

1992 Federal Practice and Procedure Update for Seventh Circuit Practitioners

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INTRODUCTION

Indiana practitioners litigating in federal court encountered diverse developments in federal practice during 1992. At the local level, the courts implemented Civil Justice Reform Plans, the Southern District enacted revised local rules, and numerous decisions were rendered on an array of procedural topics. In the Seventh Circuit, several questions of first impression were decided. At all levels, the federal courts continued their struggle to administer increasing caseloads. This Article, as the fifth 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.

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:

<u>Topic</u>	<u>Page</u>
Subject Matter Jurisdiction	817
Personal Jurisdiction	831
Service of Process	831
Specificity of Pleading	834
Filing — Rule 5	836
Amendments — Rule 15	837
Preliminary Injunction Standards	838
Discovery	841
Summary Judgment	843
Trial	845
Miscellaneous	849

I. SUBJECT MATTER JURISDICTION

A. *Diversity Jurisdiction*

Several recent decisions stress the importance of the rule for determining citizenship of partnerships for diversity jurisdiction. Recall that

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in *Carden v. Arkoma Associates*,¹ the United States Supreme Court held that in determining the citizenship of a limited partnership for diversity purposes, the residence of *all* partners—including limited partners—must be considered.² This rule followed from the settled maxim that in suits involving noncorporate entities, the citizenship of all members must be considered for diversity.³

In *Kubale v. DeSoto, Inc.*,⁴ this rule was applied in a case brought by a partner of a law firm for recovery of legal fees for services provided to a client. The law firm, with partners in Illinois and Wisconsin, had a claim for more than \$50,000 in fees against the client. Because Wisconsin statutes allow a partner asserting a partnership claim to sue in the partner's own name without joining the other partners, one of the partners sued in a Wisconsin state court on behalf of the partnership. The client, an Illinois corporation, removed the action on the basis of diversity, pointing out that the suing partner was a Wisconsin citizen.⁵

The suing partner moved to remand, arguing that diversity was lacking because the other partners' domiciles must be considered, and several of those partners were Illinois citizens, just like the defendant. The court agreed and remanded the action, reasoning that all partners must be considered for diversity.⁶ The court also relied on *Northern Trust Co. v. Bunge Corp.*,⁷ for the proposition that "'federal courts must look to the individuals being represented rather than their collective representative to determine whether diversity exists.'"⁸ Thus, even though a state statute allowed the partnership claim to be pursued by one representative partner, federal jurisdiction still requires complete diversity, considering the citizenship of all represented partners. As the court explained, under a contrary rule, "a partnership . . . could create or destroy federal jurisdiction by craftily choosing its partnership representative."⁹

1. 494 U.S. 185 (1990).

2. *Id.* at 195.

3. *Id.*

4. 777 F. Supp. 1452 (E.D. Wis. 1991).

5. *Id.* at 1452-53.

6. *Id.* at 1454-55.

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

8. *Kubale*, 777 F. Supp. at 1453 (quoting *Northern Trust*, 899 F.2d at 594).

9. *Id.* at 1454. Judge Noland showed similar respect for these rules in *Numismatic Enters. v. Hyatt Corp.*, 797 F. Supp. 687, 690 (S.D. Ind. 1992), in which a rare-coins partnership sued Hyatt for alleged negligence in storing valuables in a safety deposit box. The partnership sued in state court, and Hyatt removed to federal court claiming diversity. Although diversity appeared present because neither of the two partners shared the same domicile as Hyatt, Judge Noland nonetheless examined whether a third individual who received a percentage of the partnership profits might be considered a "partner." If so,

B. Amount-in-Controversy Requirement

A number of decisions addressed the diversity jurisdiction amount-in-controversy requirement that the matter exceed the sum or value of \$50,000.¹⁰ In *Bradford National Life Insurance v. Union State Bank*,¹¹ the plaintiff sued a bank in federal court for alleged conversion of a check in the amount of \$50,000. The case, filed in 1990, proceeded all the way to a trial setting in June of 1992, when, four days before trial, the parties notified the court that the case could be decided on stipulated facts.¹² Before doing so, however, the court raised the issue of subject matter jurisdiction *sua sponte*, and held that the amount-in-controversy requirement was not satisfied.¹³ Under § 1332(a), the amount in controversy must *exceed* \$50,000, exclusive of interest and costs. In this case, however, the check at issue was for exactly \$50,000, and thus could not confer federal jurisdiction.

The court further reasoned that the plaintiff's claim for "interest at the legal rate" did not add to the amount in controversy.¹⁴ Section 1332(a) excludes interest that becomes due because of a delay in payment, and although prejudgment interest *is* to be considered in the amount in controversy, the court observed that the governing state statute did not allow prejudgment interest in this setting.¹⁵ Further, although attorneys' fees may be considered in determining the jurisdictional amount, and such fees were specifically requested in the complaint, the request was to no avail because the plaintiff failed to show any legal right to recover such fees.¹⁶

Several cases address the situation in which a plaintiff brings a tort claim in a state court, the case is removed to federal court, but because of a state-law prohibition against a prayer for a specific dollar amount, the complaint is silent as to the amount of damages sought. Each state

diversity would have been destroyed.

Judge Noland found this individual not to be a partner, because he did not own any of the partnership, did not share in losses, and was not involved in partnership decision-making. *Id.* at 690-91. Thus, although diversity remained, the case shows that courts will follow the Seventh Circuit's directives to police the limits of federal jurisdiction. *See id.* at 690 n.2 (quoting *Market St. Assocs. v. Frey*, 941 F.2d 588, 590 (7th Cir. 1991)). In cases involving partnerships, practitioners must take extra care to determine whether diversity is present.

10. 28 U.S.C. § 1332(a) (1988).

11. 794 F. Supp. 296 (E.D. Wis. 1992).

12. *Id.* at 297.

13. *Id.* at 298.

14. *Id.*

15. *Id.*

16. *Id.*

in the Seventh Circuit has such a limitation.¹⁷ In such cases, at least some courts take the position that they have an independent duty to determine the amount in controversy.¹⁸

In the Northern District of Illinois, courts have set a new trend for dealing with such cases. One line of authority simply holds that when the prayer does not specifically seek more than \$50,000, and when the injuries sustained are not clear from the complaint, a prompt remand is the prudent course.¹⁹

Thus, in *Navarro v. Subaru of America*,²⁰ Judge Norgle—on the court's own motion—considered whether jurisdiction was present in a personal-injury action after Subaru's notice of removal. Notwithstanding the plaintiff's allegations of permanent physical injuries, lost wages, medical expenses, and pain and suffering, the court simply remanded the action.²¹ The court specifically refused to consider Subaru's claim that plaintiff suffered a fractured pelvis, ribs, ankles, and other bones because this was not alleged in the complaint, but was instead "merely derived from an apparent informal conversation [between counsel]."²² The court further stated that it was "concerned with needlessly divesting the state courts of jurisdiction over matters legitimately in their domain."²³ Judge Norgle then noted that if discovery later showed that the amount in controversy did exceed \$50,000, the thirty-day removal period would start again.²⁴ In remanding the companion case, *Stemmons v. Toyota Tsusho America*,²⁵ Judge Norgle appeared to add an additional requirement for removal, stating that if it should later appear through further proceedings in state court "that the requisite amount is *clearly* in excess of \$50,000, the thirty-day period for seeking removal would begin anew."²⁶

It is unclear how federal judges in Indiana will handle such issues. No reported decisions on point from Indiana's federal courts have been

17. ILL. REV. STAT. ch. 110, para. 2-604 (1992); WIS. STAT. ANN. § 802.02(1m)(a) (Supp. 1992); IND. TRIAL R. 8(A)(2).

18. *Krider Pharmacy v. Medi-Care Data Sys.*, 791 F. Supp. 221, 225 (E.D. Wis. 1992).

19. *Navarro v. Subaru of Am.*, 802 F. Supp. 191, 193 (N.D. Ill. 1992).

20. *Id.*

21. Judge Norgle's "automatic remand" decision follows a similar holding of Judge Shadur in 1990. *See Navarro v. LTV Steel Co.*, 750 F. Supp. 930, 931 (N.D. Ill. 1990). A companion decision issued by Judge Norgle on the same day as the *Subaru* decision contains strikingly similar facts, and the same analysis and remand as in *Subaru*. *See Stemmons v. Toyota Tsusho Am., Inc.*, 802 F. Supp. 195, 198-99 (N.D. Ill. 1992).

22. 802 F. Supp. at 194.

23. *Id.*

24. *Id.*

25. 802 F. Supp. 195 (N.D. Ill. 1992).

26. *Id.* at 198 (emphasis added) (citation omitted).

located, and—probably because remand orders are generally not appealable²⁷—clear guidance from the Seventh Circuit is absent. Although *Subaru* and *Toyota* certainly follow the Seventh Circuit directives to police jurisdiction, it is respectfully submitted that the approach in these cases goes too far and should not be followed by federal judges in Indiana.

There are four potential difficulties with the *Subaru* reasoning. First, the question is not whether a plaintiff *will* recover more than \$50,000, but whether it can be said to a legal certainty that a plaintiff *cannot* recover such an award.²⁸ The *Subaru* rationale imposes a contrary requirement. Indeed, in the portion of the *Toyota* opinion stating that removal could be possible if new facts are discovered, Judge Norgle wrote that removal would be appropriate if it *clearly* was shown that the amount at issue exceeded \$50,000. No such requirement exists in the law.

Second, the holding imposes a pleading requirement greater than the notice pleading standard of federal practice, and places removing defendants at a jurisdictional disadvantage. In a personal injury case such as *Subaru* or *Toyota*, all that a plaintiff would have to do if filing originally in federal court would be to give notice pleading of the claim. As the Seventh Circuit explained during the survey period, the purpose of the complaint under a notice pleading system is “to advise the other party of the event being sued upon.”²⁹ If a plaintiff makes the same notice-pleading allegations in an action filed in federal court as were made in *Subaru* or *Toyota*, a court would be hard-pressed to say to a legal certainty that more than \$50,000 could not be recovered. The inquiry should not be any different merely because the case comes to federal court through removal.

