

1991 Federal Practice and Procedure Update for the Seventh Circuit Practitioner

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INTRODUCTION

Indiana practitioners litigating in federal court continued to encounter significant developments in federal civil practice last year. Several key amendments were made to the Federal Rules of Civil Procedure effective December 1, 1991, local rules were amended in the Southern District of Indiana, Civil Justice Reform Plans were adopted in the Northern and Southern Districts of Indiana, and the Supreme Court, Seventh Circuit, and regional district courts rendered important decisions affecting many aspects of federal litigation. This Article, as the fourth of an annual section on federal civil practice, highlights the more important developments in an effort to assist local attorneys in their federal civil litigation.¹

Federal civil practice is noteworthy for the broad spectrum of procedural issues that often arise in getting to the merits of a case or controversy. As a result, this Article covers diverse topics such as subject matter jurisdiction, rules of pleading, discovery, trial rules, and post-judgment issues. The developments that this author deems of greatest importance are discussed in detail. Other issues are merely raised 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. As in past years, this Article concentrates on federal civil practice and procedure. Substantive federal decisions and matters of federal criminal procedure are left to other forums.

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I. DEVELOPMENTS IN SUBJECT MATTER JURISDICTION

A. Diversity Jurisdiction

Diversity jurisdiction generated a number of reported decisions during the survey period. As in past years, the Seventh Circuit somewhat sternly advised district judges and practitioners to address such jurisdictional questions early in litigation. For instance, in *Market Street Associates Limited Partnership v. Frey*,² the defendants removed an action to federal court on the basis of diversity jurisdiction, asserting in the removal papers that the plaintiff limited partnership was a Wisconsin entity based on its sole general partners' Wisconsin citizenship and that none of the plaintiffs was a Wisconsin domiciliary. The district court proceeded to address the merits of the action, apparently without delving further into jurisdiction.

On appeal, the parties' lawyers were confronted by the panel with the settled rule that in considering the citizenship of a limited partnership, the residence of *all* partners, including limited partners, must be considered. This had been the law in the Seventh Circuit since 1984,³ and was adopted as the law of the land by the Supreme Court in 1990.⁴ Writing for the *Market Street* panel, Judge Posner chastised counsel

2. 941 F.2d 588 (7th Cir. 1991).

3. *Elston Inv., Ltd. v. David Altman Leasing Corp.*, 731 F.2d 436 (7th Cir. 1984). *Accord* *Stockman v. LaCroix*, 790 F.2d 584 (7th Cir. 1986).

4. *Carden v. Arkoma Assoc.*, 494 U.S. 185 (1990). The *Carden* decision is discussed at length in last year's federal practice survey. See John R. Maley, *1990 Federal Practice and Procedure Update for the Seventh-Circuit Practitioner*, 24 IND. L. REV. 631, 632-34 (1991) [hereinafter Maley, *1990 Developments*].

noting, "Even when the appeal was argued, more than a year after *Carden* came down, the parties' lawyers were unaware of the rule; indeed they seemed astonished at the suggestion that the citizenship of the limited partners was relevant to jurisdiction."⁵

The Seventh Circuit ordered the parties to submit affidavits concerning diversity and determined that jurisdiction was, in fact, present. Judge Posner nonetheless added the following warning:

[B]y their *insouciance* concerning jurisdiction the litigants not only ran the risk of having to start the case over in state court but also made more work for us and delayed the decision of the appeal. We remind the bench and bar of this circuit that it is their nondelegable duty to police the limits of federal jurisdiction with meticulous care and to be particularly alert for problems in diversity cases in which one or more of the parties is neither an individual nor a corporation. For it is with respect to the other, the unconventional entities — two of which, a partnership and a trust, are involved in this case — that mistakes concerning the existence of diversity jurisdiction are most common. Among other unconventional entities that lawyers and judges in diversity should be wary of tripping over are joint ventures, joint stock companies, labor unions, religious and charitable organizations, municipal corporations and other public and quasi-public agencies, and the governing boards of unincorporated institutions.⁶

Thus, as pointed out in last year's federal practice article, extreme care must be taken in the Seventh Circuit to ensure that subject matter jurisdiction exists.⁷ If the district court does not raise the issue, which is unlikely,⁸ the Seventh Circuit obviously will.

In another significant decision, *General Railway Signal Co. v. Corcoran*,⁹ the Seventh Circuit held that a suit naming the administrator of a federal agency as a defendant cannot be rooted in diversity jurisdiction.¹⁰ In writing for the panel, Judge Easterbrook declined to follow a decision from the D.C. Circuit holding otherwise. Judge Easterbrook followed the general rule that the United States and its agencies cannot be sued in diversity, reasoned that a "suit against an agency administrator

5. *Market St. Assocs.*, 941 F.2d at 589-90.

6. *Id.* at 590.

7. Maley, 1990 *Developments*, *supra* note 4, at 637.

8. *E.g.*, *Lutkowski v. High Energy Sports*, 768 F. Supp. 224 n.1 (N.D. Ill. 1991) ("This Court always undertakes an immediate review of newly-filed complaints.").

9. 921 F.2d 700 (7th Cir. 1991).

10. *Id.* at 703.

is equivalent to a suit against the agency," and added that a "contrary holding would undermine the longstanding rule that agencies cannot be citizens of any state for diversity purposes and would arbitrarily expand diversity jurisdiction over instrumentalities of the United States."¹¹

In *Metropolitan Life Insurance Co. v. Estate of Cammon*,¹² the Seventh Circuit revisited the proper test to be used in determining the citizenship of corporations for diversity purposes. Recall that 28 U.S.C. § 1332(c)(1) provides that a corporation is deemed to be a citizen of the state in which it is incorporated and the state in which it has its "principal place of business."¹³ No other statutory guidance is given, however, for determining what constitutes the principal place of business. The Seventh Circuit has followed the "nerve-center" approach, which holds that a corporation has a single principal place of business where its executive headquarters are located.¹⁴ In *Metropolitan Life*, the Seventh Circuit reaffirmed its commitment to the nerve-center approach, declining to follow other courts, such as the Ninth Circuit, that reject this concept.¹⁵

Finally, the Seventh Circuit also addressed the citizenship of individual litigants. In *Galva Foundry Co. v. Heiden*,¹⁶ an Illinois corporation sued its former president, Ray Heiden. Mr. Heiden had lived and worked in Illinois all his life. In 1966, he bought a second home in Florida and continued to vacation there. In 1988, Heiden quit the plaintiff's company and sold his stock. That same year he registered to vote in Florida, took out a Florida driver's license, listed Florida as his permanent address on his tax returns, and stated in an application for a Florida tax exemption that he was a Florida resident. In 1989, when the lawsuit was filed, Heiden continued to maintain his home in Illinois and spent the greater balance of the year there rather than in Florida. He retained his memberships in an Illinois country club and church.

Faced with these facts and a motion to dismiss from Heiden for want of diversity, the district court found Heiden to be a nondiverse Illinois resident and dismissed the action. The Seventh Circuit affirmed.¹⁷ Writing for the panel, Judge Posner began by noting that although there is no statutory definition of "citizenship" for an individual, the courts have held that it is the state of the individual's domicile, and a district

11. *Id.* at 704-05.

12. 929 F.2d 1220 (7th Cir. 1991).

13. 28 U.S.C. § 1332(c)(1) (1988).

14. *E.g.*, *Kanzelberger v. Kanzelberger*, 782 F.2d 774 (7th Cir. 1986).

15. *Metropolitan Life*, 929 F.2d at 1223 (declining to follow *Indus. Tectonics, Inc. v. Aero Alloy*, 912 F.2d 1090 (9th Cir. 1990)).

16. 924 F.2d 729 (7th Cir. 1991).

17. *Id.* at 731.

court's conclusion on domicile "must stand unless clearly erroneous."¹⁸ Judge Posner elaborated on the domicile standard, writing:

Unfortunately, in this age of second homes and speedy transportation, picking out a single state to be an individual's domicile can be a difficult, even a rather arbitrary, undertaking. Domicile is not a thing, like a rabbit or a carrot, but a legal conclusion, though treated as a factual determination for purposes of demarcating the scope of appellate review. And in drawing legal conclusions it is always helpful to have in mind the purpose for which the conclusion is being drawn. The purpose here is to determine whether a suit can be maintained under the diversity jurisdiction, a jurisdiction whose main contemporary rationale is to protect nonresidents from the possible prejudice that they might encounter in local courts.¹⁹

Applying this standard, the *Galva Foundry* court concluded that Heiden was an Illinois domiciliary, noting that he was a "long-time resident of Illinois and unlikely therefore to encounter hostility in its state courts."²⁰ Judge Posner interpreted Heiden's Florida declarations as steps to avoid Illinois taxes, and concluded, "[t]his is shady business but it cannot convert a suit between two residents of Illinois into a suit against a Floridian."²¹

B. Amount-In-Controversy Requirement

The current amount-in-controversy requirement for diversity jurisdiction is that the matter exceed the sum or value of \$50,000.²² As anticipated, the increase from \$10,000 to \$50,000 in 1988 appears to have resulted in a corresponding surge in decisions addressing the amount-in-controversy requirement.²³ Two decisions from the survey period reiterate the basic standards and address situations that recur with some frequency.

