.* at 1046.

86. *Id.* at 1046 n.1.

87. *Id.* at 1046.

88. *Id.* at 1047.

89. *Id.*

- A statute of limitations problem will not serve to establish good cause because the focus is on why service was not obtained, rather than on what the effects of a dismissal would be.<sup>90</sup>
- Lack of prejudice to the defendant, standing alone, does not constitute good cause for the same reason that the inquiry is why service was not obtained, not what the results of dismissal would be.<sup>91</sup>
- The lack of prejudice can, however, be a consideration when coupled with a "good cause" explanation of why service was not made.<sup>92</sup>

The question, then, is what constitutes good cause? The Rule does not define the term, and the legislative history is of little help in that it only lists evasion of service as one example of good cause.<sup>93</sup> Beyond this, the best that can be offered is the general statement that good cause is extremely difficult to establish under Rule 4(j). The plaintiff bears the burden of proof to show good cause,<sup>94</sup> and the failure to follow the Federal Rules of Civil Procedure is ordinarily an insufficient excuse.<sup>95</sup>

Two examples show the unique types of settings that can satisfy Rule 4(j)'s stringent standard. For instance, in *Sellers v. United States*,<sup>96</sup> the Seventh Circuit held that when the district court instructs the Marshal to serve papers for a prisoner, and the Marshal fails to complete service, good cause is automatically shown. Similarly, in *Patterson v. Brady*,<sup>97</sup> good cause was found when the plaintiff's failure to perfect service was attributable to an unusual situation. Specifically, the clerk's office had failed to provide the plaintiff with appointed counsel as required by certain statutes and rules, and had also failed, after volunteering to assist her in filing her initial papers, to inform her that service was required on both the Attorney General and the local United States Attorney in an action against the Secretary of the Treasury.

Good cause will rarely be found in 4(j) cases. Thus, practitioners initiating litigation should take extra steps to ensure that service is timely

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90. *Id.* at 1048.

91. *Id.*

92. *Id.* See also *Lewellen v. Morley*, 875 F.2d 118 (7th Cir. 1990) (no good cause shown when failure to serve was due to shortcomings of plaintiff's attorney).

93. Federal Rules of Civil Procedure Amendments Act of 1982, Pub. L. No. 97-462, 1982 U.S. CODE CONG. & ADMIN NEWS (96 Stat. 2527) 4434, 4446 n.25.

94. *Geiger v. Allen*, 850 F.2d 330, 333 (7th Cir. 1988).

95. *Reynolds v. United States*, 782 F.2d 837, 838 (9th Cir. 1986); *Barco Arroyo v. Federal Emergency Management Agency*, 133 F.R.D. 46, 49 (D. P.R. 1986).

96. 902 F.2d 598 (7th Cir. 1990).

97. 131 F.R.D. 679 (S.D. Ind. 1990).

made. At the very least, the 120-day limitation should be diaried several times before it expires, such as at 50, 100, 110, 115, and 120 days.

### III. PERSONAL JURISDICTION

Although not a subject confined to federal courts, the issue of personal jurisdiction often arises in federal litigation, particularly given the large number of diversity cases filed against out-of-state defendants. A personal jurisdiction case decided by the Supreme Court during the survey period did not arise in federal court, but nonetheless will apply and is instructive here.

In *Burnham v. Superior Court of California*,<sup>98</sup> the Supreme Court squarely held that service upon non-residents while they are temporarily in the state is constitutionally permissible, even if the non-resident's entry into the state is unrelated to the issues raised in the lawsuit. All nine Justices agreed with this holding, although no less than four separate opinions were delivered discussing its rationale.<sup>99</sup>

It is unnecessary to dissect the various opinions given the unanimity of the judgment. As Justice Stevens explained in a one-paragraph concurrence, "[I]t is sufficient to note that the historical evidence and consensus [on the issue] identified by Justice Scalia, the considerations of fairness identified by Justice Brennan, and the common sense displayed by Justice White, all combine to demonstrate that this is, indeed, a very easy case."<sup>100</sup>

All that needs to be said is that non-residents can be served while present in the forum state, regardless of the reason for the presence. The only conceivable exception raised by *Burnham* is when that presence is unintentional, which, as Justice White pointed out, is the rare exception.<sup>101</sup> Thus, although one can imagine a scenario in which a non-resident unintentionally ends up in the forum, (for instance, when a non-resident is rendered unconscious in an automobile accident and is

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98. 110 S. Ct. 2105 (1990).

99. *Id.* Justice Scalia announced the judgment of the Court and delivered an opinion joined by the Chief Justice and by Justice Kennedy, with Justice White joining in part and concurring separately in part and concurring in the judgment. Justice Brennan, joined by Justices Marshall, Blackmun, and O'Connor filed an opinion concurring in part and concurring in the judgment. Justice Stevens filed an opinion concurring in the judgment.

100. *Id.* at 2126 (Stevens, J., concurring in the judgment). Justice Stevens added in a footnote, "Perhaps the adage about hard cases making bad law should be revised to cover easy cases." *Id.*

101. *Id.* at 2120 (White, J., concurring in part and concurring in the judgment) ("[C]laims in individual cases that the rule would operate unfairly as applied to the particular non-resident involved need not be entertained. At least this would be the case where presence in the forum state is intentional, which would almost always be the fact."). *Id.*

transported across state lines without his or her knowledge for medical care), most of the time no inquiry need be made into why the non-resident appeared in the forum state. The mere presence is enough under the Due Process Clause.

#### IV. RULE 55 - DEFAULTS

Rule 55(a) provides that the clerk shall enter a default when a party has failed to respond to an action and that fact is made to appear by affidavit or otherwise.<sup>102</sup> Judgment by default is then made upon request by the clerk when the claim is for a sum certain, and by the court upon request in all other cases.<sup>103</sup> The clerk's entry of default can be set aside by the court only for "good cause shown," and a judgment by default can be set aside only in accordance with Rule 60(b).<sup>104</sup>

During the survey period, the Seventh Circuit issued several opinions dealing with setting aside entries of default and default judgments. For instance, in *In re State Exchange Finance Co.*,<sup>105</sup> the Seventh Circuit held that the trial court did not err in refusing to set aside a default, even though the answer was filed only two weeks late. Indeed, Judge Posner wrote that "even if the answer is filed two minutes late, if a default is entered the defendant cannot get it set aside without showing that he had good cause for the default [under Rule 55(c)]."<sup>106</sup> Judge Posner found good cause lacking because the evidence showed that the defendant and his lawyer both had proper notice of the suit more than a month before an answer was filed.<sup>107</sup>

The court's discussion of the new attitude towards defaults is instructive:

Traditionally, default judgments were strongly disfavored; however, "this court has moved away from the traditional position . . . ; we are increasingly reluctant to reverse refusals to set them aside." *Dimmitt & Owens Financial, Inc. v. United States*, 787 F.2d 1186, 1192 (7th Cir. 1986). To the cases cited in *Dimmitt*, we may now add our more recent cases of *Hal Commodity Cycles Management Co. v. Kirsh*, 825 F.2d 1136 (7th Cir. 1987); *North Central Illinois Laborer's District Council v. S.J. Groves & Co.*, 842 F.2d 164 (7th Cir. 1988); *United States v. Di Mucci*,

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102. FED. R. CIV. P. 55(a).

103. FED. R. CIV. P. 55(b).

104. FED. R. CIV. P. 55(c).

105. 896 F.2d 1104 (7th Cir. 1990).

106. *Id.* at 1106.