Third, the portion of *Subaru* showing concern for divesting the state courts of jurisdiction is without legal support. Such a theory smacks of abstention, but there is no abstention doctrine that allows federal courts to relinquish jurisdiction over a diversity claim simply because concurrent jurisdiction lies in a state court. To the contrary, where subject matter jurisdiction is present, the federal courts have a duty to exercise that jurisdiction.³⁰

27. *Hernandez v. Brakegate, Ltd.*, 942 F.2d 1223, 1224 (7th Cir. 1991).

28. See 14A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3725 (2d ed. 1985).

29. *Daniels v. USS Agri-Chems.*, 965 F.2d 376, 381 (7th Cir. 1992). See also *Brownlee v. Conine*, 957 F.2d 353, 354 (7th Cir. 1992) (The Federal Rules establish a system of notice pleading rather than of fact pleading.).

30. See, e.g. *Deakins v. Monaghan*, 484 U.S. 193, 203 (1988) (“This Court repeatedly has stated that the federal courts have a ‘virtually unflagging obligation’ to

Fourth, as a policy matter, the *Subaru* method frustrates the goals of avoiding needless expense and delay in federal litigation. It seems unimaginable that in either *Subaru* or *Toyota*, both of which involved auto accidents, it could be said to a legal certainty that the plaintiffs could not recover more than \$50,000. What is probable in such cases is that, after remand, the defendants will elicit facts through discovery to further support removal, and then file a new notice of removal. The result for all involved is extra expense in dealing with removal twice, and likely delays caused by the case bouncing back and forth between state and federal court.

In light of the current push for civil justice reform, it would be more economical to withhold ruling on jurisdiction until such time, perhaps as short as ten days, that the parties present evidence on the issue. Indeed, the Seventh Circuit recently observed that when jurisdiction is at issue, “*sua sponte* dismissals without prior notice or opportunity to be heard are ‘hazardous.’”³¹ Further, at least in actions originally filed in federal court, the Seventh Circuit has stated that “‘unless the [jurisdictional] defect is clearly incurable a district court should grant the plaintiff leave to amend, allow the parties to argue the jurisdictional issue, or provide the plaintiff with the opportunity to discover the facts necessary to establish jurisdiction.’”³² Indeed, in the related setting of a motion to dismiss for want of subject matter jurisdiction, Judge Norgle has correctly observed that the court may hold an evidentiary hearing to determine subject matter jurisdiction, and that there are no specific guidelines on such hearings and “‘any rational mode of inquiry will do.’”³³ Such a hearing, no matter how abbreviated, and even if done by documents and affidavits, would be preferable to an automatic remand.

It is this author’s experience that the federal judges in Indiana do not follow the *Subaru* approach. There does not seem to be the same desire—as appears to exist in the Northern District of Illinois—to scour the docket for cases that can be dismissed for want of jurisdiction.³⁴

exercise their jurisdiction except in those extraordinary circumstances ‘where the order to the parties to repair to the State court would clearly serve an important countervailing interest.’”); *Property & Casualty Ins. v. Central Nat’l Ins.*, 936 F.2d 319, 320-21 (7th Cir. 1991) (“Jurisdiction, if properly conferred, is meant to be exercised.”).

31. *Joyce v. Joyce*, 975 F.2d 379, 386 (7th Cir. 1992) (quoting *Shockley v. Jones*, 823 F.2d 1068, 1072 (7th Cir. 1987)).

32. *Id.* (quoting *Shockley*, 823 F.2d at 1073).

33. *Lumpkin v. United States*, 791 F. Supp. 747, 749 (N.D. Ill. 1992) (quoting *Crawford v. United States*, 796 F.2d 924, 929 (7th Cir. 1986)).

34. In the Northern District of Illinois, at least some of the judges apparently review every filing *sua sponte* to check subject matter jurisdiction. See *Lutkowski v. High*

Assuming no such animosity toward federal jurisdiction (and new cases), perhaps there is little need for concern among Indiana practitioners. Nonetheless, to avoid unnecessary expense and delay, practitioners should be aware of potential problems in this area. As Professors Wright and Miller have explained, this is an area of “special difficulty.”³⁵

Plaintiffs filing in federal court should give more than bare notice pleading when it comes to damages, specifying each type of injury, and alleging unequivocally that the amount in controversy exceeds \$50,000. Defendants seeking removal should also state specifically that the amount in controversy exceeds \$50,000. In addition, although Judge Norgle disregarded such statements, removing defendants should go further and outline, based on initial investigations, the facts that support the amount-in-controversy requirement. For instance, if an accident report reveals that the accident was serious, a removing defendant might want to reference that report in the removal notice, and might even incorporate it or similar evidence as an exhibit.

In addition, removing defendants should promptly serve interrogatories inquiring into the scope of plaintiff’s damages. Although responses will not come before the thirty days for removal expires, if the court or the plaintiff later raises the issue, responses likely will be in hand by that time. Finally, if the amount in controversy becomes an issue, the party desiring to stay in federal court should submit evidence in support of its position. If necessary, a request for a prompt evidentiary hearing (on paper or in person) might also be advisable.

C. *Federal Question Issues*

Federal question jurisdiction exists over “all civil actions arising under the Constitution, laws, or treaties of the United States.”³⁶ Despite this seemingly clear language, the presence of federal question jurisdiction continues to be litigated in this Circuit.

For instance, in *Northrop Corp. v. AIL Systems*,³⁷ Northrop and AIL entered into a “teaming agreement” to work together pursuing a contract from the Air Force for work on the B-1B bomber. Under the agreement, if AIL were named the prime contractor, Northrop would be awarded certain subcontracting work. AIL was awarded the prime

Energy Sports, 768 F. Supp. 224 n.1 (N.D. Ill. 1991) (“This Court always undertakes an immediate review of newly filed complaints.”). Indeed, that is apparently how *Subaru* came before the court, for the plaintiff did not move to remand, and did not contest federal jurisdiction. This author is unaware of any such systematic initial review of actions by Indiana’s federal judges.

35. 14A WRIGHT ET AL., *supra* note 28, § 3725.

36. 28 U.S.C. § 1331 (1988).

37. 959 F.2d 1424 (7th Cir. 1992).

contract, but after Northrop performed some subcontracting work, a dispute arose between Northrop and AIL over Northrop's right to additional work under the teaming agreement. Northrop sued AIL in the Northern District of Illinois for breach of contract, promissory estoppel, and breach of an implied covenant of good faith. Diversity was not present, but Northrop asserted federal-question jurisdiction—not under any federal statutory provision—but instead under “federal common law.”³⁸

The district court dismissed the action for want of jurisdiction, and the Seventh Circuit affirmed.³⁹ The opinion contains an excellent discussion of the contours of obtaining federal jurisdiction based on a federal common law claim. The panel began by noting that although there is no “federal general common law,” federal-question jurisdiction “will support claims founded upon federal common law.”⁴⁰ This unusual source of jurisdiction stems from the Supreme Court's recognition of

the need and authority in some limited areas to formulate what has come to be known as federal common law These instances are few and restricted . . . and fall into essentially two categories: those in which a federal rule of decision is necessary to protect uniquely federal interests . . . and those in which Congress has given the courts the power to develop substantive law.⁴¹

Because no congressional enactment grants federal courts the power to create substantive law for contractor disputes on Air Force projects, the court quickly disposed of this second branch of federal common law jurisdiction.⁴²

The court instead focused on the first branch, which asks whether there is a uniquely federal interest requiring protection by the federal judiciary. In general, such interests are present “where there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism.”⁴³ However, this test “is met ‘only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our

38. *Id.* at 1425-26.

39. *Id.* at 1426.

40. *Id.* at 1426.

41. *Id.* (quoting *Texas Indus. v. Radcliff Materials*, 451 U.S. 630, 640 (1981)).

42. *Id.*

43. *Id.* at 1426 (quoting *Illinois v. City of Milwaukee*, 406 U.S. 91, 105-06 n.6 (1972)).

relations with foreign nations, and admiralty cases.”⁴⁴ Moreover, the Seventh Circuit added, there must be more than a uniquely federal interest, for that merely establishes a necessary, but not sufficient, condition for displacement of state law. As an additional requirement, a significant conflict must arise between an identifiable federal policy or interest and the application of state law, such that applying state law would frustrate specific objectives of federal legislation.⁴⁵

Applying this strict standard, the Seventh Circuit found federal jurisdiction lacking because Northrop merely disputed the meaning and application of a teaming agreement between two private defense contractors. Although the court recognized that the procurement of equipment by the United States has been held an area of uniquely federal interest, Northrop’s case was too far removed from that interest. Because the federal government was not involved in and would not be directly affected by the outcome of the Northrop litigation, the case did not rise to the level of a federal question.⁴⁶

Finally, the Seventh Circuit recognized that several federal courts have held that federal common law applies to the interpretation of subcontracts entered into pursuant to prime contracts with the federal government.⁴⁷ The Seventh Circuit declined to extend the logic of those subcontract cases to Northrop’s teaming agreement, reasoning that “[s]ubcontracts are agreements to perform work on government projects; teaming agreements are arrangements which *may* give rise to such subcontracts.”⁴⁸ Having thus disposed of federal jurisdiction based on a teaming agreement, the court then observed:

We refuse to express a view as to the desirability of applying federal common law to disputes involving government subcontracts. Nevertheless, we observe that subcontracts which govern actual work being performed on federal projects implicate federal interests much more directly than teaming agreements entered into in the hope that they will lead to government subcontract work.⁴⁹

Thus, in the Seventh Circuit, disputes over teaming agreements for federal projects do not give rise to federal question jurisdiction, but it remains

44. *Id.* (quoting *Texas Indus.*, 451 U.S. at 641).

45. *Id.* at 1426-27.

46. *Id.* at 1427.

47. *Id.* at 1428 (citing *United States v. Taylor*, 333 F.2d 633, 635 (5th Cir. 1964); *American Pipe & Steel v. Firestone Tire & Rubber*, 292 F.2d 640, 641 (9th Cir. 1961); *Grinnel Fire Protection Sys. v. Regents of the Univ.*, 554 F. Supp. 495, 496 (N.D. Cal. 1982)).

48. *Northrop*, 959 F.2d at 1428.

49. *Id.*

an open question whether *subcontract* disputes involving federal projects can lie in federal court. The *Northrop* panel, quite appropriately, left this issue for another day. Practitioners with subcontract disputes on federal jobs should thus at least consider the possibility of litigating such matters in federal court.