In *Sharp Electronics Corp. v. Copy Plus, Inc.*,²⁴ the plaintiff sued in diversity for \$15,000 in compensatory damages and an unspecified

18. *Id.* at 729.

19. *Id.* at 730.

20. *Id.*

21. *Id.* at 731.

22. 28 U.S.C. § 1332(a) (1988). A proposal was introduced in the Senate in 1991 to raise this to \$75,000. See S. 1494, 102d Cong., 1st Sess. (1991). The recommendation was not enacted.

23. See John R. Maley, *1989 Developments in Federal Civil Practice Affecting Indiana Practitioners*, 23 IND. L. REV. 261-63, 263-66 (1990) [hereinafter Maley, *1989 Developments*].

24. 939 F.2d 513 (7th Cir. 1991).

amount of punitive damages for fraud. The district court dismissed the action for want of diversity jurisdiction, reasoning that "any recovery of punitive damages was highly unlikely to be sufficient to bring the recovery within the jurisdictional prerequisite."²⁵

On appeal, the Seventh Circuit began by noting that the Supreme Court has long since determined that "[w]here both actual and punitive damages are recoverable under a complaint each must be considered to the extent claimed in determining the jurisdictional amount."²⁶ The question, in determining whether it "appear[ed] to a legal certainty that the claim is really for less than the jurisdictional amount," was thus whether the plaintiff could recover punitive damages under local law in view of the circumstances alleged.²⁷ Because the plaintiff could recover punitive damages under governing Wisconsin law, the Seventh Circuit could not say to a legal certainty that the suit was for less than the jurisdictional threshold, and the court thus reversed the judgment of the district court.

Judge Shadur of the Northern District of Illinois addressed similar issues in *Griffin v. Dana Point Condominium Association*,²⁸ holding that a woman with serious injuries from a slip-and-fall accident met the \$50,000 threshold, while at the same time dismissing her spouse's loss of consortium claim for insufficient damages.²⁹ The court noted that whenever the potential recovery is not susceptible to precise measurement, as is always the case in personal injury cases, "both the litigants and the court must be keenly aware of the need to establish at least a colorable basis" for meeting the amount-in-controversy requirement.³⁰ There was no dispute about the wife's claim, for she alleged medical expenses exceeding \$20,000, pain and suffering she valued in excess of \$40,000, and loss of quality of life and mental anguish she pegged at some \$20,000. By contrast, her spouse's consortium claim did not delineate the elements of damage, and the court reasoned that if the wife placed only a \$22,000 loss on lost quality of life, "there appears to be no predicate for assigning a much larger price tag (over \$50,000) to the intangible loss claimed by [her spouse]."³¹

Thus, depending upon whether a litigant desires to be in federal court or not, care must be taken in such situations to address amount-in-controversy issues in the framing of pleadings. In the *Griffin* setting,

25. *Id.* at 515 (paraphrasing district court's decision).

26. *Id.* (quoting *Bell v. Preferred Life Soc'y*, 320 U.S. 238, 240 (1943)).

27. *Id.*

28. 768 F. Supp. 1299 (N.D. Ill. 1991).

29. *Id.* at 1301.

30. *Id.*

31. *Id.* at 1301 n.3.

for example, it appears that the husband could have kept his claim in federal court had he gone into more detail in delineating his damages and had his wife been less specific (or less conservative) about her intangible damages. In the punitive damages setting, by contrast, no specification of the amount of damages appears necessary under *Sharp Electronics*. However, for plaintiffs that prefer to remain in state court and who believe their chances of obtaining a sizeable punitive damages award are slim in their particular cases, removal could possibly be defeated by requesting total compensatory and punitive damages of \$50,000 or less. Plaintiffs' attorneys are reminded, however, that in Indiana no specific dollar prayer may be made for personal injuries, wrongful death, or punitive damages.³²

C. Supplemental Jurisdiction

As reported last year, Congress codified the concepts of pendent claim and pendent party jurisdiction by creating "supplemental jurisdiction" under 28 U.S.C. § 1367.³³ This statute provides that when the district courts have original jurisdiction over a claim, they also have "supplemental jurisdiction over all other claims 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."³⁴ Although the statute appears clear on its face, questions remain, several of which were addressed in this circuit during the survey period.

For instance, one issue is whether a plaintiff who has no independent basis of original jurisdiction can join a related action with a co-plaintiff under supplemental jurisdiction. Section 1367(a) initially seems to indicate that this is possible, for it provides: "Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties."³⁵ A reported decision from the Northern District of Illinois, however, holds otherwise.

Specifically, in *Griffin v. Data Point Condominium Association*, discussed above in the amount-in-controversy context, Judge Shadur held that the husband's consortium claim, which did not meet the \$50,000 threshold, could not find its way into court based on supplemental jurisdiction.³⁶ The court acknowledged it had previously suggested to the parties the possibility that section 1367 might save the consortium claim,

32. IND. R. TR. PROC. 8(a)(2).

33. See Maley, *1990 Developments*, *supra* note 4, at 644-46.

34. 28 U.S.C.A. § 1367(a) (West Supp. 1991).

35. *Id.*

36. *Griffin v. Data Point Condominium Ass'n*, 768 F. Supp. 1299, 1301 (N.D. Ill. 1991).

but concluded that "a close look at both the language of the statute and its legislative history teaches that the new provision does not change the old law in this area at all."³⁷ The court relied primarily on *Zahn v. International Paper Co.*,³⁸ wherein the Supreme Court held that claims of different plaintiffs asserting their individualized claims cannot be aggregated to satisfy the jurisdictional amount.³⁹ From this presupplemental jurisdiction holding dealing with the amount-in-controversy requirement, Judge Shadur apparently extrapolated that in the supplemental jurisdiction setting "each plaintiff's claim must be considered on its own as though it were a separate lawsuit."⁴⁰ Judge Shadur added in a footnote that the House Report on supplemental jurisdiction indicates that *Zahn* is not intended to be affected by section 1367.⁴¹

Judge Shadur seems correct in his ultimate decision, though his analysis does not entirely stick to the "language of the statute" as promised. The *Zahn* decision dealt only with aggregating claims of different parties to reach the \$50,000 threshold, although the broader principle that a plaintiff must have his own basis of original jurisdiction can reasonably be drawn from the Court's opinion. The result in *Griffin* might be more directly supported by section 1367(b), which provides that when original jurisdiction is founded solely on diversity, supplemental jurisdiction is not proper over claims made by plaintiffs against parties joined under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure.⁴² Note that in the *Griffin* context it is the plaintiff without original jurisdiction that attempts to get into court in the first place, rather than an original jurisdiction plaintiff trying to get additional defendants into court. In a sense, the second plaintiff can be viewed as an intervener under Rule 24 or a party whose joinder is needed under Rule 19, and according to section 1367(b), such intervention or joinder is ordinarily improper in the diversity context.

The bedrock of *Griffin* could also be that supplemental jurisdiction, a concept not fully defined by Congress, simply does not encompass claims made by related plaintiffs that do not enjoy their own source of original jurisdiction. The only definition of supplemental jurisdiction, implicit though it may be, is found in section 1367(a), which states that in any action of which the district courts have original jurisdiction, the district courts shall have "supplemental jurisdiction over all other claims

37. *Id.* at 1301.

38. 414 U.S. 291, 292-95 (1973).

39. *Id.* at 299.

40. *Griffin*, 768 F. Supp. at 1301.

41. *Id.* at 1302 n.4 (citing H.R. Rep. No. 734, 101st Cong. 2d Sess. 76-77 (1990), reprinted in 1990 U.S.C.C.A.N. 6802).

42. 28 U.S.C.A. § 1367(a) (West Supp. 1991).

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."⁴³ The first element of this test (an action over which the court has original jurisdiction) would seem to be satisfied in the *Griffin* setting, for the wife's claim was properly before the court on diversity. What might not be satisfied is the constitutional standard of being so closely related to the original jurisdiction claims that Article III is satisfied.

This issue is a highly technical one that need not (and cannot) be resolved here. For Seventh Circuit practitioners, the important points are that supplemental jurisdiction embodies the former concepts of ancillary and pendent jurisdiction and that the requirements for invoking supplemental jurisdiction, particularly in the diversity context, require study prior to filing. An excellent and concise review of section 1367 is found in the Practice Commentary following this statute in the United States Code Annotated.⁴⁴ The Commentary is highly recommended as a starting point for those confronting these issues.

