

# 1994 FEDERAL CIVIL PRACTICE AND PROCEDURE UPDATE FOR SEVENTH CIRCUIT PRACTITIONERS: A YEAR OF ADJUSTMENT

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## INTRODUCTION

Indiana practitioners litigating in federal court during 1994 experienced a year of adjustment to drastic changes imposed during 1993. With the sweeping revisions to the Federal Rules of Civil Procedure taking effect December 1, 1993, with local rules changes and civil justice reform plans in effect, and with numerous important decision from the Seventh Circuit and Indiana district courts, it has been no easy task for practitioners to keep informed. This Article analyzes these developments to assist Indiana attorneys in their federal civil litigation.

The subjects are presented in the order in which they often arise in litigation. As in past years, complex or difficult issues are thoroughly analyzed, while straightforward but novel developments are merely highlighted. For ease of future reference, the following table of contents outlines the subjects discussed:

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## I. SUBJECT-MATTER JURISDICTION

### A. *Consenting To Magistrate Judges*

In one of the more remarkable decisions of the year, the Seventh Circuit held that magistrate judges lack jurisdiction to try cases unless all parties expressly—not just

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implicitly—consent to the magistrate.<sup>1</sup> In *Mark I, Inc. v. Gruber*, the original parties to the action had signed consent forms agreeing to have a magistrate adjudicate the action. Two new defendants were added through amendment two years later. No one raised the issue of consent, and the new defendants never expressly consented to the magistrate.<sup>2</sup> A year later the magistrate tried the action, and one of the new defendants, Gruber, remained in the case at that point and participated in trial without objection. The magistrate found against Gruber, awarding plaintiff more than \$500,000.<sup>3</sup>

Gruber appealed on the merits. The Seventh Circuit, always scrupulous in its review of jurisdiction, raised the consent issue and ordered supplemental briefing. Not surprisingly, when “[o]ffered a belated opportunity to make his wishes known, Gruber . . . declined to consent.”<sup>4</sup> In line with prior Seventh Circuit authority holding that consent to a magistrate under 28 U.S.C. § 636(c) must be “on the record and unequivocal,”<sup>5</sup> the court held that the judgment had to be vacated and the action remanded to an Article III district judge. Writing for the panel, Judge Easterbrook noted that the consent “need not be in writing” as required in some courts,<sup>6</sup> but must be “explicit and on the record.”<sup>7</sup>

The *Gruber* decision seems overly technical, particularly given the simple language of the magistrate consent statute.<sup>8</sup> However, *Gruber* is consistent with the 1991 Seventh Circuit decision in *Jaliwala v. United States*,<sup>9</sup> in which an appeal from a \$160 million judgment was dismissed because an intervening party had not consented orally nor in writing to trial by the magistrate.

The practical lessons, of course, are that magistrate consents should be either: (1) in writing and filed, or (2) made in open court on the record. For counsel retained to appeal from an adverse judgment before a magistrate, the other lesson is to immediately check to ascertain that such consent was expressly obtained.

### B. Diversity Jurisdiction

Two Seventh Circuit decisions reinforce the importance of ensuring that diversity of citizenship is present for diversity cases. In *Dausch v. Rykse*,<sup>10</sup> the Seventh Circuit delayed reaching the merits of an appeal to ascertain if diversity existed. Plaintiffs had alleged diversity based on residence.<sup>11</sup> For diversity jurisdiction to exist, however, the parties' *citizenship* is what matters.<sup>12</sup> Because defective allegations of jurisdiction may

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1. *Mark I, Inc. v. Gruber*, 38 F.3d 369, 370 (7th Cir. 1994).

2. *Id.*

3. *Id.* at 370-71.

4. *Id.* at 371.

5. *Id.* at 370 (citing *King v. Ionization Int'l, Inc.*, 825 F.2d 1180, 1185 (7th Cir. 1987); *Lovelace v. Dall*, 820 F.2d 223, 226 (7th Cir. 1987)).

6. *E.g.*, *New York Chinese TV Programs, Inc. v. U.E. Enterprises*, 996 F.2d 21 (2d Cir. 1993).

7. *Gruber*, 38 F.3d at 371.