In a more common setting, in *Ore-Ida Foods v. Richmond Transportation Service*,⁵⁰ the Northern District of Illinois dismissed a shipper's action against an insurer for want of federal jurisdiction. Ore-Ida had shipped goods via a common carrier, which had obtained certain insurance covering the goods. Ore-Ida sought to collect on the policy for damage to the goods, and filed suit in federal court asserting the case arose under the Interstate Commerce Act. Judge Norgle rejected this argument, reasoning that the Act only states that the Commission "may require" a carrier to obtain insurance, and it creates no rights, duties, or obligations.⁵¹ If a federal question were present in this mere insurance dispute, the court reasoned, "every accident involving a common carrier would end up in the federal courts."⁵²

Finally, in *Forest County Potawatomi Community v. Doyle*,⁵³ a district court within the Seventh Circuit applied the settled rule that specious federal claims cannot bootstrap a state claim into federal court. In dismissing that action, the court explained, "[i]f a plaintiff's claim under the United States Constitution or federal law 'clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous,' the suit may be dismissed for lack of subject matter jurisdiction."⁵⁴

Thus, *Northrop*, *Ore-Ida*, and *Doyle* all teach that federal-question jurisdiction is zealously guarded in this Circuit, and careful research and analysis are necessary before filing a federal question action.

D. Removal

A number of significant removal cases were decided during the survey period, but are merely highlighted below so that practitioners are aware of these developments:

- (1) A district judge's practice of remanding any removed case in which the plaintiff files a post-removal stipulation to seek no more than \$50,000 is improper. Because the time for determining

50. 783 F. Supp. 382 (N.D. Ill. 1992).

51. *Id.* at 385.

52. *Id.* at 386.

53. 803 F. Supp. 1526 (W.D. Wis. 1992).

54. *Id.* at 1533 (quoting *Bell v. Hood*, 327 U.S. 678, 682-83 (1946)).

jurisdiction is the moment of removal, any attempt thereafter to destroy federal jurisdiction is of no avail.⁵⁵

(2) Remand orders—with the exception of those involving civil-rights claims removed under 28 U.S.C. § 1443—are generally not subject to appellate review.⁵⁶

(3) A narrow line of authority does permit review, however, in very limited circumstances when remand was made on grounds outside 28 U.S.C. § 1447(c), or remands not authorized by § 1447(c).⁵⁷

(4) When the district court fails to state its reasons for remand of an action, the Seventh Circuit cannot determine whether the remand is reviewable, so the Seventh Circuit will issue a limited writ directing the district court to provide the essential information.⁵⁸

(5) To avoid confusion on the reviewability of remand orders, the Seventh Circuit has announced that “district courts should accommodate both the litigants and this tribunal by stating reasons for their remand orders. Reasons need not be elaborate; often a sentence will do.”⁵⁹

(6) The prohibition of 28 U.S.C. § 1441(b) that a diversity case cannot be removed if a defendant is a citizen of the forum state is a procedural rather than a jurisdictional limitation. Thus, where such an action is “improperly” removed but the plaintiff fails to seek remand within thirty days for procedural defects under 28 U.S.C. § 1447(c), such a procedural defect is waived.⁶⁰

(7) Whenever an action is removed under the general removal provision of 28 U.S.C. § 1441(a), all defendants must join in the action, and a petition joined by less than all defendants is defective unless it explains the absence of codefendants. Nominal defendants, however, are disregarded for removal purposes, and need not join in the notice.⁶¹

55. *In re Shell Oil Co.*, 970 F.2d 355, 356 (7th Cir. 1992). Thus, in order to defeat removal of a diversity case, a plaintiff must claim less than the jurisdictional amount in its state-court complaint.

56. 28 U.S.C. § 1447(d) (1988); *In re Shell Oil Co.*, 966 F.2d 1130, 1132 (7th Cir. 1992); *In re Amoco Petroleum Additives Co.*, 964 F.2d 706, 708 (7th Cir. 1992).

57. *Shell Oil*, 966 F.2d at 1132 (citing *Thermtrom Prods. v. Hermansdorfer*, 423 U.S. 336 (1976)); *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343 (1988); *Rothner v. Chicago*, 879 F.2d 1402 (7th Cir. 1989); *Amoco Petroleum*, 964 F.2d at 708.

58. *Shell Oil*, 966 F.2d at 1132-33.

59. *Id.* at 1133.

60. *Veltze v. Bucyrus-Erie Co.*, 791 F. Supp. 1363, 1365 (E.D. Wis. 1992).

61. *Lang v. American Elec. Power*, 785 F. Supp. 1331, 1333 (N.D. Ind. 1992).

(8) When there is a “separate and independent” federal claim under 28 U.S.C. § 1441(c), not all defendants need join in the removal notice. In determining whether such a federal claim is separate and independent, it is well settled that a claim arising from the same loss or actionable wrong is not separate and independent, nor is this standard met if the wrongs arise from an interlocked series of transactions or substantially derive from the same facts.⁶²

(9) Under 28 U.S.C. § 1447(c), costs may be assessed against a removing defendant upon a remand to state court. Such an award is generally inappropriate if the defendant raised legitimate and substantial grounds for removal and asserted them in good faith.⁶³ If such costs are appropriate, they may be assessed against the defendants, their attorneys, or both.⁶⁴

(10) When a state-law claim is not originally removable, it may be removed under 28 U.S.C. § 1446(b) within thirty days “after receipt by the defendant . . . of a copy of an amended pleading, motion, order, or other paper from which it may first be ascertained that the case is one which is or has become removable.”⁶⁵ However, diversity claims may not in any event be removed more than one year after the action was filed in state court.⁶⁶

(11) The subsequent removal option of § 1446(b), however, does *not* apply when the nondiverse defendant was involuntarily dismissed from the case.⁶⁷ Thus, for instance, when summary judgment is granted against a nondiverse defendant, the case cannot be removed because of this “voluntary/involuntary” dismissal rule. The rationale for this rule is two-fold. First, such a state-court decision could be appealed and reversed, thus leading to a “yo-yo effect” between federal and state jurisdiction. Second, the federal courts have shown some deference to plaintiffs’ choice of forum, while at the same time not wishing to expand diversity jurisdiction any further.⁶⁸

(12) Thus, under the voluntary/involuntary dismissal rule, only a plaintiff’s voluntary act of dismissing a nondiverse defendant

62. *Id.* at 1333-34.

63. *Id.* at 1335.

64. *Wisconsin v. Missionaries to the Preborn*, 798 F. Supp. 542, 544 (E.D. Wis. 1992).

65. 28 U.S.C. § 1446(b) (1988).

66. *Id.* See also *Poulos v. Naas Foods, Inc.*, 959 F.2d 69, 71 (7th Cir. 1992).

67. *Poulos*, 959 F.2d at 72 (deciding a case of first impression in the Seventh Circuit, and following the majority rule in the country).

68. *Id.*

will allow removal under 28 U.S.C. § 1446(b). The scope of the rule, however, was left open by the Seventh Circuit. After noting with “some sympathy” that the Second Circuit treats a *non-appealed* state-court dismissal as a voluntary dismissal that will allow removal,⁶⁹ the Seventh Circuit declined to resolve this issue because it had not been briefed.⁷⁰

Finally, in a case of first impression requiring more than summarized treatment, the Seventh Circuit addressed the fraudulent joinder doctrine in *Poulos v. Naas Foods*.⁷¹ In *Poulos*, a sales representative sued his employer in a Wisconsin court for violations of Wisconsin’s Fair Dealership Law. The sales representative was a citizen of Illinois, and his employer was an Indiana citizen. Thus, diversity existed between plaintiff and his employer. The plaintiff also sued a holding company that owned the employer. However, that holding company was, like the plaintiff, a citizen of Illinois. Thus, on the face of the complaint diversity was lacking.⁷²

The case was removed, however, on the grounds of fraudulent joinder. The district court denied the plaintiff’s motion to remand, agreeing with the employer that the holding company had been fraudulently joined to defeat federal jurisdiction.⁷³ The Seventh Circuit affirmed the finding of fraudulent joinder, noting that it had never before addressed the issue.⁷⁴

Writing for the panel, Judge Cudahy observed that although false allegations of jurisdictional facts may make joinder fraudulent, “in most cases fraudulent joinder involves a claim against an in-state defendant that simply has no chance of success, whatever the plaintiff’s motives.”⁷⁵

69. *Id.* (citing *Quinn v. Aetna Life & Casualty*, 616 F.2d 38, 40 n.2 (2d Cir. 1980)).

70. *Id.* at 72 n.3. There is thus uncertainty in the Seventh Circuit concerning what conditions will allow an originally nonremovable state-court action to be removed based on a dismissal of a nondiverse defendant. The court in *Poulos* was at least somewhat sympathetic to the Second Circuit’s view that the dismissal is “voluntary” when the plaintiff does not appeal. Application of this rule, however, would cause at least some confusion, for the defendants ordinarily would not know whether the plaintiff had appealed until the thirty days for removal under 28 U.S.C. § 1446(b) had expired. For now, uncertainty will remain, but for defendants interested in a federal forum, consideration should be given to trying the Second Circuit’s approach.

71. 959 F.2d 69 (7th Cir. 1992).

72. *Id.* at 70-71.

73. *Poulos v. Naas Foods*, 132 F.R.D. 513, 519 (E.D. Wis. 1990), *aff’d*, 959 F.2d 69 (7th Cir. 1992).

74. *Poulos*, 959 F.2d at 73.