Supplemental jurisdiction was invoked rather routinely in a number of reported decisions. For instance, in *Corporate Resources, Inc. v. Southeast Suburban Ambulatory Surgical Center, Inc.*,⁴⁵ the plaintiff sued nine diverse defendants. Original jurisdiction existed only as to four of the defendants because the claims against the others did not exceed \$50,000. The district court nonetheless exercised supplemental jurisdiction under section 1367, finding that the claims derived from the same common nucleus of operative facts as those in the original jurisdiction claims and that exercising full jurisdiction would be in the interests of judicial economy.⁴⁶

Similarly, in *American Pfauter, Ltd. v. Freeman Decorating Co.*,⁴⁷ the district court chose to exercise supplemental jurisdiction over a defendant that was not named as a federal question defendant. Six defendants were named, with all but one of them sued under the Carmack Amendment.⁴⁸ The sixth defendant was sued under a related state law contractual claim. Judge Aspen addressed the discretionary exceptions to exercising supplemental jurisdiction under section 1367(c), particularly subsection (c)(2)'s exception where the state-law claim "substantially predominates" over the federal claim.⁴⁹ Judge Aspen found that the

43. *Id.*

44. See Daniel D. Siegel, *Practice Commentary — The 1990 Adoption of § 1367, Codifying "Supplemental Jurisdiction,"* reprinted in 28 U.S.C.A. § 1367, at 219 (West Supp. 1991).

45. 774 F. Supp. 503 (N.D. Ill. 1991).

46. *Id.* at 506.

47. 772 F. Supp. 1071 (N.D. Ill. 1991).

48. 49 U.S.C. § 11707 (1988).

49. 28 U.S.C.A. § 1367(c)(2) (West Supp. 1991).

state law claim did not so overwhelm the federal claim and thus, retained jurisdiction over the sixth defendant.⁵⁰

Finally, it was noted last year that supplemental jurisdiction was created to override the Supreme Court's anti-pendent party decision in *Finley v. United States*,⁵¹ and that because section 1367 was enacted December 1, 1990, and made effective to actions commenced on or after that date, there exists a gap in pendent party jurisdiction for all actions predating December 1, 1990.⁵² This was confirmed during the survey period by Judge Gordon of the Eastern District of Wisconsin in *McGraw-Edison Co. v. Speed Queen Co.*⁵³ After determining that pendent party jurisdiction did not exist under CERCLA,⁵⁴ Judge Gordon also declined to invoke supplemental jurisdiction over a pendent party because the action had been filed in June of 1990, "well before the December 1, 1990, effective date of the statute."⁵⁵

Because there are still hundreds if not thousands of pre-December 1, 1990, actions pending in the Seventh Circuit, the bench and bar should still be on the lookout for erroneously placed pendent party claims. Despite the apparent harshness of the rule, such claims cannot lie in federal court, and if they are not dismissed at the district court level, they most surely will be in the Seventh Circuit. Practitioners need not panic, however, for in Indiana, such claims can be refiled in state court under Indiana's savings statute.⁵⁶

D. Removal

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

1. Removal was allowed even after the one-year jurisdictional limitation of 28 U.S.C. § 1446(b) had expired where the defendant had once removed to federal court in a timely fashion, the plaintiff had later added a diversity-destroying defendant leading to a remand, that defendant was voluntarily dismissed after the one-year period had expired,

50. *American Pfauter*, 772 F. Supp. at 1073.

51. 490 U.S. 545 (1990).

52. Maley, *1990 Developments*, *supra* note 4, at 645.

53. 768 F. Supp. 684 (E.D. Wis. 1991).

54. 42 U.S.C. §§ 9601-9675 (1988 & Supp. I 1989).

55. *McGraw-Edison*, 768 F. Supp. at 688.

56. See IND. CODE § 34-1-2-8 (1988); *Huffman v. Anderson*, 118 F.R.D. 97, 100 (N.D. Ind. 1987); *Torres v. Parkview Foods*, 468 N.E.2d 580, 582-83 (Ind. Ct. App. 1984).

and the diverse defendant then promptly sought removal a second time.⁵⁷

2. 28 U.S.C. § 1446(b) contains a mandatory thirty day period for removing an initially non-removable action after notice of a paper from which it may first be ascertained that the case is removable; this thirty day period begins to run when a defendant is able reasonably and intelligently to conclude that federal jurisdiction is present, and in actions without a specific prayer, "it is unreasonable to expect the defendant to calculate with any amount of certainty the claims of the plaintiff."⁵⁸
3. The right of removal of a federal question or diversity action is fixed upon compliance with the statutory requirements, and removal cannot be denied based on the state court's concurrent jurisdiction.⁵⁹
4. Defects in removal procedure, but not subject matter jurisdiction, are ordinarily waived unless raised within thirty days.⁶⁰
5. Fees and costs may be ordered upon remand of a case improperly removed, and such fees and costs can be ordered even after the order of remand is issued.⁶¹
6. An award of fees and costs on remand is generally inappropriate if the defendant raised legitimate and substantial grounds for removal and asserted them in the best of faith.⁶²
7. Fees and costs were imposed where the defendants could have easily ascertained "with minimal research" that removal was clearly improper.⁶³
8. In personal injury and other such cases where local law prohibits a specific *ad damnum*, removal is not guaranteed, and the removing party should indicate in the removal notice that the jurisdictional amount has been satisfied.⁶⁴

57. *Kite v. Richard Wolf Medical Instruments Corp.*, 761 F. Supp. 597 (S.D. Ind. 1989).

58. *Roberson v. Orkin Exterminating Co.*, 770 F. Supp. 1324, 1329 (N.D. Ind. 1991) (quoting *Smith v. Executive Life Ins. Co.*, 651 F. Supp. 269, 271 (M.D. La. 1986)).

59. *Pettit v. Consolidated Rail Corp.*, 765 F. Supp. 508 (N.D. Ind. 1991).

60. *Western Sec. Co. v. Derwinski*, 937 F.2d 1276, 1279 (7th Cir. 1991).

61. *M.D.C. Wallcoverings v. State Bank of Woodstock*, 771 F. Supp. 242 (N.D. Ill. 1991).

62. *Roberson*, 770 F. Supp. at 1330-31.

63. *M.D.C. Wallcoverings*, 771 F. Supp. at 244.

64. *Navarro v. LTV Steel Co.*, 750 F. Supp. 930 (N.D. Ill. 1991).

9. Except for civil rights cases, orders remanding a case that was improperly removed are not ordinarily appealable.⁶⁵

II. SERVICE OF PROCESS

Perhaps the biggest news in the area of service of process is that the proposed amendments to Rule 4, which made it through the Judicial Conference and were passed on to the Supreme Court for consideration, were *not* adopted. The proposed changes to Rule 4 would have reorganized the Rule almost completely, permitted nationwide service of process in federal-question cases, and implemented a cost- and time-saving procedure whereby the formality of service could be waived by a defendant.⁶⁶ Although many other proposed rules were approved by the Supreme Court and enacted by default by Congress on December 1, 1991, the Supreme Court did not transmit the proposed amendments to Rule 4 "pending further consideration by the Court."⁶⁷ Otherwise, the service of process arena was relatively quiet during the survey period, with the following decisions merely highlighted:

1. Dismissal for failure to properly serve a defendant within 120 days was affirmed under Rule 4(j) where the plaintiff could show no good cause for his delays or deficiencies in service.⁶⁸
2. A *pro se* litigant showed good cause under Rule 4(j) when he relied on erroneous advice of the clerk's office.⁶⁹
3. A default judgment was reversed where service on the defendant was technically improper; actual knowledge of the lawsuit does not confer jurisdiction, nor do a plaintiff's efforts in diligently trying to serve a defendant.⁷⁰
4. The defense of insufficient service of process can be waived by failing to assert it by motion or in first responsive pleading or by leading a plaintiff to believe that service was adequate, by for instance, testifying regarding the default judgment without raising the propriety of service.⁷¹

65. *Hernandez v. Brakegate, Ltd.*, 942 F.2d 1223 (7th Cir. 1991).

66. See Proposed Amendments to the Federal Rules of Civil Procedure, Committee on the Rules of Practice and Procedure, Report of the Judicial Conference (June 19, 1990) [hereinafter 1990 Report] (on file with author).

67. Letter from Chief Justice William H. Rehnquist to Speaker of the House Thomas S. Foley, Accompanying Transmittal of Amendments to the Federal Rules of Civil Procedure (April 30, 1991).

68. *Williams v. Leach*, 938 F.2d 769 (7th Cir. 1991).

69. *Poulakis v. Amtrak*, 139 F.R.D. 107 (N. D. Ill. 1991) (following Judge McKinney's decision in *Patterson v. Brady*, 131 F.R.D. 679 (S.D. Ind. 1990)).

70. *Mid-Continent Wood Prods., Inc. v. Harris*, 936 F.2d 297 (7th Cir. 1991).

71. *Trustees of Cent. Laborers' Welfare Fund v. Lowery*, 924 F.2d 731 (7th Cir. 1991).