8. 28 U.S.C. § 636(c)(1) (1988 & Supp. 1994).

9. 945 F.2d 221, 223 (7th Cir. 1991).

10. 9 F.3d 1244 (7th Cir. 1993).

11. *Id.* at 1245.

12. *Id.*

be amended on appeal,<sup>13</sup> the court ordered plaintiffs to submit affidavits “stating with precision” the basis for asserting diversity.<sup>14</sup>

In *Pollution Control Industries of America v. Van Gundy*,<sup>15</sup> during discovery it was learned that one of the defendants was a citizen of the same state as the plaintiff. Nonetheless, the parties focused on personal jurisdiction issues. The district court eventually dismissed for lack of personal jurisdiction, and imposed sanctions against the plaintiff.<sup>16</sup>

On appeal, the Seventh Circuit addressed diversity, ruling that complete diversity was lacking because subject-matter jurisdiction did not exist.<sup>17</sup> The court chastised the parties for bypassing this fundamental issue and focusing on personal jurisdiction. Although the court approved of sanctions for the plaintiff’s failure to determine diversity,<sup>18</sup> it criticized the defendants for not raising the issue earlier, and reduced the sanctions award considerably.<sup>19</sup>

Both cases serve as painful reminders that: (1) when pleading diversity, it is *citizenship*—not residence—that matters; and (2) special care should be taken to ensure that diversity jurisdiction exists from the outset of a case, for the Seventh Circuit will certainly raise the issue.

### C. Supplemental Jurisdiction

Supplemental jurisdiction exists over state law claims that are “so related to claims . . . within [the court’s] original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.”<sup>20</sup> Under 28 U.S.C. § 1367(c)(3), district courts “may decline to exercise supplemental jurisdiction” if the federal or diversity claims have been dismissed.<sup>21</sup>

On its face, this law would appear to give the district courts discretion to hear—or not hear—supplemental claims after dismissal of the original claims. As noted in a previous article, however, the Seventh Circuit issued potentially conflicting opinions on this subject in 1993.<sup>22</sup> In *Wentzka v. Gellman*,<sup>23</sup> the Seventh Circuit held that the district court abused its discretion by retaining a supplemental claim involving unsettled state law issues after dismissal of the federal claim.<sup>24</sup> By contrast, in *Brazinski v. Amoco Petroleum Additives*,<sup>25</sup> Chief Judge Posner, joined by Judges Kanne and Flaum, held that supplemental claims

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13. 28 U.S.C. § 1653 (Supp. 1994).

14. *Dausch*, 9 F.3d at 1245.

15. 21 F.3d 152 (7th Cir. 1994).

16. *Id.* at 153.

17. *Id.* at 153-54.

18. *Id.* at 154.

19. *Id.* at 155-56.

20. 28 U.S.C. § 1367(a) (Supp. 1994).

21. 28 U.S.C. § 1367(c)(3) (Supp. 1994).

22. See John R. Maley, *1993 Federal Practice and Procedure Update for the Seventh Circuit Practitioner*, 27 IND. L. REV. 813, 818-20 (1994) [hereinafter “1993 Federal Practice”].

23. 991 F.2d 423 (7th Cir. 1993).

24. *Id.* at 426.

25. 6 F.3d 1176 (7th Cir. 1993).

can be retained after dismissal of federal claims, even absent extraordinary circumstances.<sup>26</sup>

In a 1994 decision, *Timm v. The Mead Corporation*,<sup>27</sup> a panel comprised of Judges Flaum, Kanne, and Fairchild followed the *Brazinski* lead. The district court had granted summary judgment and dismissed an employee's federal discrimination claim, but retained and decided the supplemental state law claims in the same summary judgment ruling. On appeal, the employee argued that the state law claims should have been relinquished. The Seventh Circuit disagreed.<sup>28</sup>