107. Judge Posner seemed particularly distraught at the defendant's delay because the defendant himself was a lawyer.

879 F.2d 1488, 1493-96 (7th Cir. 1989). The old formulas - a harsh sanction, drastic, should be imposed only as a last resort, for example when other, less drastic remedies prove unavailing, etc. - are still at times intoned. The new practice, however, is different. The entry of a default judgment is becoming - without interference from this court - a common sanction for late filings by defendants, especially in collection suits such as this against sophisticated obligors.<sup>108</sup>

Judge Posner used similar language in *Connecticut National Mortgage Co. v. Brandstatter*,<sup>109</sup> even though the end result was different. The *Brandstatter* case is unique in that the defendant's answer was overdue, but the plaintiff had informed the defendant that a motion for entry of default and for entry of judgment would be made at a status hearing on July 12th. The defendant's attorney arrived at court that day, filed his answer in the clerk's office, and proceeded to Judge Conlon's courtroom for hearing, whereupon he discovered that, without notice, Judge Conlon had vacated the hearing and entered a default judgment.

The Seventh Circuit reversed the judgment below and remanded the case for further proceedings for the "fundamental reason" that Judge Conlon had not even considered the defendant's motion to file an untimely answer. The court stated, "To grant such a motion the judge would not have had to find good cause or excusable neglect [as in the default settings], although some finding, however attenuated, of either would be implicit in favorable action on the motion."<sup>110</sup>

In so ruling, the Seventh Circuit noted that if the case had turned on whether excusable neglect had been shown under Rule 60(b)(1) to set aside the default judgment, the defendant would not have prevailed

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108. *Id.* A seemingly contrary analysis was embraced by the Seventh Circuit in *Beeson v. Smith*, 893 F.2d 930 (7th Cir. 1990). There it was held that a decision that the court labeled a "default," which was actually a dismissal of the plaintiffs' action for want of prosecution, was an abuse of discretion when the dismissal was the result of the attorney's "repeated mishandling" of the case. As discussed later in the Rule 41(b) context, the *Beeson* decision must be questioned in light of the trend in the Seventh Circuit, as demonstrated in *State Exchange Finance Co.*, to hold parties accountable for the failings of their counsel. See also *Daniels v. Brennan*, 884 F.2d 783 (7th Cir. 1989) ("a client who independently chooses his counsel is bound by that counsel's acts . . ."). *Id.* at 788. But see *Del Carmen v. Emerson Elec. Co.*, 908 F.2d 158 (7th Cir. 1990) (reversing dismissal because counsel's single failure to attend status conference did not "satisfy the threshold showing of delay, contumacious conduct, or failed prior sanctions . . ."). *Id.* at 163. For now it is sufficient to point out that *Beeson* is not, contrary to the language of the opinion, a default case involving Rule 55, and to note that *Beeson* was written by a Senior District Judge from another circuit.

109. 897 F.2d 883 (7th Cir. 1990).

110. *Id.* at 885.

because "routine back-office problems . . . do not rank high in the list of excuses for default and certainly do not *require* a district judge to relieve a party from a default judgment."<sup>111</sup> Judge Posner then explained the difference between a default order entered by the clerk under Rule 55(a), and the subsequent default judgment made under Rule 55(b):

It is true that relief from a default order requires a showing of good cause, Fed. R. Civ. P. 55(c), that "good cause" is not sharply distinguishable from "excusable neglect," if it is distinguishable at all, *Lorenzen v. Employees Retirement Plan*, 896 F.2d 228, 231-32 (7th Cir. 1990), and that some decisions, illustrated by *United States v. DiMucci*, 879 F.2d 1488, 1493 n.9 (7th Cir. 1989), imply that the standards for setting aside a default are the same under Rule 55(c) and 60(b). Most decisions, however, hold that relief from a default judgment requires a stronger showing of excuse than relief from a mere default order. [listing authorities]. Such an order is normally entered by the clerk of the court automatically upon the failure to file a timely pleading. Fed. R. Civ. P. 55(a). And as it does not conclude the lawsuit, the practical considerations that support a strong presumption against the reopening of final decisions are not in play. The defendant in this case was denied an opportunity to argue that a default judgment should not be entered, but instead was forced to bear the heavier burden of showing that a judgment already entered should be set aside.<sup>112</sup>

The lessons from these cases are two-fold. First, *always* respond to complaints on time and avoid the entry of a default order by the clerk. There is no excuse for failing to at least file a motion for enlargement of time, except for extraordinary situations such as natural disasters and the like. As is equally true in the Rule 4(j) setting, "good cause" does not mean that counsel was busy in trial or that a secretary forgot to diary the deadline.

Second, if a default is entered, act *immediately* to preclude the entry of a default judgment under Rule 55(b). Once such a judgment is entered, the availability of relief via Rule 60(b) is virtually foreclosed, as the Seventh Circuit has made clear.

#### V. RULE 9(B) - PLEADING WITH PARTICULARITY

Rule 9(b) requires "all averments of fraud or mistake" to be "stated with particularity."<sup>113</sup> During the survey period, the Seventh Circuit

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111. *Id.* at 884-85 (emphasis added).

112. *Id.* at 885 (citations omitted).

113. FED. R. CIV. P. 9(b).

discussed Rule 9(b) in *Flynn v. Merrick*,<sup>114</sup> holding that “cryptic statements” found in a fraud complaint were insufficient.<sup>115</sup> The court wrote, “Mere allegations of fraud, corruption or conspiracy, averments to conditions of mind, or referrals to plans and schemes are too conclusional to satisfy the particularity requirement, no matter how many times such accusations are repeated.”<sup>116</sup>

Thus, care must be taken in fraud cases to detail the factual basis of the claims. Merely repeating the conclusory allegation that fraud occurred will not suffice.

## VI. RULE 13(A) - COMPULSORY COUNTERCLAIMS

Rule 13(a) requires “compulsory counterclaims” to be asserted at the time of filing the responsive pleading if the counterclaim “arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim and does not require for its adjudication the presence of third parties of when the court cannot acquire jurisdiction.”<sup>117</sup> In *Burlington Northern Railroad Co. v. Strong*,<sup>118</sup> the Seventh Circuit held that an employer’s claim for set-off under a disability insurance program was not a compulsory counterclaim that needed to be filed in response to the employee’s personal injury claim against the employer. This holding, by itself, is not particularly noteworthy.

The court’s opinion, however, contains an excellent analysis of the standards for compulsory counterclaims. The court noted that “Rule 13(a) is in some ways a harsh rule: if a counterclaim is compulsory and the party does not bring it in the original lawsuit, that claim is thereafter barred.”<sup>119</sup> However, “the rule serves a valuable role in the litigation process, especially in conserving judicial resources.”<sup>120</sup>

In determining whether a counterclaim arises out of the same transaction or occurrence, the court wrote that the Seventh Circuit has developed a “logical relationship” test. Under this test, the words “transaction or occurrence” are liberally interpreted to further the general policies of the federal rules. The court stated, “Despite this liberal construction, [the Seventh Circuit] has stressed that [the] inquiry cannot be a wooden application of the common transaction label. Rather, [the court] examine[s] carefully the factual allegations underlying each claim

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114. 881 F.2d 446 (7th Cir. 1989).

115. *Id.* at 449.

116. *Id.* (quoting *Hayduk v. Lanna*, 775 F.2d 441, 444 (1st Cir. 1985)).

117. FED. R. CIV. P. 13(a).

118. 907 F.2d 707 (7th Cir. 1990).

119. *Id.* at 710 (quotations and footnote omitted).

120. *Id.*

to determine if the logical relationship test is met."<sup>121</sup> The court concluded, "In short, there is no formalistic test to determine whether suits are logically related."<sup>122</sup> Instead, "[a] court should consider the totality of the claims, including the nature of the claims, the legal basis for recovery, the law involved, and the respective factual backgrounds."<sup>123</sup>

Thus, when responding to complaints, defendants should determine whether any counterclaims can be asserted. If such claims exist, a focused analysis of whether such counterclaims are compulsory is necessary. The standard used by the courts is admittedly inexact, so practitioners should err on the side of treating a counterclaim as compulsory when there is room for doubt.