III. RULE 9(b) — PLEADING WITH PARTICULARITY

Rule 9(b)'s requirement that all averments of fraud be "stated with particularity" was addressed by Chief Judge Moran of the Northern District of Illinois in *In re First Chicago Corp. Securities Litigation*,⁷² in which it was held that a securities fraud complaint cannot simply quote verbatim from annual reports and press releases and assert that the statements are untrue.⁷³ Rather, the complaint must explain "what is untrue about each of the challenged statements."⁷⁴

Similarly, in *Fairmont Homes, Inc. v. Shred Pax Corp.*,⁷⁵ Judge Miller explained that although Indiana's Trial Rule 9(b) has been interpreted to require averments of the time, place, and substance of the false representations, the facts misrepresented, and the identification of what was procured by fraud, the federal courts interpret Federal Rule 9(b) more stringently.⁷⁶ In federal court, a plaintiff must also "identify particular statements and actions and specify why they are fraudulent."⁷⁷ Further, in federal court, the allegations of fraud cannot be based on information and belief except as to matters within the opposing party's control and even then, must be accompanied by a statement of facts upon which that belief is founded.⁷⁸ Judge Miller further held that the federal version applies even when the action is originally filed in state court and removed by the defendant to federal court.⁷⁹ Thus, plaintiffs averring fraud in a federal action *or* in a state case that has any potential of being removed to federal court must go the extra mile to comply with the strict requirements of the federal interpretation of Rule 9(b).

IV. PROPER PARTIES

Rule 19 basically provides that a party who is subject to service of process and whose presence will not destroy subject matter jurisdiction shall be joined if complete relief cannot be accorded without that party, or alternatively, if that party claims an interest in the litigation.⁸⁰ Such parties are often called "indispensable" parties. Rule 12(b)(7) backs up Rule 19 by allowing dismissal for failure to join a party under Rule

72. 769 F. Supp. 1444 (N.D. Ill. 1991).

73. *Id.* at 1452.

74. *Id.* at 1453 (quoting *Loan v. Federal Deposit Ins. Corp.*, 717 F. Supp. 964, 967 (D. Mass. 1989)).

75. 754 F. Supp. 665 (N.D. Ind. 1990).

76. *Id.* at 667-68.

77. *Id.* at 667.

78. *Id.*

79. *Id.*

80. FED. R. CIV. P. 19(a).

19.⁸¹ In *Todd v. Merrell Dow Pharmaceuticals*,⁸² the Seventh Circuit rejected an argument that joint tortfeasors are indispensable parties. In so doing the court noted the Supreme Court's statement in 1990 that "[i]t has long been the rule that it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit."⁸³ This rule has significance in the diversity jurisdiction setting as well, for a plaintiff can obviously preserve diversity by naming only diverse defendants.

V. RULE 15 — AMENDMENT OF PLEADINGS

Rule 15(a) and (b) allows for amendments to be made to pleadings in various circumstances.⁸⁴ Rule 15(c) then speaks to amendments made after the statute of limitations has run and whether such amendments relate back to the original pleading so as to be deemed timely. Rule 15(c) was rewritten in 1991 in an effort to clarify and liberalize the standards. The Rule now reads in relevant part:

(c) Relation Back of Amendments. An amendment of a pleading relates back to the date of the original pleading when

(1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or

(2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or

(3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.⁸⁵

Thus, three subsections to Rule 15(c), each separated by the disjunctive "or," provide an independent basis for relation back. Rule 15(c)(2) makes no substantive changes from former law, leaving intact the basic

81. FED. R. CIV. P. 12(b)(7).

82. 942 F.2d 1173 (7th Cir. 1991).

83. *Id.* at 1176 (quoting *Temple v. Synthes Corp.*, 111 S. Ct. 315 (1990) (per curiam)).

84. FED. R. CIV. P. 15(a), (b).

85. FED. R. CIV. P. 15(c).

standard for relation back of arising out of the same "conduct, transaction, or occurrence." The other two subsections, however, alter prior law.

First, Rule 15(c)(1), by providing that relation back occurs if it is permitted by the law providing the applicable statute of limitations, is meant to ensure that if an applicable state limitations period provides a more liberal standard for relation back, that standard should apply. The decision in *Schiavone v. Fortune*,⁸⁶ could have been interpreted otherwise, and this subsection is intended to make it clear that such a strict interpretation is not warranted.⁸⁷

Second, Rule 15(c)(3) is intended to override directly *Schiavone's* holding by permitting an amendment to change or add the name of a party if that party received actual notice of the action within 120 days of filing *or*, within the same period of time, knew or should have known that but for a mistake, the action would have been against that party.⁸⁸ Of course, Rule 15(c)(3) incorporates 15(c)(2)'s "same conduct, transaction, or occurrence" standard as well.⁸⁹

Thus, new Rule 15(c) encompass a common-sense approach to the relation back of amended pleadings. The perceived harshness of *Schiavone* has been ameliorated, and the Rule has been subdivided into a logical, workable framework.

VI. DISCOVERY

Several significant amendments were made to the discovery rules, in particular, Rules 34, 35, and 45. Unlike Indiana's version of Rule 34 which allows production of documents from nonparties,⁹⁰ the federal version of Rule 34 has not allowed such production. Instead, a party seeking to obtain documents from a third party custodian often had to go through the formality of serving a subpoena duces tecum on the custodian for production of documents at a deposition and sometimes even had to go through with a cursory deposition if the third party or the opponent did not cooperate. By amending Rules 34 and 45, the Supreme Court and Congress significantly improved this aspect of discovery, bringing it in line with the goal of the Federal Rules to secure

86. 477 U.S. 21 (1986).

87. See FED. R. CIV. P. 15(c) committee notes; 1990 Report, *supra* note 66.

88. See *supra* note 87.

89. As initially drafted, Rule 15(c) referred to Rule 4(m). Had Rule 4 been rewritten as proposed with the set of rules changes, Rule 4(j) would have been relocated at Rule 4(m). However, as part of a technical correction bill signed by the President on Dec. 9, 1991, Congress corrected the reference from 4(m) to 4(j). Pub. L. No. 102-198, 105 Stat. 931, 1623-27 (1991).

90. IND. R. TR. PROC. 34.

the just, speedy, and inexpensive determination of every action.⁹¹

Rule 35, speaking to physical and mental examinations, formerly allowed for examinations only by physicians or psychologists. The Rule was broadened by an amendment to allow examinations by a "suitably licensed or certified examiner."⁹² According to the drafters, the revision is intended to "include other certified or licensed professionals, such as dentists or occupational therapists, who are not physicians or clinical psychologists, but who may be well-qualified to give valuable testimony about the physical or mental condition that is the subject of the dispute."⁹³ In addition, by adding the requirement that the examiner be "suitably" licensed or certified, the drafters intended to allow the court to assess the credentials of the examiner and assure that the examiner is competent.⁹⁴

Although not specifically limited to discovery, Rule 72, which provides for a ten-day appeal period from a magistrate's ruling on non-dispositive matters, often arises in the discovery context. In the past, there was ambiguity over when the ten days begin to run. Indeed, the former rule provided that the district judge shall consider objections, "provided they are served and filed within 10 days after entry of the order," but later stated that objections are to be made within ten days of *service* of the order.⁹⁵ The Rule was amended to resolve this ambiguity and fortunately, to adopt the "ten days from service" standard.⁹⁶ The Rule also makes it clear that if timely objection is not made to the district judge, any claimed error is waived. Thus, practitioners must carefully consider whether to object to a magistrate's order, keeping in mind, however, that the standard of review is whether the order is clearly erroneous or contrary to law.⁹⁷

Finally, several important discovery decisions were issued from district courts in Indiana. In *Spangler v. Sears, Roebuck & Co.*,⁹⁸ Judge Tinder held that a party may take trial depositions after the close of discovery.⁹⁹ An order closing discovery thus does not prevent a party from memorializing a witness's testimony in order to offer it at trial. This makes

91. FED. R. CIV. P. 1.

92. FED. R. CIV. P. 35.

93. See FED. R. CIV. P. 35 committee notes; 1990 Report, *supra* note 66.

94. See *supra* note 93.

95. FED. R. CIV. P. 72(a).

96. *Id.* ("Within 10 days after being served with a copy of the magistrate's order, a party may serve and file objections to the order; a party may not thereafter assign as error a defect in the magistrate's order to which objection was not timely made.")

97. *Id.*

98. 138 F.R.D. 122 (S.D. Ind. 1991).

99. *Id.* at 123-26.

sense, for if the witness will be unavailable for trial (or if the parties agree to use a deposition in lieu of live testimony), the "trial" or "evidence" deposition will, by definition, not involve discovery of that witness. Instead, the trial deposition will be the time when evidence for trial is elicited, and the parties will adjust their "deposition" styles to more of a trial format accordingly.