Writing for the panel, Judge Flaum noted that *Brazinski* "retreated somewhat from strong dicta in *Wentzka* . . . . Instead," Judge Flaum wrote, "we recognized [in *Brazinski*] that especially when difficult and unsettled state law issues are not implicated by the pendent claims, it is entirely acceptable under the discretionary principle for a federal court to decide those claims even after dismissing the main claim."<sup>29</sup> So long as "an arguable balance of [judicial economy, convenience, fairness, and comity] points in the direction of the district court's discretionary determination whether or not to exercise jurisdiction, that decision, being discretionary, will not be disturbed."<sup>30</sup>

Judge Flaum noted some of the factors that should be considered in deciding whether to retain a supplemental claim, including "the nature of the state law claims at issue, their ease of resolution, and the actual, and avoidable, expenditure of judicial resources."<sup>31</sup> Also, a pre-trial dismissal of federal claims "informs the balance" but is not dispositive. He added: "Exactly when before trial the federal claim is eliminated, however, is relevant. For example, dismissal at the pleading stage usually counsels strongly in favor of relinquishing jurisdiction because at that point in a case 'judicial resources' typically are yet to be heavily tapped."<sup>32</sup>

After *Timm*, district judges in this circuit should be freer to exercise discretion under 28 U.S.C. § 1367(c) and retain supplemental jurisdiction where it is deemed appropriate. To lessen the chances of reversal, the *Timm* factors should be recited in any order retaining supplemental jurisdiction.

#### D. Miscellaneous Jurisdictional Items

The following developments, although not strictly jurisdictional, are worthy of brief mention:

- (1) The Seventh Circuit held that the standard of review for *Younger*-based abstention dismissals is *de novo*.<sup>33</sup> After noting that prior Seventh Circuit decisions had suggested or applied an abuse of discretion standard,<sup>34</sup> the court

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26. *Id.* at 1182.

27. 32 F.3d 273 (7th Cir. 1994).

28. *Id.* at 274.

29. *Id.* at 277.

30. *Id.*

31. *Id.*

32. *Id.* at n.2 (citing *Wright v. Associated Ins. Cos.*, 29 F.3d 1244, 1251 (7th Cir. 1994)).

33. See *Younger v. Harris*, 401 U.S. 37 (1971).

34. *A.G. Edwards & Sons, Inc. v. Public Bldg. Comm'n*, 921 F.2d 118, 121 (7th Cir. 1990) (suggesting

held that *de novo* review is mandatory for *Younger* abstention because, unlike other forms of abstention, “application of the *Younger* doctrine is absolute.”<sup>35</sup> When a case fits within *Younger*, abstention is mandatory, so there is no discretion to exercise.<sup>36</sup>

(2) Where a forum selection clause required suit in “the state of Indiana in the courts of general jurisdiction for Evansville, Indiana,” Judge Brooks remanded a removed action to state court on the basis that federal courts are courts of limited jurisdiction, whereas Indiana trial courts are courts of general jurisdiction.<sup>37</sup>

## II. REMOVAL

Although it should be a simple process, removal continues to be a hotly litigated matter. Key developments during 1994 include:

(1) Defendant’s receipt of a copy of the complaint will ordinarily start the thirty-day clock of 28 U.S.C. § 1446(b) for removal, regardless of whether formal service has been effected.<sup>38</sup>

(2) Examples of “non-service” receipt that will start the removal clock include: (a) delivery of the complaint by a process server that is not otherwise effective as service of process; (b) attempted service by mail where the recipient refuses to sign and return the acknowledgement; and (c) transmission of a copy of the complaint by one defendant to a co-defendant before service is effected on the co-defendant.<sup>39</sup>

(3) Removal ordinarily requires “joinder” of all defendants, and the Seventh Circuit interprets this mandate to require such joinder to be in writing; a removing defendant cannot simply recite that other defendants do not object to removal.<sup>40</sup>

(4) Removal of a facially non-diverse action may be possible where a non-diverse defendant is fraudulently joined, which arises either when there is “no possibility that plaintiff can state a cause of action against the non-diverse

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that abuse of discretion governs all abstention decisions); *Sekerez v. Supreme Court of Ind.*, 685 F.2d 202, 205-06 (7th Cir. 1982) (applying abuse of discretion standard to a *Younger*-based abstention).

35. *Trust & Inv. Advisers, Inc. v. Hogsett*, 43 F.3d 290, 294 (7th Cir. 1994).