75. *Id.*

An out-of-state defendant seeking removal bears a "heavy burden" to establish fraudulent joinder:

The defendant must show that, after resolving all issues of fact *and law* in favor of the plaintiff, the plaintiff cannot establish a cause of action against the in-state defendant. At the point of decision, the federal court must engage in an act of prediction: is there any reasonable possibility that a state court would rule against the non-diverse defendant? If a state court has come to [a] judgment [against the plaintiff], is there any reasonable possibility that the judgment will be reversed on appeal?⁷⁶

Applying these standards, the panel held that there was no reasonable possibility that the holding company would be liable for the acts of its subsidiary.⁷⁷ The plaintiff had made no allegations of direct involvement by the parent, and had made no allegations that would support piercing the subsidiary's corporate veil. Thus, because plaintiff had no chance of recovering against the parent, fraudulent joinder existed, and the citizenship of the parent could not defeat diversity.⁷⁸

The Seventh Circuit reiterated the rule of 28 U.S.C. § 1446(b) that removal is required within thirty days of learning that removal is possible, and the court stated that in this case—as in any case of fraudulent joinder—the defendant should have removed the action within thirty days of service of the complaint, because at that time the defendant could have discovered that joinder was fraudulent. The defendant had failed to follow this thirty-day rule, but the plaintiff "did not notice the error, and the 30-day limit in section 1446(b) can be waived."⁷⁹

The lessons of *Poulos* are thus three-fold. First, defendants should be on the watch for fraudulent joinder and should file removal based on fraudulent joinder within thirty days of service of the complaint. Second, if the thirty-day limitation of § 1446(b) has passed, defendants still should consider a notice of removal if the absolute one-year limitation of § 1446(b) has not expired. Third, plaintiffs whose cases are removed *after* the thirty-day period should raise this procedural defect in a prompt motion to remand.⁸⁰

76. *Id.* (citation omitted).

77. *Id.* at 74.

78. *Id.* at 73-74.

79. *Id.* at 73 n.4.

80. One other lesson from *Poulos* is that in speaking of diversity of citizenship, practitioners should not refer to "residency," but should instead talk of citizenship or domicile. The panel made a point of criticizing the defendant's removal papers for referring to residency, noting that diversity jurisdiction "requires diversity of citizenship, and mere residence has never been enough to establish citizenship." *Id.* at 70 n.1. The court also

II. PERSONAL JURISDICTION

In *Dehmlow v. Austin Fireworks*,⁸¹ the Seventh Circuit reaffirmed its commitment to the stream of commerce theory of personal jurisdiction.⁸² Under this theory, a manufacturer or seller is subject to personal jurisdiction in the forum state if it delivers its products into the forum state with the expectation that they will be purchased by consumers in that state. The last word from the Supreme Court on the doctrine came in *Asahi Metal Industry v. Superior Court*,⁸³ in which the Court could not reach a majority view on the subject.

In *Dehmlow*, the Seventh Circuit noted the uncertainty on the issue after *Asahi*, but nonetheless felt bound by the stream of commerce theory that originated in *World-Wide Volkswagen v. Woodson*.⁸⁴ The Seventh Circuit explained, "This Circuit has repeatedly endorsed the 'stream of commerce theory' and has resolved cases on the basis of it."⁸⁵ Further, Judge Cummings observed that because the

Supreme Court established the stream of commerce theory, and a majority of the Court has not yet rejected it, we consider that theory to be determinative. We may not depart from Court precedent on the basis of a belief that present Supreme Court Justices would not readily agree with past Court decisions.⁸⁶

The *Dehmlow* decision thus confirms, as Judge McKinney had held in 1989, that the stream of commerce theory is the law of this Circuit.⁸⁷

III. SERVICE OF PROCESS

Federal Rule of Civil Procedure 4(c)(2)(C)(ii) allows for service by "mailing a copy of the summons and complaint (by first-class mail,

commented that "people are not domiciles, rather, they *have* domiciles." *Id.* Thus, proper allegations would be that plaintiff is a citizen of State X, or that plaintiff is a domiciliary of State X, or plaintiff is domiciled in State X. This is, of course, quite picky, but the Seventh Circuit is a stickler on such points, particularly because they affect jurisdiction.

81. 963 F.2d 941 (7th Cir. 1992).

82. *Id.* at 946.

83. 480 U.S. 102 (1987).

84. 444 U.S. 286, 297-98 (1980).

85. *Dehmlow*, 963 F.2d at 946.

86. *Id.* at 947 (citations omitted).

87. See *Curtis Management Group v. Academy of Motion Picture Arts & Sciences*, 717 F. Supp. 1362, 1367-71 (S.D. Ind. 1989) (discussing *World-Wide Volkswagen*, *Asahi*, and various Seventh Circuit decisions, and concluding that "[b]ecause the Supreme Court could not agree to a standard, and because the Seventh Circuit has not addressed the issue since the *Asahi* decision, this District Court must continue to apply the stream of commerce theory set forth in *World-Wide Volkswagen* and used in the Seventh Circuit in prior decisions").

postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to Form 18-A and a return envelope, postage prepaid, addressed to the sender.”⁸⁸ In *Audio Enterprises v. B & W Loudspeakers*,⁸⁹ the Seventh Circuit held that service by Federal Express does *not* constitute “mailing” under this Rule, and that such service is insufficient to confer personal jurisdiction.⁹⁰ With little discussion, the court simply reasoned that the Rule speaks of “mailing” in the terms of “first class mail,” and concluded that “Federal Express is not first class mail.”⁹¹

In the same decision, the Seventh Circuit also held that service was defective under Rule 4(c)(2)(C)(ii) because no acknowledgment form had ever been filed with the district court clerk.⁹² The court observed that the rule “in this and other circuits is that service by mail is not complete until an acknowledgment form is filed with the court.”⁹³ Despite the defendant’s knowledge of the suit, service was not complete or effective under Rule 4(c)(2)(C)(ii) until that form—acknowledging the defendant’s receipt of service—was filed.⁹⁴

It is possible that this acknowledgment filing requirement does not apply where the plaintiff serves under Rule 4(c)(2)(C)(i), which allows service under the forum-state’s service provisions. Indiana’s Trial Rules 4.1 and 4.6 allow individuals and organizations to be served by registered or certified mail, and Indiana Trial Rule 4.11 then provides that the return shall be filed by the clerk. It is at least arguable that when Indiana’s service rules are utilized for service under Federal Rule of Civil Procedure 4(c)(2)(C)(i), the mere filing of the certified mail return receipt card—without the separate federal Form 18-A acknowledgement form—constitutes the last step of service. Both measures appear aimed

88. FED. R. CIV. P. 4(c)(2)(C)(ii).

89. 957 F.2d 406 (7th Cir. 1992).

90. *Id.* at 409.

91. *Id.*

92. *Id.*

93. *Id.* (quoting *Geiger v. Allen*, 850 F.2d 330, 332 n.3 (7th Cir. 1988)).

94. *Id.* at 409. This holding is initially consistent with Rule 4(g), which requires the person serving the process to make proof of service to the court promptly “and in any event within the time during which the person served must respond to the process.” Rule 4(g) further states that if service is made under subdivision (c)(2)(C)(ii) of this rule, “return shall be made by the sender’s filing with the court the acknowledgment form received pursuant to such subdivision.” The next sentence of Rule 4(g), however, then states that “[f]ailure to make proof of service does not affect the validity of service.”

It is unclear what role, if any, Rule 4(g)’s last sentence plays in this equation. The *Audio Enterprises* court never mentioned it, and there is an apparent split of authority on this issue across the country. See generally 4A WRIGHT ET AL., *supra* note 28, § 1092.1, at 57 (and cases cited therein). It appears, however, that in the Seventh Circuit Rule 4(g) does not mean what it says.

at the same end, namely, proof of service. It should be noted that Magistrate Judge Cosbey has expressly held that when Indiana's service rules are used the mere filing of the return receipt card is sufficient.⁹⁵

It is this author's experience that this appears to be a common practice in federal court in Indiana. Indeed, both the Northern and Southern Districts of Indiana have local rules stating that in certain circumstances, filing of the return receipt card is *prima facie* proof of service.⁹⁶ To be safe, and in particular to avoid overlooking those instances when local rules do not speak to filing the return receipt card, plaintiffs might consider covering both bases by following the letter of Rule 4(c)(2)(C)(ii) and its acknowledgment form service and filing requirement, as well as by filing the proof of service under Rule 4(g) with the certified return receipt card. At the very least, plaintiffs should ensure that if Rule 4(c)(2)(C)(i)'s state-law method of service is used, the letter of Indiana Rule 4 is followed and the return receipt card is promptly filed.

In a related service of process case, the Seventh Circuit in *TSO v. Delaney*,⁹⁷ held that plaintiffs had failed to effect timely service within the 120-day limitation of Federal Rule of Civil Procedure 4(j) when they did not file the acknowledgment form in that time period.⁹⁸ The court reiterated that under Rule 4(c)(2)(C)(ii), service is not complete until the acknowledgment form is filed. Although Rule 4(j) excuses the failure to complete service within 120 days for "good cause," the court applied the Seventh Circuit's narrow standard for good cause under Rule 4(j), and held that the attorney's mere ignorance of the acknowledgment requirement was no excuse.⁹⁹

Thus, *TSO* teaches not only that plaintiffs must ensure that the defendants receive the summons and complaint within 120 days under one of Rule 4's prescribed methods of service, but also that plaintiffs must ensure that the proof of service—whether it be the acknowledgment form under Rule 4(c)(2)(C)(ii) or a return receipt card under Rule 4(c)(2)(C)(i)'s incorporation of Indiana's method of service, or both—*must* be filed with the clerk within 120 days as well. Thus, plaintiffs should diary this deadline, leaving sufficient time to effect alternative service and filing of proof of service if initial attempts at service are unsuccessful.

95. *Darlington Farms v. Springwater Cookies & Confections*, No. 91-228, slip op. at 6-9 (N.D. Ind. Nov. 7, 1991).

96. U.S. DISTRICT CT. RULES S.D. IND. R. 5.1(e); U.S. DISTRICT CT. RULES N.D. IND. R. 7(f).

97. 969 F.2d 373 (7th Cir. 1992).

98. *Id.* at 376.

99. *Id.*

In addition, *TSO* teaches that defendants interested in litigating such procedural issues should also diary the 120-day deadline, check the docket for proof of service, and, if plaintiff has omitted this last prerequisite for service, consider moving to dismiss. It is this author's experience, both in practice and while as a law clerk in federal court, that the filing of such proof of service is often forgotten by plaintiffs. In order to preserve such a defective service claim, defendants would need to raise the issue by a motion to dismiss under Rule 12(b)(5) with their first responsive pleading, even though that would ordinarily occur before the 120 days had expired.

IV. SPECIFICITY OF PLEADING

Federal Rules of Civil Procedure 8 and 9 speak to the requisite level of pleading, a subject that continues to generate reported decisions. Rule 8 simply requires a "short and plain statement" of the basis for jurisdiction and of the claim presented, plus a demand for judgment for the relief sought. Despite this liberal standard, defendants often attack plaintiffs' complaints as insufficiently specific.