In *Wauchop v. Domino's Pizza, Inc.*,¹⁰⁰ plaintiffs brought a personal injury action charging Domino's with negligence. The case was based in part upon Domino's thirty-minute delivery guarantee. Plaintiffs sought to discover a broad array of information relating to the thirty-minute guarantee, and Domino's responded with a motion for a protective order under Rule 26(c). Judge Miller denied the protective order, reasoning that while such orders are appropriate under Rule 26(c)'s "good cause" standard when trade secrets are involved, Domino's had not established that its policies on this subject constituted trade secrets or that disseminating the information would affect the court's ability to impanel an impartial jury or otherwise specifically embarrass Domino's.¹⁰¹ Judge Miller's decision contains an excellent discussion of these issues, including references to case law on the subject from across the nation. His decision also signals that the standard protective order that has generally been readily obtainable in this circuit is no longer automatic.

VII. SUMMARY JUDGMENT

Last year it was noted that the failure to follow a district court's local rules on summary judgment can result in a summary grant or denial of the motion, particularly in the Northern District of Illinois.¹⁰² During 1991, the courts continued to rely on such local rules to dispose quickly of summary judgment motions.¹⁰³ The district judges in Indiana have begun to take note of their local rules on summary judgment, and practitioners must ensure that summary judgment materials comply with them.

100. 138 F.R.D. 539 (N.D. Ind. 1991).

101. *Id.* at 546.

102. Maley, *1990 Developments, supra* note 4, at 664.

103. *E.g.*, *Maksym v. Loesch*, 937 F.2d 1237, 1240-41 (7th Cir. 1991) (Judge Posner deems facts asserted in the movant's papers to be admitted, writing, "We have approved strict enforcement of [Local] Rule 12(m) [of the Northern District of Illinois] repeatedly."); *Appley v. West*, 929 F.2d 1176, 1179-80 (7th Cir. 1991) (per curiam); *Colby v. J.C. Penney Co.*, 926 F.2d 645, 647 (7th Cir. 1991) (Judge Cummings notes effect of failure to follow local rules on summary judgment); *Property Owners Ins. Co. v. Cope*, 772 F. Supp. 1096, 1098 (N.D. Ind. 1991) (Judge Moody notes Local Rule 11); *Terre Haute Indus., Inc. v. Pawlik*, 765 F. Supp. 925, 928-29 (N.D. Ill. 1991) (party failed to comply with local summary judgment rule).

VIII. TRIAL

A number of developments occurred affecting federal trial practice. First, Rules 41, 47, 48, 50, and 52 were amended. Rules 47 and 48 deal with jurors. The former version of Rule 47 allowed alternate jurors.¹⁰⁴ New Rule 47 eliminates this option,¹⁰⁵ recognizing that the "use of alternate jurors has been a source of dissatisfaction with the jury system because of the burden it places on alternates who are required to listen to the evidence but denied the satisfaction of participating in its evaluation."¹⁰⁶

Rule 48 formerly allowed any number of jurors,¹⁰⁷ but new Rule 48 provides that the jury must initially consist of not less than six and not more than twelve jurors.¹⁰⁸ New Rule 48 further adds that each juror shall participate in the verdict unless excused for good cause (illness, etc.) during trial or deliberations. Rule 48 also provides that unless the parties stipulate otherwise, the verdict shall be unanimous, and no verdict shall be taken from a jury of fewer than six members. Thus, depending on the length of trial, practitioners can expect juries of seven, eight, or nine members in civil cases, with each juror voting on the verdict.

Rules 41, 50, and 52 were amended to effect a housekeeping change in the names used for concluding bench and jury trials. Rule 41(b) formerly provided for bench trials to be dismissed as a matter of law when the plaintiff fails to carry its burden of proof.¹⁰⁹ This provision is simply deleted from the amended Rule 41(b), and the same substantive provision is inserted in new Rule 52(c).¹¹⁰ In bench trials, parties will thus no longer make motions for involuntary dismissal under Rule 41(b), but will instead make motions for "judgment on partial findings" under Rule 52(c). As under former Rule 41(b), the courts retain discretion to enter no judgment until the close of all the evidence, and factual findings made pursuant to a Rule 52(c) judgment are reviewed under the "clearly erroneous" standard.¹¹¹

Finally, Rule 50, dealing with jury trials, was rewritten to do away with the directed verdict and judgment notwithstanding the verdict (j.n.o.v.) labels. Amended Rule 50 instead uses a single, common-sense label for these rulings, which will now be called "judgments as a matter of law."¹¹² New Rule 50 does the following:

104. FED. R. CIV. P. 47.

105. *Id.*

106. *See id.* 47 committee notes; 1990 Report, *supra* note 66.

107. FED. R. CIV. P. 48.

108. *Id.*

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

110. FED. R. CIV. P. 52(c).

111. *See id.* committee notes; 1990 Report, *supra* note 66.

112. FED. R. CIV. P. 50.

1. A party may move for judgment as a matter of law (formerly the directed verdict motion) on any claim or issue during trial, and the court may grant the motion if under controlling law the nonmovant cannot obtain a favorable ruling.¹¹³
2. A motion for judgment as a matter of law must be made during trial if a party desires to renew the same motion (formerly the j.n.o.v. motion) after an adverse jury verdict.¹¹⁴
3. The renewed motion for judgment as a matter of law (formerly the j.n.o.v. motion) must be made not later than ten days after entry of judgment.¹¹⁵
4. A motion for a new trial or alternative motion for a new trial may be joined with the renewed motion for judgment as a matter of law.¹¹⁶
5. The standard for determining a motion for judgment as a matter of law or a renewed motion for judgment as a matter of law is the same as under prior practice for directed verdicts or j.n.o.v.s. Specifically, as the name suggests, judgment is proper if, as a matter of law, the nonmovant cannot prevail on the issue or claim in question. This is the same standard invoked at summary judgment pursuant to Rule 56 wherein the court construes the evidence favorably to the nonmovant and determines, as a matter of law, whether any rational jury could find for the nonmovant on the issue.¹¹⁷

Thus, the amendments to Rule 50 reflect a common-sense effort to invoke standard terminology throughout the Federal Rules. New Rule 50 also implicitly confirms that the standard for Rule 56 and Rule 50 is the same. Finally, new Rule 50 confirms that an initial motion for

113. FED. R. CIV. P. 50(a)(1).

114. FED. R. CIV. P. 50(b). This was true in the Seventh Circuit with directed verdict motions, a requirement for a later j.n.o.v. motion, but was not specifically required by the text of former Rule 50 nor universally adopted by all circuits. *See Continental Airlines, Inc. v. Wagner-Morehouse, Inc.*, 401 F.2d 23, 27 (7th Cir. 1968) (requiring motion for directed verdict as prerequisite to seeking j.n.o.v.); *Amendments to Federal Rules Are Approved By Supreme Court*, 59 U.S.L.W. 2695, 2696 (May 21, 1991) ("The practice followed in some courts of allowing a motion for judgment notwithstanding the verdict to be made even though not preceded by a motion for directed verdict is thus clearly prohibited.").

115. FED. R. CIV. P. 50(b).

116. *Id.*

117. *See id.* committee note (discussing implicit standard and noting that because this standard "is also used as a reference point for entry of summary judgment under Rule 56(a), it serves the link the two related provisions"); John R. Maley, *Developments in Federal Civil Practice Affecting Indiana Practitioners*, 22 IND. L. REV. 103 (1989) (analyzing the modern view of summary judgment).

judgment as a matter of law at trial is a prerequisite for a later renewed motion for judgment as a matter of law after judgment is entered.

Several significant decisions dealing with trial issues were issued during 1991. In *Oostendorp v. Khanna*,¹¹⁸ the Seventh Circuit approved of Judge Shabaz's practice of prohibiting reading of more than five pages from depositions at trial and requiring five page narrative summaries of each deposition used at trial. Although the Seventh Circuit acknowledged that it "might question the validity of an overly rigid application of the district court's requirement" and noted that the five-page limit should be increased in "appropriate cases," it held that the use of depositions at trial pursuant to Rule 32 is discretionary with the district court.¹¹⁹ Further, the Seventh Circuit held that neither the Due Process Clause nor the Seventh Amendment requires courts to admit deposition testimony.¹²⁰

The *Oostendorp* decision should not be taken lightly, for there appears to be a move towards requiring deposition summaries throughout the Seventh Circuit. Judge Lee of the Northern District of Indiana has made this standard practice in many cases, and Judge Dillin of the Southern District of Indiana has reportedly imposed similar limitations on occasion as well. Although it no doubt results in speedier trials, it is uncertain whether this practice actually promotes justice. The practice might end up costing clients more in attorney time spent attempting to summarize depositions in a manner that is effective for trial. For plaintiffs' counsel working on a contingency basis, this could result in undue, unpaid busy work that does not enhance the client's case. It is also difficult to imagine how a five hour deposition of a crucial out-of-state examining physician can be adequately summarized in several pages to include key points elicited during cross-examination.¹²¹

Practitioners should seek to determine at the onset of litigation whether the assigned judge might follow such a practice. If so, trial

118. 937 F.2d 1177 (7th Cir. 1991).