## VII. RULE 15 - AMENDMENT OF PLEADINGS

Rule 15 allows pleadings to be amended in three situations: (1) as a matter of right at any time before a responsive pleading is served; (2) by leave of court or written consent of the adverse party thereafter; or (3) during or after trial via an amendment to conform to the evidence when issues not raised by the pleadings are tried by express or implied consent of the parties.<sup>124</sup> During the survey period, the Seventh Circuit rendered important decisions involving the last two situations.

These decisions are merely highlighted below so that practitioners are aware of them:

1. A district court did not abuse its discretion in denying amendment by consent of the parties when the amendment was to be conditioned on reopening discovery, the case had already been tried once, and the district court was properly concerned with "artificial protraction of [the] litigation."<sup>125</sup>
2. A district court did not abuse its discretion in allowing amendment at the close of plaintiff's evidence to allow plaintiff to include, in a free-speech claim, an allegation of retaliation by superiors — defense counsel did not formally object to a remark of employee's counsel that such an allegation was included, and defense counsel did not object to the introduction of evidence on the allegation at trial.<sup>126</sup>

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121. *Id.* at 711 (quotations and citations omitted).

122. *Id.*

123. *Id.* (footnote omitted).

124. FED. R. CIV. P. 15(a).

125. *Fort Howard Paper Co. v. Standard Havens, Inc.*, 901 F.2d 1373, 1379 (7th Cir. 1990).

126. *Barkoo v. Melby*, 901 F.2d 613, 617 (7th Cir. 1990). This shows the care that must be taken at trial to keep the evidence limited to the original pleadings. In *Barkoo*,

3. A district court did not abuse its discretion in denying amendment to plead a fraud claim when counsel should have been aware of the facts giving rise to the claim nineteen months previous.<sup>127</sup>

4. Leave to amend cannot be granted after summary judgment has been granted and judgment entered until the judgment is first reopened via Rules 59 or 60.<sup>128</sup>

### VIII. TRANSFER (CHANGE OF VENUE)

Several important decisions were issued during the survey period dealing with transfer of an action to another district.<sup>129</sup> In *Ferens v. John Deere Co.*,<sup>130</sup> a sharply divided Supreme Court held that when an action is transferred to another district, the transferee court must apply the law of the transferor court, regardless of who initiated the transfer. The court had decided in 1964 that the transferor state's law applies when a defendant seeks transfer, but left unresolved whose law governs when the plaintiff obtains transfer.<sup>131</sup> After *Ferens*, the law of the transferor state applies in both situations.

This decision has important forum-shopping considerations, as the facts of the case reveal. The plaintiff had been injured in Pennsylvania. Three years later, after Pennsylvania's two-year limitations period for torts had expired, plaintiff sued John Deere in a Pennsylvania federal court for breach of warranty, which invoked a longer limitations period. In a stroke of genius, plaintiff then filed a tort action against John Deere in a Mississippi federal court. This action was properly before the court on diversity, and venue was proper as well under 28 U.S.C.

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the plaintiff's counsel remarked early in the trial that the free-speech claim included the allegation of retaliation. Although defense counsel said, "I do not think that is alleged," he did not "lodge a formal objection" and did not object to such evidence being admitted. *Id.*

127. *Amendola v. Bayer*, 907 F.2d 760, 764-65 (7th Cir. 1990). The district court had properly reasoned that this delay would prejudice the defendant and "impair the public interest in prompt resolution of legal disputes." *Id.*

128. *Id.* at 765 n.4.

129. Litigants in federal court may seek to transfer the action to another district under 28 U.S.C. § 1404. However, transfer is not automatic as it is in certain situations under Indiana Trial Rule 76, but is instead governed by the court's discretion in the interest of justice, taking into account the "convenience of parties and witnesses." 28 U.S.C. § 1404(a), (b) (1990).

130. 110 S. Ct. 1274 (1990). Justice Kennedy wrote the majority opinion and was joined by the Chief Justice and Justices White, Stevens, and O'Connor. Justice Scalia wrote a strong dissent, joined by the unlikely bedfellows Justices Brennan, Marshall, and Blackmun.

131. *Van Dusen v. Barrack*, 376 U.S. 612 (1964).

§ 1391(a) and (c).<sup>132</sup> The Mississippi forum was chosen because Mississippi's choice-of-law rules<sup>133</sup> require Mississippi's statute of limitations to govern actions brought in Mississippi, and because Mississippi's limitations period for torts is six years.<sup>134</sup>

Thus, by filing in Mississippi, the plaintiff was able to pursue a tort action that he could no longer maintain in Pennsylvania. The real savvy of plaintiff's counsel, however, was shown when he then filed a motion to transfer the action to a Pennsylvania federal court. This was done acting on the assumption that, after the transfer, the choice of law rules of Mississippi and the longer limitations period would apply. John Deere did not object to the transfer, no doubt concluding that the Pennsylvania forum was more convenient, and, it seems, without realizing the plaintiff's true motive. The federal court in Mississippi granted the transfer motion, as it should have under the standards of section 1404(a).

The end result was that the plaintiff obtained the convenient forum he desired, as well as application of favorable law that could not have been obtained by originally filing in Pennsylvania. The debate in the Supreme Court over the propriety of this result was intense,<sup>135</sup> but it is now the law of the land that the transferor's law applies in all transferred actions.

The lessons from *Ferens* are three-fold. First, plaintiffs who can invoke diversity jurisdiction are well advised to seek out the most favorable law possible among all the states. Of course, in most instances the substantive law of an unrelated forum will not apply because the forum's choice-of-law rules will dictate application of the law of the state that has the most significant contacts or where the tort occurred.<sup>136</sup>

However, when there are concerns about limitation periods, the search could be fruitful because the majority of states apply the forum's statute

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132. The plaintiff was not a resident of Mississippi and John Deere was neither incorporated nor based in Mississippi. Nonetheless, venue was proper because (presumably) John Deere was subject to personal jurisdiction in Mississippi. This is enough to allow venue, for § 1391(a) allows venue where (among other places) all defendants reside, and § 1391(c) provides that a corporation is deemed to reside in any judicial district in which it is subject to personal jurisdiction.

133. A diversity court applies the choice-of-law rules of the forum state. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941).

134. Mississippi has a borrowing statute like many states do, but it did not apply because the statute has been construed to govern only when a nonresident in whose favor the statute has accrued afterwards moves into the state. *Ferens*, 110 S. Ct. at 1278.

135. *Ferens*, 110 S. Ct. at 1284-88 (Scalia, J., dissenting).

136. As Justice Scalia noted in *Ferens*, the "diversity among the States in choice-of-law principles has become kaleidoscopic." *Id.* at 1287. Indeed, the current edition of a leading conflicts treatise lists 10 separate choice-of-law theories that are applied by the 50 states. *Id.* (citation omitted).

of limitations as a matter of course.<sup>137</sup> Thus, as in *Ferrens*, a plaintiff faced with an expired limitations period in the convenient forum might be able to find an open limitations period in an inconvenient forum, and then seek transfer to the convenient forum under section 1404(a).

Second, for defendants the lesson is to be on the lookout for such forum-shopping. When an action is filed in what seems like an improbable federal forum, it is likely that the plaintiff might have limitations problems and that, aware of *Ferrens*, the plaintiff might seek transfer back to a convenient forum. In most cases, nothing can be done about this because once the case is filed in such a forum the more favorable limitations will apply, regardless of whether transfer is effected. A defendant might well seek to block transfer, but in many cases the defendant will prefer the new forum as well. Moreover, if the initial forum is truly inconvenient for parties and witnesses, the district court is likely to transfer the action anyway. Thus, the best that can be hoped for here is legislative action to change this avenue of forum-shopping.