In *Daniels v. USS Agri-Chemicals*,¹⁰⁰ for instance, the defendant sought dismissal of one of the plaintiff's claims on the grounds that the plaintiff improperly sought to press a claim based on Illinois's wrongful death statute rather than Indiana's, which actually applied. The court explained that all that is required is notice pleading, with only the operative facts. The court added:

Neither federal nor Indiana pleading rules require the complaint to include even a theory of the case, much less the statutory basis for recovery. Moreover, specifying an incorrect theory is not fatal. Complaints are to be construed liberally; the court should ask whether relief is possible under any set of facts that could be established consistent with the allegations. This approach is consistent with the purpose of the complaint under a notice pleading system, which is to advise the other party of the event being sued upon.¹⁰¹

In *Brownlee v. Conine*,¹⁰² the Seventh Circuit similarly explained the liberal standards of notice pleading, though with some apparent sarcasm towards the district judge who had dismissed a prisoner's claim as "conclusory" and "stale." After calling this basis of dismissal "not a very happy formula," Judge Posner explained that the Federal Rules

100. 965 F.2d 376 (7th Cir. 1992).

101. *Id.* at 381 (citations and quotations omitted).

102. 957 F.2d 353 (7th Cir. 1992).

establish a system of notice pleading rather than fact pleading, "so the happenstance that a complaint is 'conclusory,' whatever exactly that overused lawyers' cliché means, does not automatically condemn it."¹⁰³ In civil-rights cases, all the complaint need do is "outline or adumbrate"¹⁰⁴ a violation of the statute or constitutional provision upon which the plaintiff relies, and connect the violation to the named defendants."¹⁰⁵

Judge Posner then turned to the staleness dismissal, writing, "[a]s for 'staleness,' that is a more disabling criticism of a bread than of a complaint, unless by this term the district judge meant barred by the statute of limitations."¹⁰⁶ Because some of the prisoners' claims were clearly not time-barred, the dismissal on this basis was also reversed.¹⁰⁷

Rule 9(b), by contrast, requires averments of fraud or mistake be stated with particularity. In *Uni*Quality v. Infotronx*,¹⁰⁸ the Seventh Circuit addressed Rule 9(b) in the context of a plaintiff's attempt to show a continuous pattern of racketeering activity. After the Supreme Court's decision in *H.J. Inc. v. Northwestern Bell Telephone*,¹⁰⁹ a Racketeer Influenced and Corrupt Organizations Act (RICO)¹¹⁰ claim requires a pattern of related and continuous predicate acts, and those extending over a few weeks or months and threatening no future criminal conduct do not satisfy the continuity requirement.¹¹¹ The plaintiff in *Uni*Quality* was able to show only one scheme by the defendant lasting at most seven to eight months, and the Seventh Circuit held that this was insufficient under *Northwestern Bell*.¹¹²

In a further effort to show a pattern of continuing racketeering activity, plaintiff also argued that the defendant engaged in similar acts with third parties. However, the only specific allegation was that defendant hired other companies and "upon information and belief none of those companies has been paid in full."¹¹³ Such pleading, the Seventh Circuit held, fails Rule 9(b)'s particularity standard, which requires plaintiff to plead the "who, what, when and where" of the alleged

103. *Id.* at 354.

104. Judge Posner's term, not the author's, who must confess prior ignorance of the term.

105. *Id.* (citations omitted).

106. *Id.*

107. *Id.* In closing, Judge Posner added, "Most prisoner civil rights cases are frivolous, but district judges, busy as they are, must not assume that all are and dismiss them by rote. They may not throw out the haystack, needle and all." *Id.* at 355.

108. 974 F.2d 918 (7th Cir. 1992).

109. 492 U.S. 229 (1989).

110. 18 U.S.C. §§ 1961-68 (1988).

111. *Id.* at 236-43.

112. *Uni*Quality*, 974 F.2d at 922.

113. *Id.* at 923.

fraud.¹¹⁴ It is true, the court said, that where a plaintiff is alleging fraud against a third party, less detail may be required because the plaintiff may not have access to all facts.¹¹⁵ In this case, however, the allegations amounted to nothing more than claims that the defendant did not pay its bills.

Finally, the court explained that Rule 9(b) served its "important purpose" here:

Accusations of fraud can seriously harm a business. This is especially so in RICO cases where those accusations of fraud lead to the probably more damaging accusation that the business engaged in 'racketeering.' Rule 9(b) ensures that a plaintiff have some basis for [its] accusations of fraud before making those accusations[,] and thus discourages people from including such accusations in complaints simply to gain leverage for settlement or for other ulterior purposes.¹¹⁶

V. FILING — RULE 5

Effective December 1, 1991, Federal Rule of Civil Procedure 5(e) was amended to limit the power of clerks to reject tendered filings. Amended Rule 5(e) now contains the following statement: "The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices." This is a significant change, because previously the clerks and their deputies—typically nonlawyers without extensive training in the Federal Rules—could reject filings if they believed they did not comply with some rule or standing order. Indeed, even the Southern District of Indiana's current local rules, adopted on February 1, 1992, purport to allow the clerk to reject a filing that is not signed by an attorney under Federal Rule 11.¹¹⁷

The change in Rule 5(e) does not prohibit judges, of course, from striking or prohibiting filings, for the rule speaks only to clerks. Indeed, in one recent case from the Northern District of Illinois, Judge Lindberg struck a motion that the clerk had properly accepted for filing for the

114. *Id.* This includes the "identity of the person making the representation, the time, place, and content of the misrepresentation, and the method by which the misrepresentation was communicated to the plaintiff." *Id.*

115. *Id.*

116. *Id.* at 924.

117. U.S. DISTRICT CT. RULES S.D. IND. R. 5.1(b). This local rule is thus in need of amendment as it conflicts with FED. R. CIV. P. 5(e). A suitable amendment would be to allow a judge to strike any such filing.

simple reason that the motion was not bound at the top and exceeded fifteen pages, both violations of that court's local rules.¹¹⁸

The lessons are two fold. First, practitioners should know the local rules of the courts in which they practice. Failure to comply with local rules—particularly in the Northern District of Illinois—can be devastating. Second, attorneys and those who file papers for them must be aware that clerks cannot refuse their filings. Many filings, of course, are made on the last day possible, and practitioners cannot jeopardize their cases by a clerk's unfamiliarity with Rule 5(e). If a deputy clerk does refuse a filing, Rule 5(e) should be stressed. If that fails, the actual clerk of the court should be consulted, and then a magistrate or district judge. If these measures fail, the tendered filing should at least be marked by the clerk's office as tendered on that date. Whatever defect concerned the clerk should then be promptly corrected with a subsequent filing.

VI. AMENDMENT OF PLEADINGS — RULE 15

Federal Rule of Civil Procedure 15(a) allows amendments to pleadings as of right any time before a responsive pleading is served. Otherwise a pleading can only be amended with the opponent's consent or with leave of the court, which is to "be freely given when justice so requires."¹¹⁹ Rule 15(c) then deals with relation back of amendments. Several decisions addressing amendments are highlighted below:

- (1) A district judge abused his discretion in allowing a defendant to amend its answer more than three years after it was originally filed to add the affirmative defense of exhaustion of remedies.¹²⁰
- (2) The Seventh Circuit held that the December 1, 1991, amendments to the relation-back provisions of Rule 15(c)(3) do not apply retroactively.¹²¹
- (3) In a case where a civil-rights plaintiff originally named "unknown officers," and then named specific officers in an amended complaint after the limitations period, the amendment did not relate back because—although the individual defendants had notice of the initial suit within 120 days of its filing as required by Rule 15(c)—there was no "mistake" on the plaintiff's part as to the officers' identity as the Seventh Circuit requires;

118. *Transamerica Corp. v. National Union Fire Ins.*, 143 F.R.D. 189 (N.D. Ill. 1992).

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

120. *Daughterity v. Traylor Bros., Inc.*, 970 F.2d 348, 351-53 (7th Cir. 1992).

121. *Diaz v. Shallbetter*, 984 F.2d 850 (7th Cir. 1993).

instead, the plaintiff simply did not know who they were.¹²²

(4) In a federal action, including one based on diversity, the federal version of Rule 15(c) rather than a state's version governs the relation-back issues.¹²³

Finally, in a civil-rights action involving several Indianapolis police officers, Judge Tinder ruled that an amendment related back where the original complaint incorrectly named officer "Jeff King" as a defendant, the actual defendant was officer "John King," and officer John King had notice of the action.¹²⁴

In so doing, Judge Tinder observed that defense counsel was present when one of his other clients incorrectly testified in a deposition that officer *Jeff* King was involved, and that defense counsel filed the deposition knowing this to be false without correcting the error. Judge Tinder further noted that defense counsel did not move to dismiss the pending claim against Jeff King, who had nothing to do with the incident in question. Judge Tinder observed that, in the abstract, attorneys may have no duty to inform opponents that they have misidentified the proper defendant. In this case, however, defense counsel's conduct of not correcting the erroneous deposition testimony and not dismissing the improper defendant revealed tactics of an "unseemly color."¹²⁵

VII. PRELIMINARY INJUNCTION STANDARDS

In *Abbott Laboratories v. Mead Johnson & Co.*,¹²⁶ a panel of the Seventh Circuit went to great lengths to clarify the standards for evaluating a request for a preliminary injunction. After noting that "con-

122. *Id.* at 834-35 (citing *Wood v. Worachek*, 618 F.2d 1225, 1230 (7th Cir. 1980); *Rylewicz v. Beaton Servs.*, 888 F.2d 1175, 1181 (7th Cir. 1989)). Chief Judge Mihm offered a well-reasoned criticism of this line of authority, observing that in his view the "mistake" language of Rule 15(c)(3) does not create a new, separate prerequisite for relation back. The focus, he stated, should be on notice to the defendant, and not on what state of mind (ignorance or mistake) brought about the initial failure to name the defendant. He further noted that a complaint that names unknown officers puts the actual defendants on some notice that they might be sued, whereas a complaint with a mistakenly named defendant does not assist the actual parties involved in knowing that they might be sued. Judge Mihm's analysis is commendable, and for plaintiffs stuck in this untenable position, should be advanced at the district court and on to the Seventh Circuit in an effort to change the standard.