119. *Id.* at 1179.

120. *Id.* at 1180.

121. Many of the current so-called civil justice "reforms" could well be nothing more than mechanisms for shifting work from the courts to litigants. This is a prime example, for it would seem to take less total time (court + parties) to have a three-hour deposition read into evidence, boring though it may be, than having the parties spend several hours each to reduce the three-hour deposition to five pages. Further, it is unclear whether such a device would actually save courts time over the long run, for there will no doubt be disagreements over the characterizations of deposition summaries and admissibility of testimony that could require court attention. There is no question that the federal courts are busy, but if the problem is too many cases chasing too few judges, magistrates, and law clerks, then it must be questioned whether further efforts to enlarge the resources of the federal courts are necessary.

strategy could be affected accordingly, for instance, by ensuring the selected witnesses are, to the extent possible, presented by live testimony rather than deposition. Further, practitioners would seem to be able to enhance the chances of having a deposition used at trial by videotaping the deposition, which is always preferable to a rote reading of a deposition.

The use of video depositions is common in most federal courts. Indeed, the taking of video depositions is implicitly authorized by Rule 30(b)(4), which allows the parties to stipulate or the court to order that the deposition be recorded other than by stenographic means.¹²² The Seventh Circuit recently explicitly approved of video depositions, noting that “[v]ideotaped depositions are a necessary and time effective method of preserving witnesses’ time and allocating precious court and judicial time in this age of advanced court technology and over-crowded court calendars.”¹²³ Moreover, a video deposition need not be expensive, for there is no reason why, with a little preparation, counsel cannot set up the video and audio equipment and make a perfectly adequate recording.¹²⁴

Counsel can also enhance the prospects of having the deposition rather than a summary used at trial by keeping trial depositions reasonable in length. The point of the deposition-summary orders is obviously that judges believe most witnesses’ testimony can be reduced to a few pages. There is merit to this belief, and certainly most witnesses’ testimony could be handled in a one-hour deposition as effectively as in a five hour deposition. The former would seem to have a good chance of being used at trial; the latter not. Thus, the lesson from the *Oostendorf* decision would seem to be that fans of the full day (and longer) deposition will not be rewarded for their efforts and should reconsider their styles, at least in most situations. This is probably not so bad after all.

Several other decisions of interest dealing with trial issues were rendered during the survey period. These are merely highlighted below:

122. FED. R. CIV. P. 30(b)(4). See also *Commercial Credit Equip. Corp. v. Stamps*, 920 F.2d 1361, 1368 (7th Cir. 1990) (Rule 30(b)(4) allows the parties to stipulate to recording a deposition by “other than stenographic means,” and videotaped depositions qualify as “other than stenographic means”).

123. *Commercial Credit*, 920 F.2d at 1368.

124. Unless costs are a real problem, it is of course still wise to have a court reporter present to take testimony and prepare transcripts. This author has used this joint system on several occasions and found it satisfactory. Assuming your law firm has the equipment (video camera, microphones, tripod, two VCRs for copying, and a monitor), all of which can be obtained for less than \$2,000, there is no additional cost in videotaping a deposition. Moreover, there is something about a video camera that seems, beyond the oath and presence of the court reporter, to give witnesses additional pause in departing from the truth. Finally, there are the obvious benefits at trial of playing a witness’s testimony on television rather than merely reading pages and pages of a deposition.

1. The *Batson*¹²⁵ rule that prohibits the use of peremptory challenges on the basis of race applies equally in civil cases as in criminal cases.¹²⁶
2. *Batson* was not violated when the government used peremptory challenges to excuse two Italian-American surnamed jurors because the Italian defendant did not make a prima facie showing that the veniremen belonged to a particular ethnic group or that the purported ethnic group (Italian-Americans) comprises a cognizable ethnic group subject to discrimination.¹²⁷
3. A litigant may object to the discriminatory use of peremptory challenges under *Batson* even though the litigant is not of the same race as the member of the venire. Thus, a white plaintiff has standing to assert error in the discriminatory exclusion of a black individual from the jury.¹²⁸

125. *Batson v. Kentucky*, 476 U.S. 79 (1986).

126. *Dunham v. Frank's Nursery & Crafts, Inc.*, 919 F.2d 1281 (7th Cir. 1990). The Supreme Court agreed with the Seventh Circuit's view several months later in *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077 (1991). The *Batson* rule and its application were aptly summarized by Judge Kanne in *Dunham* as follows:

In order to establish a prima facie case under *Batson*, the defendant must first show that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to prevent members of his race from serving on the jury. Second, the defendant is entitled to rely on the fact that the mere exercise of a peremptory challenge can be used as circumstantial evidence of discriminatory intent. Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used peremptories to exclude veniremen from the petit jury on account of their race.

Once the defendant makes a prima facie showing, the burden shifts to the state to come forward with a non-racial explanation for its challenge. Although the prosecutor's explanation does not have to rise to the level of cause, the mere denial of a discriminatory motive, or an affirmation of prosecutorial good faith does not suffice as a neutral explanation. After hearing the state's explanation, the trial court must determine if the defendant has established purposeful discrimination.

Dunham, 919 F.2d at 1283 (citations omitted). The first element, that the objecting party be a member of the cognizable group, was altered by the Supreme Court in *Edmonson*. *Edmonson*, 111 S. Ct. at 2088 (to bar petitioner's claim because his race differs from that of the excluded jurors would be to condone the arbitrary exclusion of citizens from the duty, honor, and privilege of jury service, thus race is irrelevant to a defendant's standing to object to the "discriminatory use of peremptory challenges").

127. *United States v. Campione*, 942 F.2d 429, 432-33 (7th Cir. 1991). Judge Kanne thus did not reach the larger issue of whether *Batson* extends to discrimination in jury selection based on ethnicity.

128. *Soler v. McHenry*, 771 F. Supp. 252, 254 (N.D. Ill. 1991).

4. A civil litigant satisfied his burden of showing a race-neutral reason for excluding a prospective black juror where the litigant explained that the prospective juror was a cardiology technologist. This satisfied the *Batson* requirement that the explanation be clear and reasonably specific without having to rise to the level of cause because the case involved claims that the plaintiff's heart condition had been aggravated by the defendant's conduct.¹²⁹
5. The Seventh Circuit affirmed Judge McKinney's ruling barring purported rebuttal witnesses from testifying at trial, reasoning in part that the evidence could have been offered (and even was, in one respect) during the plaintiff's case-in-chief; the exclusion of rebuttal evidence that could have been offered during a party's case-in-chief is reversible only for an abuse of discretion.¹³⁰

IX. RULE 58 JUDGMENTS, POST-JUDGMENT MOTIONS, AND APPEALS

Rule 58 mandates that "[e]very judgment shall be set forth on a separate document."¹³¹ The goal of this maxim is to make it easy for the parties and others who might have an interest in knowing precisely what the judgment is and when it was entered. If litigants do not comply with Rule 58, their appellate rights (particularly the right to appeal that arises with finality) can be seriously affected. Two decisions from the Seventh Circuit during the survey period addressed the question of whether a "minute order" can constitute the "separate document" judgment required by Rule 58, though with slightly different methods.

In *Alpine State Bank v. Ohio Casualty Insurance Co.*,¹³² the district court granted a summary judgment motion in a declaratory judgment action, issued a minute order, and issued a form prescribed for judgment in a civil case. None of the three documents, however, actually declared the rights of the parties. Appeal was taken, and the Seventh Circuit raised the issue of appellate jurisdiction *sua sponte* over concern about whether Rule 58 was satisfied. Judge Ripple explained that neither the memorandum opinion nor the minute order can satisfy the separate-document judgment rule. Instead, the judgment "must be self-contained and complete" and must "describe the relief to which the prevailing

129. *Id.*

130. *Cook v. Navistar Int'l Transp. Corp.*, 940 F.2d 207, 214 n.5 (7th Cir. 1991).