Third, if litigation involving potential compulsory counterclaims appears likely and a potential defendant is concerned that its adversary might utilize *Ferrens* forum-shopping, that "defendant" might want to consider filing its action first in a forum that would apply favorable limitations from the defendant's perspective. In so doing, this party could force the adversary to bring its action, if at all, in an undesirable forum from a limitations standpoint.

The Seventh Circuit also decided several important transfer cases during the survey period. For instance, in *Heller Financial, Inc. v. Midwhey Powder Co.*,<sup>138</sup> the plaintiff sought transfer of a case from a district that the parties had previously agreed upon in a contractual forum-selection clause. Judge Manion began by noting the settled rule that the existence of a forum-selection clause is not dispositive under section 1404(a) because only one of this section's factors, convenience of the parties, is within the parties' power to waive. "In other words, a valid forum-selection clause may waive a party's right to assert his own inconvenience as a reason to transfer a case, but district courts must still consider whether the 'interests of justice' or the 'convenience . . . of witnesses' require transferring a case."<sup>139</sup>

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137. See, e.g., *Hauch v. Connor*, 453 A.2d 1207, 1214 (Md. 1983) (Maryland courts apply the limitations period of the forum). The rule remains well entrenched, although it has been the subject of "considerable academic criticism," *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779 n.10 (1984), and "[m]any subsequent cases have taken a different view." RESTATEMENT (SECOND) OF CONFLICT § 142 comment "e" (1989). Note again, however, that the issue of a borrowing statute must also be considered.

138. 883 F.2d 1286 (7th Cir. 1989).

139. *Id.* at 1293.

Thus, despite the existence of a forum-selection clause, courts may still transfer a case under section 1404(a). Nonetheless, in *Heller Financial* the Seventh Circuit found that transfer was properly denied because the defendant had waived its own inconvenience as a factor by virtue of the clause, and because the defendant did not meet its burden to otherwise specifically show that witnesses would face difficulty in the initial forum.

Thus, forum-selection clauses are entitled to some weight in the transfer analysis. However, practitioners should advise their clients that the interests of other parties or witnesses can override such a clause.

### IX. RULE 41(A) - VOLUNTARY DISMISSAL

Rule 41(a) provides for voluntary dismissal of an action at the plaintiff's request in three situations: (1) by the plaintiff's notice of a dismissal at any time before the service of an answer or motion for summary judgment;<sup>140</sup> (2) by stipulation of the parties;<sup>141</sup> or (3) by court order upon such terms and conditions as the court deems proper.<sup>142</sup> An excellent example of the third setting arose during the survey period.

In *Belkow v. Celotex Corp.*,<sup>143</sup> an alleged victim of asbestos exposure sued various defendants for damages in an eight-count complaint. Defendants sought to dismiss five of the counts, and plaintiff responded by seeking voluntary dismissal of three of those five counts without prejudice. The district court granted the plaintiff's motion in a well-written opinion. Judge Kocoras of the Northern District of Illinois first noted that voluntary dismissals by court order under Rule 41(a)(2) are within the sound discretion of the court. Judge Kocoras wrote, "In exercising its discretion, a court must seek to prevent prejudice to the non-moving parties . . . however, the legitimate interests of both the plaintiffs and defendants must be considered."<sup>144</sup> Dismissal is thus "typically allowed unless the defendants will suffer some legal prejudice beyond the potential for further litigation."<sup>145</sup>

Based on these principles, the court found the voluntary dismissal proper, writing, "Although the defendants may witness the subsequent resurrection of these claims, as plaintiffs have indicated their intention to move to amend, the prospect of facing these resurrected claims is not sufficiently prejudicial to bar a voluntary dismissal."<sup>146</sup> "Similarly,"

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140. FED. R. CIV. P. 41(a)(1)(i).

141. FED. R. CIV. P. 41(a)(1)(ii).

142. FED. R. CIV. P. 41(a)(2).

143. 722 F. Supp. 1547 (N.D. Ill. 1989).

144. *Id.* at 1552-53 (citations omitted).

145. *Id.* at 1553 (citations omitted).

146. *Id.* (citations omitted).

the court added, “any technical advantage plaintiffs may gain fails to constitute sufficient prejudice.”<sup>147</sup> The court also noted that plaintiff had raised the motion early in the proceedings and had otherwise been diligent.<sup>148</sup>

The court then rejected a defense argument that the dismissal be with prejudice, noting that the dismissal should be without prejudice “unless the court finds that the defendant will suffer legal prejudice.”<sup>149</sup> The court then disposed of the defendant’s request that costs be imposed against the plaintiff as part of the “terms and conditions” referred to in Rule 41(a)(2).<sup>150</sup> Although noting that costs are sometimes awarded when there is a threat of relitigation, the court concluded that costs were inappropriate because plaintiff sought dismissal of only three claims. Thus, any “work product defendant . . . generated [wa]s not wasted but useful and relevant to the rest of the litigation.”<sup>151</sup> “Furthermore,” the court wrote, “if defendant has incurred expense for work that is wasted, it has not specified that amount.”<sup>152</sup>

The *Belkow* decision thus illustrates that plaintiffs can seek voluntary dismissal of claims that appear threatened by defense motions. The earlier that such Rule 41(a)(2) motions are filed, the better the prospects of success are. Defendants opposing such motions should routinely seek costs as a condition of dismissal, but should be prepared to specifically demonstrate what costs are essentially “wasted expense[s]”<sup>153</sup> due to the dismissal.

#### X. RULE 41(B) - INVOLUNTARY DISMISSAL

Rule 41(b) provides for the involuntary dismissal of an action or any claim for failure to prosecute or to comply with the federal rules or an order of the court.<sup>154</sup> Unless otherwise specified in the dismissal order, a Rule 41(b) dismissal “operates as an adjudication upon the merits.”<sup>155</sup>

The Seventh Circuit issued no less than six decisions dealing with involuntary dismissals. The principles espoused in these cases are outlined as follows:

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147. *Id.* (citations omitted).

148. *Id.*

149. *Id.* (quotations and citations omitted).

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. FED. R. CIV. P. 41(b).

155. *Id.*

1. Dismissal is warranted when there is a "clear record of delay or contumacious behavior."<sup>156</sup>
2. A client who independently chooses his or her counsel is bound by that counsel's acts,<sup>157</sup> particularly when the client is aware of the attorney's acts.<sup>158</sup>
3. The district court has the inherent authority to dismiss a case *sua sponte* for failure to prosecute, without motion by a defendant under basically the same rationale and standards as Rule 41(b).<sup>159</sup>
4. If the district judge does not state whether the dismissal is with or without prejudice, Rule 41(b) dictates that it is with prejudice; the Rule puts the burden on the plaintiff to take action to have the trial court specify otherwise.<sup>160</sup>
5. A trial court's discretionary order dismissing a case for failure to prosecute will not be disturbed unless "it is clear that no reasonable person could concur in the trial court's assessment of the issue under consideration."<sup>161</sup>

## XI. DISCOVERY

The decision in *Henderson v. Zurn Industries*,<sup>162</sup> addresses a number of discovery issues that are often given "short shrift." The central issue was whether a request for production served upon a party required the

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156. *Daniels v. Brennan*, 887 F.2d 783, 785 (7th Cir. 1990).

157. *Id.* at 788 (per Judge Kanne).