36. *Id.*

37. *Wats/800, Inc. v. Voice America*, 867 F. Supp. 811, 812-13 (S.D. Ind. 1993).

38. *Rose v. O'Donahue*, 38 F.3d 298, 303 (7th Cir. 1994).

39. *Id.* at 302-03.

40. *Id.* at 302. As noted in the 1993 Federal Practice Article, the mechanics for expressing such joinder (e.g., whether through separate removal notices or one notice signed by all defendants) are unclear in this Circuit. See 1993 *Federal Practice*, *supra* note 22, at 821-23. To be safe, defendants should seek to obtain each defendant’s signature on the removal notice. If that is not possible, each defendant’s oral consent to removal should be obtained within the 30-day period, and each should promptly file a brief notice noting their joinder in removal and the date it was given.

defendant, or where there has been outright fraud in the pleading of jurisdictional facts."<sup>41</sup>

(5) In one of his first published opinions, Judge Hamilton held that an Indiana garnishment action is sufficiently independent of the underlying state court action to be separately removable to federal court.<sup>42</sup>

Finally, in a case of first impression, the Seventh Circuit held that a district court may not remand a case on its own motion for a defect in removal procedure.<sup>43</sup> The district judge had remanded the case to state court sua sponte, and the case came to the Seventh Circuit on a writ of mandamus. Writing for the panel in *In re Continental Casualty Co.*, Judge Easterbrook began by quoting 28 U.S.C. § 1447(c), which reads in part: "A motion to remand the case on the basis of any defect in the removal procedure must be made within [thirty] days after the filing of the notice of the removal . . ." <sup>44</sup> In light of this "motion" language, settled authority that procedural removal defects can be waived, and the policy in favor of vesting a case in one forum, Judge Easterbrook concluded that district courts lack authority to remand cases for defects in removal procedure absent a motion from the plaintiff.

Judge Easterbrook concluded the opinion, writing:

District judges who look carefully at newly filed or removed cases, and identify potential defects in their institution or removal, do both the parties and the legal system a great service. We commend the district judge for his care and alertness in spotting the potential problem. But because not all potential problems are fatal, the court should alert the parties before dismissing or remanding the cases. Litigants may have sufficient answers to the court's concerns . . . . Or litigants may elect to surrender their entitlement to insist on procedural perfection . . . . Quick notice is a boon; quick action without inviting the parties' submissions may illustrate the adage that haste makes waste.<sup>45</sup>

### III. SERVICE OF PROCESS

Insufficient service must be raised in the answer or responsive motion to dismiss or it is waived.<sup>46</sup> But even if the defense is timely raised in the answer, insufficient service still can be waived. The defendant learned that lesson in *Leslie v. St. Vincent New Hope, Inc.*,<sup>47</sup> in which Judge Hamilton ruled that the defendant had waived the defense, even though it had been timely raised in the answer, by participating substantially in the litigation before moving to dismiss.

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41. *Hoosier Energy Rural Elec. Coop. v. Amoco Tax Leasing IV Corp.*, 34 F.3d 1310, 1315 (7th Cir. 1994).

42. *Harding Hospital v. Sovchen*, 868 F. Supp. 1074, 1078 (S.D. Ind. 1994).

43. *In re Continental Casualty Co.*, 29 F.3d 292 (7th Cir. 1994).

44. 28 U.S.C. § 1447(c) (1988 & Supp. 1994).

45. *In re Continental Casualty Co.*, 29 F.3d at 295.

46. FED. R. CIV. P. 12(h).

47. 873 F. Supp. 1250 (S.D. Ind. 1995).

In *Leslie*, the plaintiff filed the action in June 1994. The defendant timely filed its answer two months later in August, raising insufficient service as a defense. In November, the defendant moved to dismiss on this basis. Judge Hamilton denied the motion, not on its merits (indeed, service had not been effected), but based on waiver. The defendant had appeared in the action, submitted a case management plan, and submitted preliminary witness and exhibit lists and contentions. Citing a 1991 Seventh Circuit decision explaining that this defense may be waived by "submission through conduct,"<sup>48</sup> Judge Hamilton determined that the defendant "ha[d] participated extensively in preparing [the] case for trial," and thus had waived the defense.