123. *Worthington*, 790 F. Supp. at 835-37 (citing *Lewellen v. Morley*, 875 F.2d 118 (7th Cir. 1989)).

124. *Owens v. Mills*, No. IP91-012-C (S.D. Ind. Nov. 6, 1991) (order granting leave to amend complaint).

125. *Id.*, slip op. at 20 n.10.

126. 971 F.2d 6 (7th Cir. 1992).

fusion persists” among the bar on this subject, the court outlined the following basic standard:

As a threshold matter, a party seeking a preliminary injunction must demonstrate (1) some likelihood of succeeding on the merits, and (2) that it has ‘no adequate remedy at law’ and will suffer ‘irreparable harm’ if preliminary relief is denied. If the moving party cannot establish either of these prerequisites, a court’s inquiry is over and the injunction must be denied. If, however, the moving party clears both thresholds, the court must then consider: (3) the irreparable harm the non-moving party will suffer if preliminary relief is granted, balancing that harm against the irreparable harm to the moving party if relief is denied; and (4) the public interest, meaning the consequences of granting or denying the injunction to non-parties.¹²⁷

Writing for the panel, Judge Flaum then observed that the trial court “weighs” all four factors, “seeking at all times to minimize the costs of being mistaken.”¹²⁸ Under this “sliding scale” approach, “the more likely it is the plaintiff will succeed on the merits, the less the balance of irreparable harms need weigh towards its side; the less likely it is the plaintiff will succeed, the more the balance need weigh toward its side.”¹²⁹ Thus, Judge Flaum explained, it is *not* true that if the balance of irreparable harms tips towards the defendant, the preliminary injunction must be denied regardless of the strength of plaintiff’s case on the merits.¹³⁰

Concerning the “public interest” inquiry, Judge Flaum rejected the characterization that the movant must show that the injunction would not harm the public interest. Although there is at least support for such a statement from prior Seventh Circuit dictum, the panel in *Abbott Laboratories* “question[ed] whether it accurately characterizes the law of the circuit.”¹³¹ Rather than a dispositive requirement that the public interest not be harmed, Judge Flaum described the public interest analysis as “one factor courts must consider in weighing the equities; it is not dispositive.”¹³²

127. *Id.* at 11-12 (citations omitted).

128. *Id.* at 12 (quotation omitted).

129. *Id.*

130. *Id.* at 12 n.2.

131. *Id.* n.3 (citing *Brunswick Corp. v. Jones*, 784 F.2d 271, 274 n.1 (7th Cir. 1986)).

132. *Id.*

The panel then illustrated the application of its understanding of the public interest prong, writing:

Suppose, to take a simple example, that the balance of harms tips significantly in plaintiff's favor, that plaintiff has an overwhelming chance of succeeding on the merits, but that granting the injunction would ever so slightly impair the public interest (e.g., by removing one of ten products from a given product market). In this instance, preliminary relief would be proper even though it might harm the public interest.¹³³

Finally, Judge Flaum observed that the entire balance can often turn on the nature of the available preliminary relief. For instance, in *Abbott Laboratories* the parties and the district court had addressed the preliminary injunction as an all-or-nothing proposition: either the product would be removed from the market to avoid trademark problems or it would remain on the market. On appeal, the Seventh Circuit saw other options, such as leaving the product on the market but ordering the alleged infringing practices (deceptive advertising, etc.) to cease and desist.¹³⁴ The court explained:

[T]he district court's analysis suffered from its near exclusive focus upon the most drastic remedies requested by Abbott (e.g., 'product recall) to the exclusion of less severe remedies (e.g., corrective advertising). This focus, we learned at argument, resulted from the district court's decision to adopt, nearly verbatim, the proposed findings . . . submitted by the parties; . . . Each party . . . tried to hit a home run . . . [and] [n]either offered alternative conclusions that steered a reasonable middle ground. So, when it came time for the court to assess the impact upon the parties and the public of granting or denying preliminary relief, the court considered only the impact of either granting the most severe relief or shutting [plaintiff] out altogether.¹³⁵

The Seventh Circuit commented that when counsel draft proposed conclusions for preliminary injunctions, they "should bear in mind a crucial observation . . . : courts retain a great deal of flexibility when fashioning preliminary relief, and the equities weighed under the four-part preliminary injunction standard can shift as the nature of that relief varies."¹³⁶ Although the panel recognized the widespread practice of

133. *Id.*

134. *Id.* at 17-18.

135. *Id.* at 22-23.

136. *Id.* at 23 (citations omitted).

“busy district courts” to adopt many or most of the parties’ proposed findings, it noted that “district judges also should bear in mind our observations regarding the nature of preliminary relief, and, when presented with proposed findings and conclusions that hug the extremes, consider developing alternatives of their own.”¹³⁷

Thus, *Abbott Laboratories* is essential reading for any practitioner involved in preliminary injunction proceedings. The decision clarifies the analysis, and recommends that practitioners and district judges consider middle-of-the-road compromises in addressing these difficult issues. For a plaintiff that truly wants the home run, such as pulling an offending product off the market, this is probably bad news. On the other hand, those resisting such a motion can offer compromise solutions that allow their clients to keep their products on the market, for instance, though perhaps with some ameliorating, interim steps such as different advertising or labeling.

VIII. DISCOVERY

Several significant discovery developments are highlighted below:

(1) In a case of first impression in the Seventh Circuit, Judge Easterbrook held in *Reise v. Board of Regents*,¹³⁸ that a district court’s order requiring a plaintiff to submit to an examination under Federal Rule of Civil Procedure 35 is *not* a final decision appealable under 28 U.S.C. § 1291, nor does it fall under the “collateral order” exception allowing immediate appeal.¹³⁹ The Seventh Circuit declined to follow a Fifth Circuit decision to the contrary, and succinctly summarized the many reasons why such discovery orders are not immediately appealable.¹⁴⁰

(2) Also in a case of first impression in the Seventh Circuit, Judge Brooks held that an expert who will testify only as to historical facts—and not in any way as to matters acquired or developed in anticipation of litigation—is *not* covered by Federal

137. *Id.*

138. 957 F.2d 293 (7th Cir. 1992).

139. *Id.* at 294-95.

140. *Id.* at 294-96 (refusing to follow *Acosta v. Tenneco Oil Co.*, 913 F.2d 205 (5th Cir. 1990)). After *Reise*, a plaintiff ordered to submit to an examination has two options: submit to the examination and bring the matter up with the final judgment, or refuse to submit to the examination, taking the risk of sanctions under Rule 37, such as striking of the claims for the physical or mental damages for which the exam was ordered. As Judge Easterbrook explained, “[R]equiring the complaining part[ies] to take some risk—to back up [their] belief with action—winnows weak claims. Only persons who have *substantial* objections to the examination and believe their legal positions strong will follow a path that could end in defeat.” *Id.* at 295-96.

Rule of Civil Procedure 26(b)(4), and thus *may* be interviewed *ex parte* by opposing counsel.¹⁴¹ The opinion emphasizes that the plaintiff, in seeking a protective order, failed to come forth with any evidence showing that the experts would testify concerning anything other than historical facts. In addition, the opinion implicitly suggests that if the expert has mixed historical facts and matters prepared in anticipation of litigation, Rule 26(b)(4) probably does apply, and interrogatories and a possible deposition are the only way to talk with that expert.

(3) In a detailed opinion, Magistrate Judge Foster held that documents developed by an insurer to evaluate an insured's claim in the regular course of business are not work-product.¹⁴² Documents prepared in the ordinary course of business prior to denial of a claim are presumed not to be work product, while matters prepared after denial of a claim are presumed to be work product. In both instances the presumptions can be rebutted by specific evidence.¹⁴³

(4) A personal-injury plaintiff sought to compel the deposition of a Kansas individual defendant in Indiana. After noting the general rule that such defendants may insist on being deposed in their home district, Magistrate Judge Rodovich required the defendant to travel to Indiana to be deposed, primarily because his defense lawyer had delayed for more than a year in scheduling the deposition and discussing plaintiff's proposal to split the cost of bringing the defendant to Indiana.¹⁴⁴

(5) Judge Miller ordered Tom Monaghan, the owner and chief executive of Domino's Pizza, to submit to a deposition in a personal-injury case based on Domino's thirty-minute guarantee. Monaghan, a named defendant, had moved for summary judgment and resisted the deposition on the grounds that he was not personally liable and that other representatives could testify concerning the policy. Judge Miller held that Monaghan's summary judgment affidavit could be tested in the deposition, and that his role in the development of the policy was a proper subject of inquiry.¹⁴⁵ In addition, Judge Miller noted Monaghan's

141. *Abner J. Horrall & Sons v. Petoseed Co.*, No. TH89-269-C (S.D. Ind. Sep. 22, 1992) (order denying motion for protective order).

142. *Harper v. Auto-Owners Ins.*, 138 F.R.D. 655, 663 (S.D. Ind. 1991).

143. *Id.* Judge Foster further held that he requires a "Vaughn index" outlining, for each document withheld on privilege or immunity, the author, recipient, their capacities, its subject matter, and a specific explanation of why the document is privileged or immune. *Id.* at 664.

144. *Undraitis v. Luka*, 142 F.R.D. 675, 677 (N.D. Ind. 1992).

145. *Wauchop v. Domino's Pizza*, 143 F.R.D. 199, 202 (N.D. Ind. 1992).

pattern of delaying and frustrating discovery, which seems to have been taken into account in ordering the executive's deposition.¹⁴⁶

(6) Magistrate Judge Pierce imposed sanctions on plaintiff's counsel for instructing his client not to answer certain questions and then unilaterally terminating the deposition upon the mistaken belief that, because he had declined to cross-examine the deponent, the opposing parties were precluded from asking further questions. Judge Pierce observed that depositions are not limited to the strict sequence followed at trial, and that under Rule 30(c), except where a question calls for privileged information, it is *improper* for counsel to instruct a deponent not to answer.¹⁴⁷

IX. SUMMARY JUDGMENT

Several key decisions addressed summary judgment practice. For instance, in *Porter v. Whitehall Laboratories*,¹⁴⁸ Judge Tinder addressed the issue of the sufficiency of expert testimony at summary judgment. Plaintiff alleged that ibuprofen was the legal cause of his acute renal failure. Defendants moved for summary judgment, and plaintiff responded by proffering expert testimony. After noting Federal Rule of Civil Procedure 56(c)'s command that only admissible evidence can be used at summary judgment, the court found the experts' testimony inadmissible because it was not based on facts, but instead merely on subjective speculation.¹⁴⁹

Judge Tinder observed that every expert in the case agreed there was no scientific data showing a causal link between ibuprofen and renal failure. Instead, the experts—though well qualified—offered “a mere possibility of an unsupported and therefore hypothetical explanation for the acute renal failure.”¹⁵⁰ The following lengthy passage is particularly instructive:

Merely because an opinion of scientific causation comes from a person learned in medical science does not provide that opinion

146. *Id.* at 205.