158. *Anderson v. United Parcel Serv.*, 915 F.2d 313, 315-16 (7th Cir. 1990) (per Judge Wood). These decisions seem more persuasive than *Beeson v. Smith*, 893 F.2d 930 (7th Cir. 1990), in which a Senior District Judge from Pennsylvania, sitting by designation, wrote for the Seventh Circuit and held that a dismissal should have been vacated when "the appellants themselves [did not] engage[] in any sophisticated contumacious scheme to delay the course of justice." *Id.* at 931. The *Beeson* decision does not square with the usual Seventh Circuit dogma that the "remedy for a client who suffers a dismissal because of the negligence of his attorney is a malpractice action; the remedy is not in avoiding the consequences of a freely selected agent." *Daniels*, 887 F.2d at 788. However, another panel of the Seventh Circuit, in an opinion written by Judge Coffey, has embraced *Beeson* and found an involuntary dismissal improper when counsel's only failing was a one-time failure to attend a status conference. *Del Carmen v. Emerson Elec. Co.*, 908 F.2d 158 (7th Cir. 1990). See also *Lowe v. City of East Chicago, Ind.*, 897 F.2d 272 (7th Cir. 1990) (reversing a Rule 41(b) dismissal when there was "no sign of either client neglect of court processes or knowledge of the attorney's neglect"). *Id.* at 274.

159. *Daniels*, 887 F.2d at 787.

160. *LeBeau v. Taco Bell*, 892 F.2d 605, 608 (7th Cir. 1989).

161. *Daniels*, 887 F.2d at 785. This standard of review does not seem to have been applied by the court in *Beeson*.

162. 131 F.R.D. 560 (S.D. Ind. 1990).

production of the insurance files of that party's insurer. The most important points of the decision are summarized below:

1. A three-part analysis is appropriate when a request for production essentially seeks discovery from a nonparty. First, are the files of the nonparty even reachable under the discovery provisions? Second, assuming that the nonparty's files can be reached by a request for production, are the items requested within the permissible scope of discovery (that is, are they reasonably calculated to lead to the discovery of admissible evidence)? Third, even if the items requested are within the scope of discovery, are they excluded under the work-product doctrine?<sup>163</sup>

2. Under the federal version of Rule 34, only parties may be served with requests for production. The court stated, "The text of the Rule"<sup>164</sup> and "scores of cases make clear [that] a request for production simply cannot be made and enforced against a nonparty."<sup>165</sup> This contrasts with Indiana's version of Rule 34, under which nonparties can be served with requests for production in order to expedite and simplify the discovery process as it relates to nonparties.<sup>166</sup>

3. The insurer in *Henderson* was not a "party" to the action because it was not named in the caption of the complaint as Rule 10(a) requires,<sup>167</sup> nor was it served with a copy of the summons and complaint as Rule 4 requires.<sup>168</sup>

4. The line of district court decisions holding that a nonparty

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163. *Id.* at 564.

164. Rule 34(a) states that "[a]ny party may serve on any other party a request [for production] . . . ." FED. R. CIV. P. 34(a).

165. *Henderson*, 131 F.R.D. at 564 n.1 (citing *Hatch v. Reliance Ins. Co.*, 758 F.2d 409, 416 (9th Cir. 1985) ("Rule 34 may not be used to discover matters from a non-party"); *Fisher v. Marubeni Cotton Corp.*, 526 F.2d 1338, 1341 (8th Cir. 1975) (Rule 34 applies only to parties); *Wimes v. Eaton Corp.*, 573 F. Supp. 331, 333 (E.D. Wis. 1983) (noting that the drafters of Rule 34 "deliberate[ly] . . . limited the applicability of the rule to parties only").

166. See IND. R. TR. P. 34(c); 1 W. HARVEY, INDIANA PRACTICE 4, 9 (1988) (discussing rule). Note that documents from a federal nonparty can nonetheless ordinarily be obtained by way of a deposition and subpoena under Rule 45. Usually the deposition is unnecessary and, with the parties' consent, can be waived in lieu of simple production of the desired documents.

167. FED. R. CIV. P. 10(a).

168. FED. R. CIV. P. 4. See also *Welling, Discovery of Nonparties' Tangible Things Under the Federal Rules of Civil Procedure*, 59 NOTRE DAME L. REV. 110 (1983). "It is usually easily discernable who the parties are because their names must be listed in the summons and complaint." *Id.* at 112 n.8.

insurer is nonetheless subject to Rule 34 “under the theory that the insurer is virtually a party to the action”<sup>169</sup> is unavailing. Although these decisions have the virtue of facilitating discovery, the text of the Federal Rules cannot be rewritten to avoid inefficiencies that they might produce.

5. Rule 34(a) does have an agency aspect to it, though, because it allows discovery of documents that “are in the possession, custody or control of the party upon whom the request is served . . . .”<sup>170</sup>

6. In applying Rule 34(a)’s control test, the courts look to whether the party has “the legal right to obtain the documents requested upon demand.”<sup>171</sup> In the insurance setting, the focus is on the contract between the insured and the insurer, and on the relevant state law regarding whether the insured has the legal right to obtain various materials held in the insurer’s files.

7. The work-product doctrine embodied in Rule 26(b)(3) depends on whether, “in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation . . . . While litigation need not be imminent, the primary motivating purpose behind the creation of the document must be to aid in possible future litigation.”<sup>172</sup>

8. The burden is on the party asserting the work-product doctrine to prove that some articulable claim, likely to lead to litigation, has arisen.<sup>173</sup>

9. In the liability-insurance setting, there should be no *per se* rules that documents prepared at the onset by a claims adjuster are covered by the doctrine; each case should be decided on its own facts.<sup>174</sup>

Several decisions involving sanctions under Rule 37 for failure to provide discovery were rendered during the survey period. These are similarly highlighted below:

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169. *Henderson*, 131 F.R.D. at 565 (declining to follow *Simper v. Trimble*, 9 F.R.D. 598 (W.D. Mo. 1949); *Bingle v. Liggett Drug Co.*, 11 F.R.D. 593 (D. Mass. 1951); *Wilson v. David*, 21 F.R.D. 217 (W.D. Mich. 1957); *State Farm Ins. Co. v. Roberts*, 97 Ariz. 169, 398 P.2d 671 (1965)).

170. *Henderson*, 131 F.R.D. at 567 (quoting FED. R. CIV. P. 34(a)).

171. *Id.* (quotations and citations omitted).

172. *Id.* at 570 (quoting *Binks Mfg. Co. v. National Presto Indus.*, 709 F.2d 1109, 1118-19 (7th Cir. 1983) (citations omitted)).

173. *Id.*

174. *Id.* at 571 n.11.

1. A district court did not abuse its discretion in defaulting defendants for failing to obey discovery orders and failing to appear for noticed depositions.<sup>175</sup>
2. A district court is not required to first impose less drastic sanctions as a warning shot prior to a default or dismissal for discovery violations.<sup>176</sup>
3. Remedial actions taken after a default do not excuse the sanctionative conduct.<sup>177</sup>
4. For every discovery violation, Rule 37(d) requires the offending parties or their counsel, or both, to pay the reasonable expenses and fees caused by the violation, unless the court finds the failure substantially justified or that other circumstances make an award unjust.<sup>178</sup>

## XII. SUMMARY JUDGMENT

The important liberalization of summary judgment practice was discussed at length in each of the last two survey Articles.<sup>179</sup> The courts continued to look favorably upon well-grounded summary judgment motions during the survey period. Some of the more significant decisions are summarized below so that practitioners are aware of them. Those seeking a more complete review of the fundamentals of summary judgment are referred to the previous Articles.

1. A nonmovant cannot defend a summary judgment motion with affidavits based on rumor or conjecture; affidavits must be based on personal knowledge, and testimony based on "gut feeling" is insufficient.<sup>180</sup>
2. Contract interpretation is a subject particularly suited to disposition by summary judgment.<sup>181</sup>
3. Issues of motive and intent are generally, but not always,

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175. *United States v. DiMucci*, 879 F.2d 1488, 1493-94 (7th Cir. 1989).

176. *Id.* at 1493-95; *Toombs v American Live Stock Ins. Co.*, No. IP89-912-C, slip op. at 5 (S.D. Ind. April 4, 1990).

177. *DiMucci*, 879 F.2d at 1495.

178. *Toombs*, No. IP89-912-C, slip op. at 6.

179. *See Maley, 1988 Developments*, and *Maley, 1989 Developments, supra* note 1.