The Seventh Circuit upheld a district court's finding of waiver of a similar defense (personal jurisdiction) based on less complicated facts. In *Continental Bank v. Meyer*,<sup>49</sup> the defendants fully participated in litigating the merits for over two-and-a-half years without actively contesting personal jurisdiction. They participated in lengthy discovery, and engaged in motions practice. Although the defendants literally complied with Rule 12(h) by raising the defense in their answer, the Seventh Circuit affirmed the finding of waiver, noting that defendants "did not comply with the spirit of the rule, which is to expedite and simplify proceedings in the Federal Courts."<sup>50</sup>

The decisions in *Leslie* and *Continental Bank* teach that waivable defenses must not only be raised in the answer, but should also be promptly asserted in a separate motion to dismiss.

#### IV. VOLUNTARY DISMISSAL

Rule 41(a)(2) of the Federal Rules of Civil Procedure provides that "an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper." In *Marlow v. Winston & Strawn*,<sup>51</sup> the plaintiff moved to dismiss without prejudice under this rule after several years of litigation. The defendants asked the district court to require payment of their fees as a condition of such a dismissal. The district court instead dismissed the case with prejudice.

On appeal, the Seventh Circuit reversed. Although dismissal with prejudice is a permissible condition, the Seventh Circuit held that the plaintiff moving for voluntary dismissal under Rule 41(a)(2) must first have the "option of withdrawing his motion if the district court's conditions are too onerous."<sup>52</sup> Because the district court never gave the plaintiff the chance to reject the "condition" of dismissal with prejudice, the dismissal was reversed.

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48. *Id.* at 1252 (quoting *Trustees of Central Laborers' Welfare Fund v. Lowery*, 924 F.2d 731, 732 (7th Cir. 1991)).

49. 10 F.3d 1293 (7th Cir. 1993).

50. *Id.* at 1297 (citation omitted).

51. 19 F.3d 300 (7th Cir. 1994).

52. *Id.* at 304.

## V. FAILURE TO PROSECUTE

Rule 41(b) provides that for "failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant."<sup>53</sup> This rule came into play in several cases.

In *McMahan v. CCC Express*,<sup>54</sup> plaintiffs filed their action, effected service, and then reached an agreement with defendant's insurance carrier for an indefinite extension of time for the defendant to respond to pending settlement discussions. After six months of no activity, the court had no notice of the extension, and ordered the plaintiffs to show cause why the action should not be dismissed for failure to prosecute. The plaintiffs advised the court of the extension, and asked forgiveness.

After noting the parties' failure to comply with local rules regarding extension, Judge Moody allowed the case to proceed without dismissal. He issued the following warning that should be heeded:

The court will . . . not dismiss this action. To do so would unfairly penalize plaintiffs where defendants are equally culpable. In addition, the court is aware that litigants in the past have circumvented the above-discussed rules through agreements similar to the one here. *That will no longer be the case in this court. Agreements between parties to ignore the Rules of Civil Procedure will not be allowed to sidetrack the orderly progress of litigation.*<sup>55</sup>

In *Johnson v. Kamminga*,<sup>56</sup> the Seventh Circuit affirmed a Rule 41(b) dismissal with prejudice in a case that had been pending for seven years due to plaintiff's delays, and in which plaintiff failed to appear for the first day of trial. In this respect the decision is unremarkable, but it provides a good summary of Seventh Circuit standards for Rule 41(b), including:

- (1) Rule 41(b) dismissals are reviewed for abuse of discretion, with the district court's findings of fact reversed only if clearly erroneous.<sup>57</sup>
- (2) The Seventh Circuit "presumes . . . that the district judge acted reasonably and will reverse 'only if it is plain either that the dismissal was a mistake or that the judge did not consider factors essential to the exercise of a sound discretion.'"<sup>58</sup>

53. FED. R. CIV. P. 41(b). In both the Northern and Southern Districts of Indiana, identical local rules supplement this rule as follows:

Civil cases in which no action of record has been taken for a period of six (6) months may be dismissed for want of prosecution with judgment for costs after thirty (30) days notice given by the clerk to the attorneys of record (or, in the case of a pro se party, to the party) unless, for good cause shown, the court orders otherwise.