147. *Smith v. Logansport Community Sch. Corp.*, 139 F.R.D. 637 (N.D. Ind. 1991). Judge Pierce confirmed that once a deposition is commenced, protection against abuse is afforded under Rule 30(d), which permits the court to enter a protective order once a party has shown that the deposition is being conducted in bad faith or to annoy, embarrass, or oppress the witness. If these conditions exist, counsel should suspend the deposition, state any complaints on the record, and immediately apply for protection under Rule 30(d). Judge Pierce stressed, however, that those who terminate a deposition risk sanctions if the motion lacks a substantial basis. *Id.* at 640.

148. 791 F. Supp. 1335 (S.D. Ind. 1992).

149. *Id.* at 1342-44.

150. *Id.* at 1344.

with a sufficient scientific basis. An expert cannot rely solely on his or her own stature, intellect or intuition to support an opinion The basis—the ‘reasoning’ *and* ‘facts and data’—of an opinion is distinct from the expert’s qualifications as an expert in the field. An expert’s qualifications reflect the expert’s knowledge of relevant scientific facts and skill in making comparative judgments. The factual basis of a particular medical conclusion is composed of an application of particular scientific facts to particular data about the instant case. Admissible opinions relate instant facts to known relationships; an opinion relating instant facts to an unknown relationship (a hypothesis) does not further the trier of fact’s ability to determine a fact dependent upon that hypothetical relationship. Although experts may provide opinions in the form of a hypothetical fact *situation*, the scientific foundation or reasoning process may not be based on merely hypothetical causal *relationships*. Unsupported subjective opinion is unhelpful speculation and not admissible under [Federal Rule of Evidence] 702.¹⁵¹

The *Porter* analysis applies at trial as well as summary judgment, but is more likely to confront practitioners at summary judgment, both because there are simply more summary judgment motions than trials, and because experts often are not fully prepared at the summary judgment stage. Practitioners should be alert to *Porter* and similar cases,¹⁵² and must ensure that more than just qualifications and an opinion are offered at summary judgment (and any deposition prior thereto). The crucial link of competent, specific facts supporting the opinion must also be present.

A number of other important summary judgment decisions are highlighted below:

- (1) Argument or speculation is insufficient to resist summary judgment.¹⁵³
- (2) Where a summary judgment affidavit contains inadmissible material that is inextricably combined with the admissible portions, the court may disregard the entire affidavit.¹⁵⁴

151. *Id.* at 1345.

152. *See, e.g.,* *Mid-State Fertilizer v. Exchange Nat’l Bank*, 877 F.2d 1333, 1339 (7th Cir. 1989) (rejecting expert opinion unsupported by specific facts).

153. *Scherer v. Rockwell Int’l*, 975 F.2d 356, 361 (7th Cir. 1992) (“Argument is not evidence upon which to base a denial of summary judgment.”); *Karazanov v. Navistar Int’l Transp.*, 948 F.2d 332, 337 (7th Cir. 1991) (nonmovant cannot ward off summary judgment “with an affidavit or deposition based on rumor or conjecture”).

154. *Gonzales v. North Township*, 800 F. Supp. 676, 680 (N.D. Ind. 1992).

(3) Issues of fact cannot be created by contradicting prior sworn testimony.¹⁵⁵

(4) An affidavit that contained nothing more than conclusory legal arguments was properly excluded because merely attaching a jurat to a statement does not make it competent evidence for summary judgment.¹⁵⁶

(5) When a party moves for summary judgment against a pro se litigant, separate notice must be given to the nonmovant explaining the need to respond to the motion, including both the text of Federal Rule of Civil Procedure 56(e) and an explanation of the rule in ordinary English. Prior law in the Seventh Circuit had expressly required such notice only to pro se prisoners.¹⁵⁷

(6) The mere existence of a factual dispute is not sufficient to bar summary judgment; the disputed fact must be outcome determinative.¹⁵⁸

(7) Litigants continue to ignore local rules at summary judgment, and when they do, the facts stated by the nonmovant can be and often will continue to be taken as true, particularly in the Northern District of Illinois.¹⁵⁹

(8) A party that has not been diligent in discovery may not use Federal Rule of Civil Procedure 56(f) to gain additional time to conduct discovery to oppose summary judgment. Thus, when a plaintiff filed suit in December, 1990, and then did not depose the defendant or anyone else during the sixteen months preceding the defendant's motion for summary judgment, Judge Miller denied the plaintiff's motion under Rule 56(f) to conduct new discovery.¹⁶⁰

(9) Summary judgment cannot be granted on a basis not urged by the movant, and cannot be granted by surprise without opportunity to respond.¹⁶¹

X. TRIAL

One of the most perplexing issues for lawyers trying jury cases is the scope of the peremptory challenge, of which each party gets three

155. *Essick v. Yellow Freight Sys.*, 965 F.2d 334, 335 (7th Cir. 1992).

156. *Resolution Trust Corp. v. Juergens*, 965 F.2d 149, 152-53 (7th Cir. 1992).

157. *Timms v. Frank*, 953 F.2d 281, 283-86 (7th Cir. 1992).

158. *Allstate Ins. v. Norris*, 795 F. Supp 272, 274 (S.D. Ind. 1992).

159. *Schulz v. Serfilco, Ltd.*, 965 F.2d 516, 519 (7th Cir. 1992); *Wienco, Inc. v. Katahn Assocs.*, 965 F.2d 565, 567-68 (7th Cir. 1992).

160. *CBS v. Henkin*, 803 F. Supp. 1426, 1430-32 (N.D. Ind. 1992).

161. *Edwards v. Honeywell, Inc.*, 960 F.2d 673, 674 (7th Cir. 1992); *Peckmann v. Thompson*, 966 F.2d 295, 298 (7th Cir. 1992).

in a federal civil case.¹⁶² Since the Supreme Court's decisions in *Batson v. Kentucky*¹⁶³ and *Edmonson v. Leesville Concrete*,¹⁶⁴ the available uses of the peremptory challenge have diminished drastically, while at the same time uncertainty over the permissible uses continues. The change has been profound, particularly when one considers that as late as 1989, a civil trial lawyer in the Seventh Circuit could use a peremptory challenge for *any* reason, including race, gender, age, ethnicity, or disability. Indeed, those were often the types of characteristics that figured into a peremptory strike. The following summary outlines this important issue.

The first question is what type of prospective juror is protected. In the Seventh Circuit, the *Batson* prohibition against the use of peremptory challenges on the basis of race has applied since 1990.¹⁶⁵ This became the law of the land in 1991 in the Supreme Court's *Edmonson* decision. What has been unclear is the scope of the prohibition against race-based challenges (*e.g.*, whether a white juror can be removed by a peremptory), and whether the *Batson* and *Edmonson* rules apply to protect members of other groups (*e.g.*, the elderly or women) from peremptory challenges.

Some of the cases suggest that only members of a minority group are protected from such challenges. For instance, Judge Tinder stated in one opinion that "[i]t is the striking of a single black juror [or member of another racial minority] for racial reasons that invokes the shelter of the Equal Protection clause."¹⁶⁶ On the other hand, others use broader terms such as a "cognizable racial group."¹⁶⁷ And, in late 1992, the Louisiana Supreme Court held that a racially motivated peremptory challenge cannot be used by a black criminal defendant to exclude white jurors.¹⁶⁸

Neither the Supreme Court nor the Seventh Circuit has delineated the contours of race-based peremptories, although the Supreme Court's most recent opinion in *Georgia v. McCollum*¹⁶⁹ included broad language that "denying a person participation in jury service on account of . . .

162. 28 U.S.C. § 1870 (1988). When there are multiple plaintiffs or defendants, this statute provides, "Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly." *Id.*

163. 476 U.S. 79 (1986).

164. 111 S. Ct. 2077 (1991).

165. *Dunham v. Frank's Nursery & Crafts*, 919 F.2d 1281, 1288 (7th Cir. 1990).

166. *Cotton v. Basic*, 793 F. Supp. 191, 193 (S.D. Ind. 1992) (quoting *United States v. Ferguson*, 935 F.2d 862, 865 (7th Cir. 1991)) (bracketed language inserted by district court).

167. *Dunham*, 919 F.2d at 1283.

168. *Louisiana v. Knox*, 609 So. 2d 803, 806 (La. 1992).

169. 112 S. Ct. 2348 (1992).

race unconstitutionally discriminates against the excluded juror.”¹⁷⁰ The trend has been toward further restrictions on the use of peremptories, so until there is binding authority on the issue, practitioners should not exclude jurors of *any* race on the basis of their race.¹⁷¹

Beyond race-based inquiries, the courts are now dealing with gender-based peremptories. For instance, the Ninth Circuit has ruled in a criminal case that peremptory challenges cannot be based on gender.¹⁷² As this Article went to press, the Seventh Circuit had not addressed this issue. However, because district courts in this circuit are required to give most respectful consideration to decisions of other circuits and follow their decisions where appropriate,¹⁷³ practitioners in the Seventh Circuit should assume that gender-based peremptories are illegal.

Beyond race and gender, the scope of prohibited group-based peremptories remains unclear. Age, disability, religion, and other such characteristics are likely candidates for further expansion. Indeed, in *McCullum* the Supreme Court’s majority seemed to write with a broad pen, stating that if a court “allows jurors to be excluded because of *group bias*, it is a willing participant in a scheme that could only undermine the very foundation of our system of justice—our citizens’ confidence in it.”¹⁷⁴

Again, caution is the watchword here, because certainly no trial lawyers want their judgments to be set aside based on an improper peremptory challenge. Thus, practitioners are advised to be particularly careful in striking members of “groups” defined by race, gender, age, religion, and disability, and ensure that there is a specific nondiscriminatory reason for the strike.