180. *Palucki v. Sears, Roebuck and Co.*, 879 F.2d 1568, 1572 (7th Cir. 1990). *See also Shepley v. E.I. DuPont De Nemours and Co.*, 722 F. Supp. 506 (C.D. Ill. 1989), "Plaintiff's affidavit states that she has personal knowledge of the matters attested to but ultimately states that her knowledge of such was 'related to' her by another employee. Therefore, it is beyond dispute that the affidavit is not based on personal knowledge." *Id.* at 514-15.

181. *Dribeck Importers v. G. Heileman Brewing Co.*, 883 F.2d 569, 573 (7th Cir. 1989).

matters for the trier of fact; summary judgment is proper if no reasonable juror could find for the nonmovant at trial.<sup>182</sup>

4. The issue at summary judgment involving an issue requiring expert testimony is not whether a "superrational jury" composed of experts could find for the nonmovant, but whether a normal jury could so find.<sup>183</sup>

5. Even in *pro se* prisoner cases, although the court must liberally construe pleadings, the court cannot act as the prisoner's lawyer, and must enter summary judgment when appropriate.<sup>184</sup>

6. A continuance under Rule 56(f) for discovery to rebut a summary judgment motion need not be granted if the nonmovant seeks discovery solely on issues not necessary to rebut summary judgment, or if the nonmovant's failure to obtain the needed materials is a result of the party's lack of diligence.<sup>185</sup>

7. Attacks on the admissibility of summary judgment evidence are waived if not raised in the trial court.<sup>186</sup>

8. A summary judgment order, without more, does not constitute an entry of judgment under Rule 54(b); thus, a summary judgment ruling can be reconsidered at any time before entry of judgment.<sup>187</sup>

9. The failure to follow a district court's local rules on summary judgment can result in a summary grant or denial of summary judgment (particularly in the Northern District of Illinois).<sup>188</sup>

182. *Hamann v. Gates Chevrolet, Inc.*, 910 F.2d 1417, 1420 n.4 (7th Cir. 1990).

183. *Krist v. Eli Lilly and Co.*, 897 F.2d 293, 299 (7th Cir. 1990).

184. *Bony v. Brandenburg*, 735 F. Supp. 913, 914 (S.D. Ind. 1990).

185. *Colby v. J.C. Penney Co.*, 128 F.R.D. 247, 249 (N.D. Ill. 1989). The *Colby* case is an excellent example of how *not* to conduct discovery and respond to summary-judgment motions.

186. *Whetstine v. Gates Rubber Co.*, 895 F.2d 388, 392 (7th Cir. 1990) (attacks on expert's opinion were "not raised in the court below, and thus were waived on appeal"); *Zayre Corp. v. S.M. & R. Co.*, 882 F.2d 1145, 1150 (7th Cir. 1989).

"We do not raise the authenticity and hearsay arguments that [appellant] raises on appeal, however, because there is a fundamental problem with those arguments: [appellant] did not raise them in the district court. An evidentiary objection not raised in the district court is waived on appeal, Fed. R. Evid. 103(a)(1); and this rule holds as true for a summary judgment proceeding as it does for trial."

*Id.*

187. *Continental Casualty Co. v. Great American Ins. Co.*, 732 F. Supp. 929, 931-32 (N.D. Ill. 1990); *Marvin v. King*, 734 F. Supp. 346, 351 (S.D. Ind. 1990). "[T]he Court has the power to reconsider its summary-judgment ruling as no final judgment was entered at that point. . . . Although the Court does not set aside the law of the case lightly, it must do so where, as here, it is apparent that a prior ruling requires reconsideration and the Court still has jurisdiction to do so." *Id.*

188. *Bell, Boyd & Lloyd v. Tapy*, 896 F.2d 1101, 1103 (7th Cir. 1990) (non-movant's

## XIII. CONTINUANCES

In *Mraovic v. Elgin, Joliet & Eastern Railway Co.*,<sup>189</sup> the Seventh Circuit held that the district court did not abuse its discretion in denying an eleventh-hour motion to continue trial. The decision is noteworthy for showing that practitioners who delay in preparing for trial, in the hopes that the trial date is not firm, face the risk of going to trial unprepared.

The decision also contains the following summary of the standards for review of a district court's decision on a motion for continuance:

District courts have wide discretion to control their docket by granting or denying motions to continue. *Northern Indiana Public Service Co. v. Carbon County Coal Co.*, 799 F.2d 265, 269 (7th Cir. 1986). When reviewing challenges for abuse of discretion in district court scheduling, we have concluded that "[m]atters of trial management are for the district judge; we intervene only when it is apparent that the judge has acted unreasonably. The occasions for intervention are rare." *Id.*<sup>190</sup>

Practitioners are thus well advised to learn the trial judge's practices on the firmness of trial dates, but never to take a trial date lightly. If a continuance must be sought, the motion should be supported by affidavits to show the absolute necessity of a continuance. Only in extraordinary circumstances is a continuance guaranteed.<sup>191</sup>

XIV. TRIAL<sup>192</sup>

Two decisions from the survey period show the types of issues that can and cannot be waived at trial. The teachings of these decisions are summarized below:

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failure to provide specific references to record that were required by local rule warranted grant of summary judgment, even assuming district judge (Judge Norgle) had discretion not to enforce local rule to the hilt); *Mustfov v. Superintendent of Chicago Police Dept.*, 733 F. Supp. 283, 287 (N.D. Ill. 1990) (Judge Aspen deems movant's statement of facts admitted when nonmovant did not file a statement in response as required by local rules); *Three D. Departments, Inc. v. K Mart Corp.*, 732 F. Supp. 901, 902-03 (N.D. Ill. 1990) (Judge Duff denies summary judgment because of movant's failure to comply with local rules); *United States E.E.O.C. v. Tempel Steel Co.*, 723 F. Supp. 1250, 1251 (N.D. Ill. 1989) (same) (Judge Aspen). *See also Simpson Oil Co. v. Quality Oil Co.*, 723 F. Supp. 382, 385 (S.D. Ind. 1989) (Judge Tinder denies motion to dismiss due to movant's failure to file a supporting brief as required by local rules).

189. 897 F.2d 268 (7th Cir. 1990).

190. *Id.* at 270-71.

191. *See, e.g., Lowe v. City of East Chicago, Ind.*, 897 F.2d 272, 275 (7th Cir. 1990) (denial of continuance and dismissal for failure to prosecute reversed when client was not to blame for attorney's failure to notify client of trial date and otherwise prepare case for trial).

192. Most trial issues involve evidentiary questions, and with this year's Evidence

1. A party that fails to specifically object to an instruction waives any error stemming from the instruction as given.<sup>193</sup>
2. The Seventh Circuit "distinguishes between an objection against punitive damages instructions being given at all, and an objection to the content of such a punitive damage instruction."<sup>194</sup>
3. There is no doctrine of plain error protecting parties in civil cases from erroneous jury instructions to which no objection was made.<sup>195</sup>
4. District courts cannot resolve disputed factual matters on the basis of affidavits without an evidentiary trial, even when the parties do not object; the error does not involve an evidentiary ruling, a jury instruction, or other preliminary matter that can be waived; rather, the error goes to the "heart of the truth-finding process,"<sup>196</sup> and courts have a basic obligation to try disputed issues of fact.<sup>197</sup>

#### XV. SPECIFICITY REQUIRED IN DISTRICT COURT DECISIONS

There is an old adage among trial judges that the "less said the better." Although this has merit to the extent it recognizes that the trial courts are busy places where some speed in adjudication is necessary, it is now frowned upon by the Seventh Circuit.