See S.D. IND. LR 41.1; N.D. IND. LR 41.1.

54. 153 F.R.D. 633 (N.D. Ind. 1994).

55. *Id.* at 634 (emphasis added).

56. 34 F.3d 466 (7th Cir. 1994).

57. *Id.* at 468.

58. *Id.* (citations omitted).

(3) District judges are not required to employ "progressive discipline" before ultimately dismissing a case for want of prosecution.<sup>59</sup>

(4) Although district courts are encouraged to warn litigants before dismissing a case for failure to prosecute, whether they in fact do so is clearly within their discretion.<sup>60</sup>

## VI. INTERVENTION

Several important intervention decisions were rendered during 1994. In *NBD Bank v. Bennett*,<sup>61</sup> Magistrate Judge Shields, in one of her first published opinions on the federal bench, denied intervention in an important insurance and banking case. NBD sought to enjoin the Indiana Insurance Commissioner's geographic restrictions on NBD's sale of insurance. The Indiana State Association of Life Underwriters and the Independent Insurance Agents of Indiana sought to intervene or alternatively appear as amici. Not surprisingly, the intervenors opposed NBD's requested relief, and claimed that if granted the requested relief would harm their insurance sales.

Judge Shields denied intervention, first holding that the standards for intervention as of right under Rule 24(a)(2) were not satisfied. The key issue was whether the intervenors "claim[ed] an interest relating to the property or transaction at issue."<sup>62</sup> Judge Shields held that the interest necessary for Rule 24(a)(2) must be a "direct, significant legally protectable interest."<sup>63</sup> Noting no Seventh Circuit authority on point, she held that an "economic interest that might be adversely affected by the outcome of the case alone is insufficient to warrant intervention under Rule 24(a)(2)."<sup>64</sup> In addition, the intervenors failed to show that the Insurance Commissioner did not adequately represent their interests.

As for permissive intervention under Rule 24(b), Judge Shields observed that the intervenors presented no additional claims, but simply sought to defend the claims raised by NBD. As a result, Judge Shields found intervention inappropriate, but did allow participation as amici.<sup>65</sup>

In *Shea v. Angulo*,<sup>66</sup> appeal was taken from denial of intervention. In the clearest statement on the point from the Seventh Circuit, the court wrote, "We have jurisdiction pursuant to 28 U.S.C. § 1291 because the denial of a motion to intervene, whether as of

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59. *Id.* (citations omitted).

60. *Id.* (citations omitted).

61. 159 F.R.D. 505 (S.D. Ind. 1994).

62. FED. R. CIV. P. 24(a)(2).

63. *NBD*, 159 F.R.D. at 506 (quoting *American Nat'l Bank & Trust Co. of Chicago v. City of Chicago*, 865 F.2d 144, 145 (7th Cir. 1989)).

64. *Id.* (quoting *Getty Oil Co. v. Department of Energy*, 865 F.2d 270, 276 (Tem. Em. Ct. App. 1988)).

65. *Id.* at 508.

66. 19 F.3d 343 (7th Cir. 1994).

right or by permission of the court, is treated in this Circuit as a final appealable order."<sup>67</sup> Thus, unsuccessful intervention must be appealed immediately, if at all.

## VII. DISCOVERY

As in the last few years, numerous developments occurred in the discovery area during the Survey period.

### A. *Mandatory Disclosure*

With Rule 26(a)'s mandatory disclosure rules taking effect at the national level on December 1, 1993, the Northern and Southern Districts of Indiana determined to what extent mandatory disclosure would occur in each District.<sup>68</sup>

In the Northern District, mandatory disclosure is alive and well. Although each judge is handling mandatory disclosure somewhat differently, neither the Northern District nor any judge in the Northern District has opted out of mandatory disclosure on a wholesale basis.<sup>69</sup> Indeed, the Northern District had experimented with mandatory disclosure in its Civil Justice Reform Plan as early as 1991,<sup>70</sup> and apparently approved of the experience.