131. FED. R. CIV. P. 58.

132. 941 F.2d 554 (7th Cir. 1991).

party is entitled and not simply record that a motion has been granted."¹³³

Judge Ripple added, "[W]e shall not hesitate to hold that we lack jurisdiction if the judgment ambiguously declares the rights of the parties or is unclear or calls into serious question the matter of finality."¹³⁴ Despite these strict pronouncements, the Seventh Circuit assumed jurisdiction because "consideration must be given to practicalities," and from a practical standpoint, there was no question that the district court intended a final judgment because it clearly determined the parties' rights in the memorandum opinion, denied a motion to vacate the order, and indicated that it considered the case closed.¹³⁵

Similarly, in *American National Bank & Trust Co. v. Secretary*,¹³⁶ after reciting the litany of Seventh Circuit decisions requiring strict compliance with Rule 58, Judge Kanne concluded that the minute order form completed by the court clerk satisfied the separate document requirement.¹³⁷ Judge Kanne so held because the minute order set forth the relief to which the plaintiff was entitled, because it did not incorporate the court's thirteen pages of reasoning, and because the box on the minute order indicating "Judgment is entered as follows" was marked.¹³⁸ He noted, however, that the exercise to determine whether Rule 58 had been complied with could have been avoided had the clerk simply followed proper procedure and entered Judgment Form AO 450.¹³⁹

For practitioners, and particularly those who might want to appeal, this subject poses several problems. Pursuant to Rules 58 and 79, it is the clerk, not the district judge, who enters judgments.¹⁴⁰ Moreover, Rule 58 states that forms of judgment are *not* to be submitted except upon direction of the court, and such directions shall not be given as a matter of course.¹⁴¹ The clerk, of course, is not required to be and often is not a lawyer, nor are the clerk's many deputy clerks who usually handle these tasks. In the routine two party, one issue case this ordinarily causes no problem. The days of dockets with only such "routine" cases, however, are obviously long since past. Thus, in the first instance, the rules as presently configured leave an aggrieved party's right to appeal in the hands of nonlawyer deputy clerks who do not receive training

133. *Id.* at 558-59 (quoting *American Int'l Ins. Exch. v. Occidental Fire & Cas. Co.*, 835 F.2d 157, 159 (7th Cir. 1987)).

134. *Id.* at 559.

135. *Id.*

136. 946 F.2d 1286 (7th Cir. 1991).

137. *Id.* at 1289.

138. *Id.*

139. *Id.* at 1289 n.4.

140. *See* FED. R. CIV. P. 58, 79(a).

141. FED. R. CIV. P. 58.

in the many intricacies of final judgments and appellate jurisdiction.

The real burden of scrutinizing entry of judgment thus falls upon counsel, where it probably belongs anyway. The lesson of the two Seventh Circuit decisions discussed above is that counsel must be careful to ensure that a proper Rule 58 separate document final judgment is entered. If a purported judgment appears improper or not in compliance with Rule 58, counsel should act immediately and in no event later than ten days after entry of the purported judgment. Indeed, a Rule 59 motion to alter or amend can only be filed within ten days of the entry of judgment, and *no* extension of the ten day time period is permissible.¹⁴²

Finally, in the appellate practice arena, related amendments were made to Rule 77(d) dealing with notice of judgments and Rule 4(a)(6) of the Federal Rules of Appellate Procedure. Under prior law, if the clerk recorded the mailing of a judgment, but the parties did not receive notice of the entry of judgment, that did not excuse the failure to file a timely notice of appeal.¹⁴³ Rule 77(d) and Appellate Rule 4 now allow a party not receiving such notice to try to establish this fact to the district court's satisfaction and, if also able to show no "prejudice" to any other party, to move to reopen the time for appeal. The motion to reopen the appeal time must be filed within the earlier of seven days after receipt of notice of the judgment or 180 days after entry of the judgment.¹⁴⁴ The term prejudice is not defined in Appellate Rule 4(a)(6), but the legislative history indicates that this means more than just the cost of having to oppose the appeal; it means some "adverse consequence" such as when the "appellee [has] taken some action in reliance on the expiration of the normal time period for filing a notice of appeal."¹⁴⁵

Thus, the harshness of former practice is ameliorated, but with only a limited window of opportunity for appellants who do not receive notice. The absolute 180-day ceiling confirms that litigants must continue to monitor the docket, and if an adverse judgment is possible (i.e., if a dispositive motion is pending), should do so with regularity. On the other hand, for those who prevail in district court, Rule 77(d) provides a mechanism for ensuring that the appeal clock will begin running. Specifically, Rule 77(d) allows any party to serve a notice of the entry of judgment, and the drafters encourage winning parties to utilize this procedure to ensure that the normal time periods for appeal remain

142. FED. R. CIV. P. 6(b), 59; *Winston Network, Inc. v. Indiana Harbor Belt R.R. Co.*, 944 F.2d 1351, 1362 (7th Cir. 1991); *Varhol v. Nat'l R.R. Passenger Corp.*, 909 F.2d 1557 (7th Cir. 1990) (en banc).

143. *E.g.*, *Spika v. Village of Lombard*, 763 F.2d 282 (7th Cir. 1985).

144. FED. R. APP. P. 4(a)(6).

145. *See id.* committee notes; 1990 Report, *supra* note 66.

intact.¹⁴⁶ Thus, prevailing parties are well advised to immediately serve opposing counsel with notice and copies of adverse judgments and would be wise to do so by, at the minimum, certified mail with return receipt requested so that there can be no dispute about receipt of notice.

X. Costs

Pursuant to Rule 54(d), "costs shall be allowed as of course to the prevailing party unless the court otherwise directs."¹⁴⁷ The courts addressed costs issues in several decisions which are highlighted below:

1. The costs¹⁴⁸ of enlarging trial exhibits such as a police "mug shot" are recoverable.
2. In resolving an issue not directly addressed by any circuit courts, the Seventh Circuit held that when a deposition is videotaped and transcribed, it is "proper to tax costs for the videotaping of depositions, but not necessarily for the transcripts thereof."¹⁴⁹
3. Rule 54(d) creates a presumption that the prevailing party will recover costs, and it is the losing party's burden to show affirmatively that the prevailing party is not entitled to costs.¹⁵⁰
4. The underlying documents generated from deposition or copying expenses need not be introduced at trial to recover the expenses as costs — they need only be reasonably necessary.¹⁵¹

Recoverable costs can be significant, often involving tens of thousands of dollars. Prevailing parties should thus give careful attention to recovering costs after the merits have been decided.

146. See FED. R. CIV. P. 77(d), 4(a)(6) committee notes; 1990 Report, *supra* note 66.

147. FED. R. CIV. P. 54(d).

148. 28 U.S.C. § 1920 provides that the 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 (1988).

149. *Commercial Credit Equip. Corp. v. Stamps*, 920 F.2d 1361, 1368 (7th Cir. 1990).

150. *M.T. Bonk Co. v. Milton Bradley Co.*, 945 F.2d 1404, 1409 (7th Cir. 1991).

151. *Id.* at 1410.

XI. SANCTIONS

Sanctions continue to generate collateral litigation for advocates and the courts. The basic Rule 11 standards in the Seventh Circuit are outlined in a previous survey article, and practitioners are referred to that article for a review of the fundamentals.¹⁵² The following summary highlights key decisions during the survey period:

1. In *Business Guides, Inc. v. Chromatic Communications Enterprises*,¹⁵³ the Supreme Court held that Rule 11 applies to any party who signs a pleading, motion, or other court paper, regardless of whether that party was represented by counsel.¹⁵⁴ Thus, when, for example, corporate officials sign an affidavit, they can be subjected to Rule 11 sanctions.
2. The *Business Guides* Court further held that such parties, whether represented by counsel or not, are held to the same standard of reasonableness under the circumstances as applies to attorneys, although the legal inquiry that is expected from a party may vary from "case to case," and "what is objectively reasonable for a client may differ from what is objectively reasonable for an attorney."¹⁵⁵
3. In *Chambers v. NASCO, Inc.*,¹⁵⁶ the Supreme Court held that the federal courts have the inherent power to impose attorney's fees and related expenses on a party as a sanction, even aside from the authority granted by Rule 11 and 28 U.S.C. § 1987.¹⁵⁷
4. A ruling from Judge McKinney imposing sanctions on debtor's counsel for filing a frivolous brief was affirmed.¹⁵⁸ The brief was objectively frivolous because of its numerous errors and an unfounded legal argument. The brief was "far below the standards of practice reasonably expected in this or any other court," thus causing the district court "to spend additional time to insure that a proper decision is reached."¹⁵⁹
5. Rule 11 sanctions cannot be imposed for a frivolous state court complaint that is removed to federal court.¹⁶⁰

152. Maley, *1989 Developments*, *supra* note 23, at 292-300.

153. 111 S. Ct. 922 (1991).

154. *Id.* at 933.

155. *Id.*

156. 111 S. Ct. 2123 (1991).

157. *Id.* at 2133.

158. *In re Roete*, 936 F.2d 963, 967 (7th Cir. 1991).

159. *Id.*

160. *Maciosek v. Blue Cross & Blue Shield*, 930 F.2d 536, 541 (7th Cir. 1991).