For instance, in *DiLeo v. Ernst & Young*,<sup>198</sup> the Seventh Circuit took Judge Marovich of the Northern District of Illinois to task for failing to explain his dismissal of a securities fraud action. Writing for the panel, Judge Easterbrook explained the need for sufficiently thorough opinions:

The rationale behind the [trial court's] judgment is obscure. . . . Circuit Rule 50, which requires a judge to give reasons for dismissing a complaint, serves three functions: to create the mental discipline that an obligation to state reasons produces, to assure the parties that the court has considered the important arguments, and to enable a reviewing court to know the reasons for the judgment. A reference to another judge's opinion . . . ,

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Article covering federal developments for the first time, the trial section of this year's Federal Practice Article will be brief.

193. *Coulter v. Vitale*, 882 F.2d 1286, 1289-90 (7th Cir. 1990).

194. *Id.* at 1289.

195. *Id.*

196. *Cole Energy Dev. Co. v. Ingersoll-Rand Co.*, 913 F.2d 1194, 1200 (7th Cir. 1990).

197. *Id.*

198. 901 F.2d 624 (7th Cir. 1990).

plus an unreasoned statement of legal conclusions, fulfils [sic] none of these.

The judge accepted the “reasons set forth in E&W’s briefs” in the district court. Even if we had copies of these briefs (no one supplied them to us), they would be inadequate. A district judge should not photocopy a lawyer’s brief and issue it as an opinion. Briefs are argumentative, partisan submissions. Judges should evaluate briefs and produce a neutral conclusion, not repeat an advocate’s oratory. From time to time district judges extract portions of briefs and use them as the basis of opinions. We have disapproved this practice because it disguises the judge’s reasons and portrays the court as an advocate’s tool, even when the judge adds some words of his own. Judicial adoption of an entire brief is worse. It withholds information about what arguments, in particular, the court found persuasive, and why it rejected contrary views. Unvarnished incorporation of a brief is a practice we hope to see no more.<sup>199</sup>

Judge Easterbrook then added that “[f]ailure to state reasons for a decision ordinarily would lead to a remand.”<sup>200</sup> However, the judgment below was affirmed because the plaintiff’s complaint was fatally inadequate. Thus, *DiLeo* shows that the district courts of this circuit are expected to explain their decisions. That Judge Easterbrook went to such lengths to make this point in an appeal that was patently without merit shows how seriously this is taken by the Seventh Circuit.

Similarly, in *Okaw Drainage District v. National Distillers and Chemical Corp.*,<sup>201</sup> another panel of the court criticized Judge Mills of the Central District of Illinois for failing to adequately explain his decision after a complex bench trial. Judge Mills had issued an oral opinion, which the Seventh Circuit noted is permissible under Rule 52(a).<sup>202</sup> Nonetheless, the Seventh Circuit wrote that “the goals of the rule cannot be attained unless the judge’s opinion, whether oral or written, indicates his resolution of conflicts in the evidence with clarity and specificity to enable the appellate judges to determine what the facts of the case are.”<sup>203</sup>

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199. *Id.* at 626 (citations omitted).

200. *Id.*

201. 882 F.2d 1241 (7th Cir. 1989).

202. FED. R. CIV. P. 52(a) (requiring district judge to prepare findings of fact and conclusions of law in a civil bench trial).

203. *Okaw*, 882 F.2d at 1244. The Seventh Circuit added, “[W]hether rightly or wrongly, no federal judge, trial or appellate, has been given the broad discretion that medieval Lord Chancellors of England enjoyed to disregard the law in an effort to do more perfect substantive justice.” *Id.* at 1245.

To the same effect is *Horn v. Transcon Lines*,<sup>204</sup> in which the Seventh Circuit remanded a case in which Judge Brooks had not sufficiently specified whom was to receive what relief in a purported judgment. Stressing the need for explanation by the district courts, the Seventh Circuit wrote:

When the district judge does not explain his decision, an appellate court should be skeptical . . . . Explanation produces intellectual discipline; a judge who sets down in writing (or articulates in court) the reasons pro and con, and his method of reaching a decision, must work through the factors before deciding, and we then may be sure that the conclusion is based on appropriate considerations even if not necessarily one we would have reached ourselves.<sup>205</sup>

These cases show that the Seventh Circuit will not blindly accept district court decisions under the rubric of appellate-court deference. The impact of these Seventh Circuit decisions on the district courts should be immediate and self-executing. When future decisions lack sufficient explanation, practitioners will be able to raise the deficiency. As a practical matter, the issue might be better raised on appeal than via a post-judgment motion, for the trial judge might be inclined to only clarify and reinforce the adverse decision already reached. Before the Seventh Circuit, though, a remand is possible, and under Circuit Rule 36 the case might be sent to a different judge.<sup>206</sup>

#### XVI. COSTS AND POST-JUDGMENT INTEREST

The courts addressed several issues pertaining to costs and post-judgment interest, which are summarized below:

1. Post-judgment interest is to be calculated from the date of the entry of judgment, not the date of the verdict, as the plain language of 28 U.S.C. § 1961 dictates.<sup>207</sup>
2. Expenses of obtaining a transcript of trial testimony and for copying court filings must be "necessary" to be recovered

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204. 898 F.2d 589 (7th Cir. 1990).

205. *Id.* at 592 (citations omitted).

206. Circuit Rule 36 provides that when a case has been tried and then remanded for a new trial, the new trial shall be heard by a different judge unless the remand order directs otherwise or the parties request otherwise. Rule 36 also states that in "appeals which are not subject to this rule by its terms, this court may nevertheless direct in its opinion or order that this rule shall apply on remand." 7TH CIR. R. 36.

207. *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 110 S. Ct. 1570, 1576 (1990) (resolving a split in the circuits).

as costs 28 U.S.C. § 1920.<sup>208</sup>

3. Only disbursements that were made in connection with the case at issue are taxable as costs; thus, expenses forming related suits are not recoverable.<sup>209</sup>

4. Charges for telephone calls, word-processing services, and attorneys' travel expenses incident to depositions are not taxable as costs.<sup>210</sup>

5. Fees paid to a paralegal are indistinguishable from attorneys' fees and are thus not taxable as costs.<sup>211</sup>

6. Fees paid to an expert who was not appointed by the court are not recoverable.<sup>212</sup>

7. Deposition expenses shown to be reasonably necessary to the case are recoverable as costs even if the deposition is not used at trial.<sup>213</sup>

8. The plaintiff's filing fee is clearly recoverable as costs.<sup>214</sup>

## XVII. POST-JUDGMENT MOTIONS

### A. Rule 59

Under Rule 59(b) and (e), motions to alter or amend a judgment or for a new trial must be served within ten days of the entry of judgment.<sup>215</sup> It is well settled that the time to make such a Rule 59

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208. *McIlveen v. Stone Container Corp.*, 910 F.2d 1581, 1584 (7th Cir. 1990) (affirming district court's decision that such expenses were unnecessary). Section 1920 provides that the district court may tax:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

28 U.S.C. § 1920 (1990).

209. *Smith v. United States*, 735 F. Supp. 1396, 1403 (C.D. Ill. 1990).

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.* at 1404.

215. *FED. R. CIV. P. 59*. Under Rule 6, intermediate Saturdays, Sundays, and holidays are excluded from the ten days. (when the period of time allowed for some acts is less than 11 days). *FED. R. CIV. P. 6*.

motion cannot be enlarged; indeed, Rule 6(b) specifically states that district courts cannot extend the time for taking any action under Rule 59(b), (d), and (e).<sup>216</sup> Even when a party has failed to receive notice of a court order or judgment, the Seventh Circuit has confirmed that the district courts are without power to extend the time for filing a Rule 59 motion.<sup>217</sup>

What, then, is the effect of a Rule 59 motion filed, for example, twenty-one days after the entry of judgment pursuant to the district judge's directions to counsel that they had twenty-one days to file such motions? In the 1967 case of *Eady v. Foerder*,<sup>218</sup> the Seventh Circuit held that when a judge extends the time for a new trial and counsel relies on the extension, the "unique circumstances" of the reliance allow the court to rule on the new trial motion.<sup>219</sup> During the survey period, the wisdom of the *Eady* doctrine was questioned by the entire Seventh Circuit in an *en banc* decision, and was upheld only because the judges were locked six to six on the viability of *Eady*.