The second question is who can raise the issue. In 1990, the answer was that the complaining litigant had to be a member of the same group as the challenged juror.¹⁷⁵ This changed in 1991, when the Supreme Court made it clear in the criminal context, and subsequently applied it in the civil context, that *any* opponent can raise the issue, regardless of whether they are in the same group as the challenged juror.¹⁷⁶

170. *Id.* at 2353.

171. It seems amazing that this whole area, which purportedly is based on the Equal Protection Clause, could ever reach white jurors, at least under traditional equal protection analysis (suspect-class inquiries). Nonetheless, because the trend seems to be in that direction, caution must be the watchword. As Justice Thomas noted in his *McCullum* concurring opinion, the Supreme Court’s analysis has “no clear stopping point.” *Id.* at 2360 (Thomas, J., concurring).

172. *United States v. De Gross*, 960 F.2d 1433, 1438 (9th Cir. 1992) (en banc).

173. *See, e.g., Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1123 (7th Cir. 1987).

174. *McCullum*, 112 S. Ct. at 2354 (emphasis added).

175. *Dunham v. Frank’s Nursery & Crafts*, 919 F.2d 1281, 1283 (7th Cir. 1990).

176. *See Powers v. Ohio*, 111 S. Ct. 1364 (1991) (criminal); *Edmonson v. Leesville*

The third question is how the issue is raised, and what standards apply. To begin with, it should come as no surprise that—like any other trial-based error—the issue must be timely raised. Thus, where the issue was not raised until after the challenged jurors had been excluded and the jury had been sworn, the Ninth Circuit held that any claimed error had been waived.¹⁷⁷ Trial lawyers should thus raise any such objection at side-bar the moment the peremptory is used.

When such an objection is raised, the standards for addressing it are now quite clear:

First, the [objecting party] must make a prima facie showing that the [striking party] has exercised peremptory challenges on the basis of race. Second, if the requisite showing has been made, the burden shifts to the [striking party] to articulate a race-neutral explanation for striking the jurors in question. Finally, the trial court must determine whether the [objecting party] has carried [its] burden of proving purposeful discrimination.¹⁷⁸

Although this approach was formulated in the criminal context, the Supreme Court has stated that the “same approach applies in the civil context.”¹⁷⁹

The first inquiry—whether the objecting party has shown a prima facie case of discriminatory striking—is satisfied “by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.”¹⁸⁰ Such a vague, general standard is of little help in the abstract, but fortunately some case law provides further guidance. Judge Tinder, for instance, has explained that “the striking of a single black prospective juror *without more* is not sufficient to establish a prima facie case that the potential juror was struck for racial reasons.”¹⁸¹ Thus, where one black juror and one white juror were stricken, and where no other evidence suggested race played a part in the challenge to the black juror, Judge Tinder held that no prima facie case of discrimination

Concrete Co., 111 S. Ct. 2077, 2088 (1991) (civil). Note that each case specifically dealt with race-based challenges, with the specific holding of *Powers* being that one does not have to be a black to challenge the exclusion of a black juror. Assuming that other groups are, in fact, protected by *Edmonson* and its progeny, there is no reason to believe that a man, for instance, could not similarly object to a woman’s gender-based exclusion from a jury.

177. *Dias v. Sky Chefs, Inc.*, 948 F.2d 532, 534 (9th Cir. 1991).

178. *Dunham v. Frank’s Nursery & Crafts*, 967 F.2d 1121, 1123-24 (7th Cir. 1992) (quoting *United States v. Hernandez*, 111 S. Ct. 1859, 1866 (1991)).

179. *Edmonson*, 111 S. Ct. at 2089.

180. *Batson v. Kentucky*, 476 U.S. 79, 94 (1986).

181. *Cotton v. Busic*, 793 F. Supp. 191, 193 (S.D. Ind. 1992) (citing *Batson*, 476 U.S. at 96).

had been made.¹⁸² Similarly, the Seventh Circuit found no prima facie case of discrimination where two of four black members of the venire were stricken.¹⁸³ Thus, those raising a *Batson/Edmonson* objection must do so immediately, and must offer more than just the mere striking of a single prospective juror.

Assuming the prima facie case of discrimination is made, the burden shifts to the striking party, who must offer a neutral justification that is not "an obvious mask" for an improper challenge.¹⁸⁴ If the explanation survives this test, then it is for the trial court to determine whether the objecting party has proved purposeful discrimination.¹⁸⁵ This is a factual finding for the trial court, and one which will often turn purely on the striking attorney's credibility.¹⁸⁶ For instance, in one case Judge Tinder believed defense counsel's proffered reasons in a civil-rights case that the juror had been excluded because of his demeanor, his low-paying job, and his residence near the location of the underlying incident.¹⁸⁷

The case law in this area no doubt will continue to develop, and many questions will be resolved. In the meantime, however, trial lawyers should assume that every peremptory challenge they make will be objected to on *Batson/Edmonson* grounds, and should prepare nondiscriminatory reasons for their strikes at the time they are made.¹⁸⁸ Conversely, trial lawyers also should be on the watch for their opponents' discriminatory challenges, particularly when the challenge concerns a juror thought to be ideal for the client's case. If a challenge is arguably discriminatory, an immediate objection at side-bar should be made.

XI. MISCELLANEOUS

Finally, a number of developments occurred in various subjects that are best highlighted in this catch-all miscellaneous category:

- (1) In a patent infringement case, copy costs of more than \$6,000 were denied to a prevailing party under Federal Rule of Civil Procedure 54(d) and 28 U.S.C. § 1920 because proof of the costs' necessity was not shown.¹⁸⁹
- (2) In one case, Judge Barker advised parties by written order that arguments should be made to the court by filing appropriate

182. *Id.* at 193.

183. *United States v. McAnderson*, 914 F.2d 934, 942 (7th Cir. 1990).

184. *Dunham v. Frank's Nursery & Crafts*, 967 F.2d 1121, 1124 (7th Cir. 1992).

185. *Id.*

186. *Id.*

187. *Cotton v. Busic*, 793 F. Supp. 191, 194 (S.D. Ind. 1992).

188. Indeed, in at least one case, *Watson v. Amedco Steel*, IP88-1329-C, Judge Barker raised the issue sua sponte.

189. *Arachnid, Inc. v. Valley Recreation Prods.*, 143 F.R.D. 192 (N.D. Ill. 1992).

documents with the clerk, rather than by sending letters to the judge.¹⁹⁰

(3) The President signed the Incarcerated Witness Fees Act of 1991 into law, amending 28 U.S.C. § 1821 and making prisoners ineligible for witness attendance fees.¹⁹¹

(4) The Seventh Circuit reiterated the rule that federal courts applying state law are not bound by decisions of lower or intermediate courts, but instead are duty bound to follow or predict how that state's high court would rule.¹⁹²

(5) The Seventh Circuit commented in dictum that the state-law interpretation of a district judge who has sat on the forum's appellate bench is "entitled to some weight."¹⁹³

(6) Concerning certification of state-law issues to the forum-state's high court, the Seventh Circuit held that fact-specific, particularized decisions that lack broad, general significance are not suitable for certification,¹⁹⁴ but in another case held that state court cases that provide tangential guidance as to how a state's high court would rule do not, without more, preclude certification.¹⁹⁵

(7) Remittitur proved invaluable to Black and Decker and the City of Indianapolis. Black and Decker persuaded the Seventh Circuit to reduce a punitive damages award in a products liability case from \$10 million to \$5 million,¹⁹⁶ and several Indianapolis police officers persuaded Judge Barker to enter judgment as a matter of law on several claims and otherwise order remittitur of a \$1.5 million civil-rights verdict to \$78,000.¹⁹⁷

190. *O.K. Sand & Gravel v. Martin Marietta Corp.*, IP90-1051-C (S.D. Ind. July 23, 1992) (order directing filing of the letters).

191. Pub. L. No. 102-417, 106 Stat. 2138 (1992). This overrides the Supreme Court's decision in *Demarest v. Manspeaker*, 111 S. Ct. 599 (1991).

192. *Smith v. Navistar Int'l Transp.*, 957 F.2d 1439, 1443 (7th Cir. 1992); *Eljer Mfg. v. Liberty Mut. Ins.*, 972 F.2d 805, 814 (7th Cir. 1992).

193. *Atlanta Int'l Ins. v. Yellow Cab*, 972 F.2d 751, 752 (7th Cir. 1992). This is contrary to the holding and spirit of *Salve Regina College v. Russell*, 111 S. Ct. 1217, 1221 (1991), in which the Supreme Court held that federal courts of appeal are to review district judges' determinations of state law de novo, even if that district judge has experience on the state bench.

194. *Woodbridge Place Apartments v. Washington Square Capital*, 965 F.2d 1429, 1434 (7th Cir. 1992).

195. *Doe v. American Nat'l Red Cross*, 976 F.2d 372, 374 (7th Cir. 1992).

196. *Ross v. Black & Decker*, 977 F.2d 1178 (7th Cir. 1992).

197. *Sanders v. City of Indianapolis*, IP89-480-C (S.D. Ind. Dec. 24, 1992).

Finally, the Seventh Circuit Committee on Civility issued its final report and recommendations during 1992.¹⁹⁸ In general, the Committee found that a civility problem does exist within the Circuit, particularly in the larger metropolitan areas. The Committee recommended that the Seventh Circuit adopt the Committee's detailed proposed standards of civility, which are common-sense, nonbinding guidelines seeking to improve lawyers' relations with other counsel, lawyers' relations with the courts, and judges' relations with each other. Judge McKinney and Judge Aspen served on the four-year committee, and are thus quite familiar with the report and the proposed standards. In addition, the report and standards have been circulated to all judges in the circuit.

It is rumored that some judges expect these proposed standards to be followed. Indeed, a review of the standards shows that this is the stuff of many discovery disputes, sanctions motions, and other collateral issues that detract from the merits of a case. Practitioners are advised to spend a few minutes reviewing the final report and proposed standards.¹⁹⁹

198. INTERIM REPORT OF THE COMM. ON CIVILITY OF THE SEVENTH FEDERAL JUDICIAL CIRCUIT, 143 F.R.D. 371 (1992).

199. FINAL REPORT OF THE COMM. ON CIVILITY OF THE SEVENTH FEDERAL JUDICIAL CIRCUIT, 143 F.R.D. 441 (1992).