6. Sanctions were imposed and affirmed against counsel and his client for deliberate frustrations of discovery — the thrust of the misconduct occurred at the client's deposition where documents were not produced, frivolous objections were repeatedly made, and the witness was instructed not to answer questions that counsel deemed irrelevant, notwithstanding Rule 30(c)'s requirement that evidence objected to shall be taken subject to objection.¹⁶¹
7. In confirming that Rule 11 is not intended to thwart creative arguments, the Seventh Circuit *reversed* sanctions that had been imposed on civil rights counsel when a decision that *arguably* (but not conclusively) controlled was not cited.¹⁶²

XII. LOCAL RULES CHANGES AND CIVIL JUSTICE REFORM PLANS

As this Article went to press, two key developments occurred that significantly impact local federal civil practice. First, the Southern District of Indiana adopted revised local rules effective February 1, 1992.¹⁶³ The new rules are completely renumbered to match the corresponding Federal Rules. Otherwise, the new rules are substantially the same as the prior rules with a few key changes including:

- No motion need be filed for an enlargement of time to file responsive pleadings or discovery responses if opposing counsel does not object; a confirming letter is sent to opposing counsel and filed with the clerk.¹⁶⁴
- Briefs can be thirty-five pages in length, and leave to file oversized briefs requires "extraordinary and compelling reasons." If leave is granted, the over-sized brief must contain a table of contents, statement of issues, and table of authorities.¹⁶⁵

Practitioners are well advised to study the new rules.

161. *Castillo v. St. Paul Fire & Marine Ins. Co.*, 938 F.2d 776, 778 (7th Cir. 1991). The *Castillo* decision should thus be in every practitioner's deposition notebook for use against the s.o.b. litigator — if providing a copy of the decision to such a practitioner and noting the relevant portions of the opinion on the record does not deter the misconduct, at least the record will be very strong for a sanctions motion.

162. *Thompson v. Duke*, 940 F.2d 192 (7th Cir. 1991). For practitioners opposing a sanctions motion, the *Thompson* opinion contains a wealth of favorable language, for instance, that "innovative arguments" are "especially important" and are not intended to be thwarted by Rule 11. *Id.* at 195.

163. S.D. IND. L.R. 1.1(b).

164. S.D. IND. L.R. 6.1.

165. S.D. IND. L.R. 7.1(b).

Second, both the Northern and Southern Districts adopted Civil Justice Expense and Reduction Delay Plans effective December 31, 1991.¹⁶⁶ Although a detailed analysis of each plan is beyond the scope of this Article, the highlights are as follows:

Southern District:

- Case management plans and scheduling orders should set summary judgment motions to be briefed as soon as reasonably feasible. In complex cases, summary judgment motions should be ripe no less than ninety days prior to trial. In other cases, sixty days prior to trial. If a summary judgment motion has not been resolved prior to thirty days before trial, the motion should be decided by the trial date and the trial should be rescheduled thirty to ninety days later.¹⁶⁷
- New local rules are recommended to hold trials within six to eighteen months after filing and to require the parties to meet informally and adopt a stipulated case management plan.¹⁶⁸

Northern District:

- The court declined to adopt a requirement that counsel submit a stipulated case management plan, but will consider such a requirement in appropriate cases and encouraged parties to do so voluntarily.¹⁶⁹
- Mandatory disclosure of basic information will be tried during 1992 on an experimental basis, with each division of the court formulating its own standard order mandating what must be disclosed.¹⁷⁰

These plans will have a dramatic impact on the way federal civil cases are litigated in Indiana.

XIII. MISCELLANEOUS

Finally, a number of developments occurred that are not easily pigeonholed into separate categories. For instance, Rule 45 dealing with

166. See Civil Justice Expense and Delay Plan for the United States District Court for the Southern District of Indiana (Dec. 31, 1991); Civil Justice Expense and Delay Plan for the United States District Court for the Northern District of Indiana (Dec. 31, 1991).

167. Civil Justice Expense and Delay Reduction Plan for the Southern District of Indiana 11 (Dec. 31, 1991).

168. *Id.* at 3-8.

169. Civil Justice Expense and Delay Reduction Plan for the Northern District of Indiana § 2.07 (Dec. 31, 1991).

170. *Id.* § 3.03.

subpoenas was completely rewritten and incorporates many common-sense changes that will save litigants time and money. It is strongly suggested that new Rule 45 be studied in its entirety given its radical reform. The key changes are outlined as follows:

1. The clerks shall issue signed subpoenas in blank, which can be completed and served by attorneys as officers of the court.¹⁷¹
2. Attorneys may issue subpoenas on behalf of a court in which the attorney is authorized to practice, *as well as other courts in which a deposition or production is compelled by the subpoena*, provided the deposition or production relates to an action pending in a court where the attorney is authorized to practice.¹⁷²
3. Rule 45(c) outlines new protections for persons subject to subpoenas, including the duty of parties or attorneys responsible for issuing subpoenas to take reasonable steps to avoid imposing undue burden or expense on a person subject to subpoena.¹⁷³
4. Persons commanded by subpoena to produce documents may serve written objections within fourteen days of service of the subpoena, and if objection is made, no inspection shall occur without court order.¹⁷⁴
5. New protections are added for disclosure of trade secrets and disclosure of an unretained expert's opinion or information.¹⁷⁵
6. Documents subject to a subpoena shall be produced as kept in the ordinary course of business or organized to correspond to the categories in the demand.¹⁷⁶
7. When information subject to a subpoena is withheld on a claim of privilege or work product, the objection shall be expressly stated and supported by a description of the documents sufficient to enable the demanding party to contest the claim.¹⁷⁷

171. FED. R. CIV. P. 45(a)(3)(B)(1).

172. FED. R. CIV. P. 45(a)(3). Thus, it will no longer be necessary to retain local counsel in foreign districts to get subpoenas issued.

173. FED. R. CIV. P. 45(c)(1).

174. FED. R. CIV. P. 45(c)(2)(B). This changes prior law which allowed objection within 10 days of service, and which resulted in confusion over how to count the 10 days. FED. R. CIV. P. 45(c)(2)(B) committee notes; 1990 Report, *supra* note 66.

175. FED. R. CIV. P. 45(c)(3)(B).

176. FED. R. CIV. P. 45(d)(1).

177. FED. R. CIV. P. 45(d)(2).

Rule 45 thus expands the ease of the use of subpoenas, but imposes corresponding duties and protections as well.

A number of other miscellaneous decisions or passages of interest to federal practitioners are noted below:

1. Ordinarily, substantive matters raised in footnotes rather than the text of briefs are disregarded by the Seventh Circuit and the Northern District of Illinois.¹⁷⁸
2. A litigant who fails to press a point by supporting it with pertinent authority or by showing why it has merit despite supporting authority forfeits the point; the court is not required to do the litigants' research.¹⁷⁹
3. Arguments raised for the first time in a reply brief are waived.¹⁸⁰
4. Lawyers' attempts "to impugn the integrity of the other party through unsupported allegations and innuendo irrelevant to the resolution of the issues" are frowned upon in the Seventh Circuit.¹⁸¹
5. Reliance on "facts" that are outside of the record is of no effect on the merits and raises the ire of the Seventh Circuit.¹⁸²
6. The President issued Executive Order 12778 commanding federal agencies and their counsel to give pre-filing notice of civil complaints, arrange settlement conferences, use alternative dispute resolution, make efforts to streamline and expedite discovery, present only reliable expert testimony, seek sanctions against opposing counsel and parties when appropriate, employ efficient case-management techniques, and offer to enter into a two-way fee shifting agreement with opposing parties.¹⁸³
7. In *Salve Regina College v. Russell*,¹⁸⁴ the Supreme Court held that questions of state law are to be reviewed *de novo* by federal appellate courts, rather than under a deferential standard in which the local district judge is presumed better able to predict state law.¹⁸⁵

178. *Johnston v. Bumba*, 764 F. Supp. 1263, 1282 n.21 (N.D. Ill. 1991). Ironically, the decision containing this proposition contains more than 20 footnotes, and this proposition itself is found in a footnote.

179. *Heinz v. Frank Lloyd Wright Found.*, 762 F. Supp. 804, 807 (N.D. Ill. 1991).

180. *Williams v. Romano Bros. Beverage Co.*, 939 F.2d 505, 509 (7th Cir. 1991); *Simkunas v. Tardi*, 930 F.2d 1287, 1292 (7th Cir. 1991).

181. *Boyle v. Chicago Hous. Auth.*, 946 F.2d 54, 56 n.5 (7th Cir. 1991).

182. *Williams v. Leach*, 938 F.2d 769, 773 (7th Cir. 1991).

183. Exec. Order No. 12,778, 56 Fed. Reg. 55,195 (1991).

184. 111 S. Ct. 1217 (1991).

185. *Id.* at 1221.

Finally, in one of this author's favorite passages of the year, a *per curiam* panel including Judges Easterbrook and Posner held that a skeletal argument contained in a single unreasoned paragraph did not preserve a claim because, in the words of the panel, "Judges are not like pigs, hunting for truffles buried in briefs."¹⁸⁶ Like other passages that often emanate from these two scholarly judges, these words show that if nothing else, Seventh Circuit practitioners can continue to look forward to anything but rote opinions.

186. *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991).