Specifically, in *Varhol v. National Railroad Passenger Corp.*,<sup>220</sup> six judges of the Seventh Circuit voted not to overrule the "unique circumstances" exception to Rule 59's ten-day time limit embraced in *Eady*. As the per curiam opinion states, "Since a majority of the court as constituted did not vote to overrule *Eady*, it remains as the law of this circuit."<sup>221</sup>

The internal debate within the Seventh Circuit over the viability of *Eady* is certainly interesting from a scholarly standpoint, with one group treating the words of the Federal Rules as absolute,<sup>222</sup> and another adopting an approach that "avoids an overly rigid interpretation of the Rules and encourages courts to reach the merits of the dispute."<sup>223</sup> The split in the Seventh Circuit over this narrow issue resembles the division in philosophy among the judges in general.

From a practical standpoint, attorneys should be advised that although *Eady* is still the law in the Seventh Circuit, the future of the

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216. FED. R. CIV. P. 6(b); *Browder v. Director, Dept. of Corrections of Illinois*, 434 U.S. 257, 262 n.5 (1978) (noting that Rule 6(b) prohibits enlargement of the time prescribed by Rule 59(e)); 4A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1167, at 495 (2d ed. 1987); PRACTITIONER'S HANDBOOK FOR APPEALS TO THE SEVENTH CIRCUIT 21 (1990).

217. *Marane, Inc. v. McDonald's Corp.*, 755 F.2d 106, 111 (7th Cir. 1985).

218. 381 F.2d 980 (7th Cir. 1967).

219. *Id.* at 981.

220. 909 F.2d 1557 (7th Cir. 1990) (*en banc*).

221. *Id.* at 1560. Chief Judge Bauer and Judges Wood, Cudahy, Flaum, Ripple, and Kanne voted not to overrule *Eady*. Judges Cummings, Posner, Coffey, Easterbrook, Manion, and Eschbach voted to overrule *Eady*.

222. *Id.* at 1572-77 (Manion, J., concurring in judgment).

223. *Id.* at 1570 (Flaum, J., concurring).

“unique circumstances” doctrine is in jeopardy in the Supreme Court. Indeed, in 1988 Justice Scalia, joined by Chief Justice Rehnquist and Justices O’Connor and Kennedy questioned its vitality.<sup>224</sup> It is possible that the Supreme Court, as currently constituted, might someday hold that there are *no* exceptions to the ten-day limits of Rule 59, even when a district judge represents otherwise.

Thus, practitioners are advised to ensure that their Rule 59 motions are timely filed. No requests for additional time should be filed, and if a district judge purports to grant more time gratuitously,<sup>225</sup> the ten-day limit should still be followed.

### B. Rule 60

Rule 60 is the final hope for relief for those who have failed to file timely Rule 59 motions or perfect a timely appeal. Rule 60(a) allows clerical mistakes to be corrected at any time, while Rule 60(b) allows relief for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud . . . , misrepresentation, or other misconduct of an adverse party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged . . . ;  
or
- (6) any other reason justifying relief from the operation of the judgment.<sup>226</sup>

Motions brought under Rule 60(b) must be made within a reasonable time, and those under subdivisions (1), (2), and (3) must be made within one year of the judgment or order at issue.<sup>227</sup>

The Seventh Circuit decided several Rule 60(b) cases during the survey period, which are summarized as follows:

1. In determining whether a motion for relief from judgment is brought to correct a clerical error under Rule 60(a), which can be brought at any time, or some other reason with a time

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224. *Houston v. Lack*, 487 U.S. 266, 282 (1988) (Scalia, J., dissenting).

225. This would be an unlikely scenario, for as the court noted in *Varhol*, “That we have not had to invoke *Eady* between 1967 and today stands testament only to the apparent competence of the district courts in complying with Rule 6, and is not an implied criticism of *Eady*.” *Varhol*, 909 F.2d at 1572 n.3.

226. FED. R. CIV. P. 60(b).

227. *Id.*

limitation under Rule 60(b), the relevant distinction is between changes that implement the result intended by the court at the time of the order and changes that alter the original meaning to correct a legal or factual error; thus, if the flaw lies in the translation of the original meaning to the judgment, Rule 60(a) allows a correction; if the judgment captures the original meaning but is infected by error, the remedy is Rule 60(b).<sup>228</sup>

2. A Rule 60 motion challenging a dismissal for want of prosecution which was based upon the judge's lack of information falls under Rule 60(b)(1) and thus must be filed no later than one year after the order.<sup>229</sup>

3. Rule 60(b)(1)'s reference to "inadvertence or excusable neglect" does not authorize relief from the consequences of negligence or carelessness; there must be some justification for the error beyond a mere failure to exercise due care.<sup>230</sup>

4. So-called "county-seat lawyers" are held to the same standards as other lawyers; that is, the standard for excusable neglect under Rule 60(b)(1) is the same for all lawyers.<sup>231</sup>

5. An attorney's gross negligence does not justify relief under Rule 60(b)(6), at least when the client was not diligent itself.<sup>232</sup>

6. Rule 60(b) relief is warranted when there is substantial danger that the underlying judgment is unjust.<sup>233</sup>

### C. *Remittitur*

Remittitur is the procedural process by which a jury verdict is diminished. Although remittitur is usually raised at the district court, the Seventh Circuit used this procedure twice during the survey period.

In *Pincus v. Pabst Brewing Co.*,<sup>234</sup> the Seventh Circuit found a damages award in a breach of contract case to be "monstrously excessive"

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228. *Wesco Products Co. v. Alloy Automotive Co.*, 880 F.2d 981, 984 (7th Cir. 1989).

229. *Id.* at 985.

230. *Lomas and Nettleton Co. v. Wiseley*, 884 F.2d 965, 967 (7th Cir. 1989).

231. *Id.*

232. *Reinsurance Co. of Am. v. Administratia Asiguarilor de Stat*, 902 F.2d 1275, 1278 (7th Cir. 1990) (adding that "[w]e reserve for another day the question of whether a *diligent* client is entitled to relief under Rule 60(b) for the gross negligence of counsel").

233. *Del Carmen v. Emerson Elec. Co.*, 908 F.2d 158, 161 (7th Cir. 1990) (reversing district court's denial of a Rule 60(b) motion, holding that a dismissal for counsel's single failure to attend a status conference, without more, does not satisfy the threshold showing of delay, contumacious conduct, or failed prior sanctions to deny the plaintiff an opportunity to have his or her case decided on the merits).

234. 893 F.2d 1544 (7th Cir. 1990).

because the jury's award of nearly \$4 million left the plaintiff in a "dramatically better position than his rational expectation could have justified."<sup>235</sup> The court ordered a new trial on damages unless the plaintiff was willing to accept a remittitur to \$525,000. Similarly, in *Cash v. Beltmann North American Co.*,<sup>236</sup> the Seventh Circuit found a punitive damages award of \$134,767 to be excessive, and ordered a new trial on punitive damages unless the plaintiff was willing to accept a remittitur to \$75,000.

Both decisions are instructive for showing that appellate courts have the same power as trial courts to issue a remittitur.<sup>237</sup> The *Cash* decision, however, is particularly noteworthy because the amount of punitive damages is ordinarily left undisturbed on appeal, and because the initial award was not that large. Practitioners challenging the size of jury verdicts, whether compensatory or punitive, should thus consider seeking remittitur at both the trial and appellate courts.

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235. *Id.* at 1554-55.

236. 900 F.2d 109 (7th Cir. 1990).

237. *Pincus*, 893 F.2d at 1554; *Cash*, 900 F.2d at 112.