In the Southern District, the court has adopted a flexible approach. Mandatory initial disclosure under Rule 26(a)(1) is not required unless agreed to by the parties or specifically ordered by the court.<sup>71</sup> Expert disclosure under Rule 26(a)(2) is required,<sup>72</sup> as it should be, given the rule's lack of an opt-out provision.<sup>73</sup>

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67. *Id.* at 344 (citing *B.H. by Pierce v. Murphy*, 984 F.2d 196, 199, 200 (7th Cir. 1993); *Peacock v. Board of Sch. Comm'rs of Indianapolis*, 721 F.2d 210, 212 n.2 (7th Cir. 1983)).

68. Mandatory disclosure under FED. R. CIV. P. 26(a) is broken into three parts. Rule 26(a)(1) requires initial disclosure of certain core information, except to the extent "otherwise stipulated or directed by order or local rule." Rule 26(a)(2) requires disclosure of testifying experts, including preparation and disclosure of written reports and background information. Unlike Rule 26(a)(1), Rule 26(a)(2) does not allow an opt out by local rule. Rule 26(a)(3) requires certain disclosures (witnesses, exhibits, etc.) prior to trial.

69. The Northern District has not opted out of any portions of Rule 26(a) by local rule, and indeed is pressing ahead with Rule 26(a)'s requirements, although to different degrees and in somewhat different ways depending upon the case and the judge.

70. CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (N.D. Ind. 1991).

71. S.D. IND. LR 26.3 provides:

All cases pending or filed in the Southern District shall be exempt from the requirements of the following provisions of the Federal Rules of Civil Procedure as amended effective December 1, 1993: FED. R. CIV. P. 26(a)(1); FED. R. CIV. P. 26(d); FED. R. CIV. P. 26(f). This rule does not preclude parties from entering into voluntary stipulations to comply with any or all of the above-referenced amended Federal Rule in a particular case, nor does it preclude the Court from ordering compliance with FED. R. CIV. P. 26(a)(1) in a particular case.

72. *Id.*

73. See FED. R. CIV. P. 26(a)(2). Parties may, however, stipulate away this requirement.

### B. Case Law Highlights

Noteworthy developments in discovery case law include the following:

(1) Judge Moody held that a subpoena can be served by certified mail under Rule 45(b)(1)'s "delivery" requirement.<sup>74</sup>

(2) Magistrate Judge Hussmann held that defense counsel in a personal injury action could conduct ex parte interviews with plaintiff's physicians where there was no showing that the physician had "potentially embarrassing or ruinous" information unrelated to the injuries at issue.<sup>75</sup>

(3) In a thorough opinion outlining key standards for the issue, Magistrate Judge Cosby held that analysis done by an environmental consulting firm prior to litigation was protected from discovery because the firm was retained in anticipation of litigation, and no exceptional circumstances were shown for disclosure.<sup>76</sup>

(4) Where a plaintiff did not have the power to order a third party to surrender documents, the plaintiff did not have "possession, custody or control" under Rule 34, and thus was not obligated to produce the requested documents.<sup>77</sup>

(5) In *Jepson, Inc. v. Makita Electric Works*,<sup>78</sup> two parties entered into a protective order to preserve the confidentiality of certain discovery materials. The order was challenged but enforced in the district court.<sup>79</sup> The Seventh Circuit reversed, holding that protective orders cannot be issued under Rule 26(c) without an express finding of "good cause" for confidentiality.<sup>80</sup>

(6) Where a plaintiff's deposition was repeatedly rescheduled to accommodate him but he failed to attend, the Seventh Circuit affirmed the district court's dismissal of his action with prejudice as a discovery sanction under Rule 37(b)(2).<sup>81</sup>

Finally, in addressing a question of first impression in the Seventh Circuit, Judge Tinder issued a comprehensive opinion addressing discovery of defense surveillance videos by plaintiffs. His decision in *Fisher v. National Railroad Passenger Corp.*<sup>82</sup> is a "must-read" for practitioners involved in litigation that might involve surveillance.

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74. *Doe v. Hersemann*, 155 F.R.D. 630 (N.D. Ind. 1994).

75. *Garcia v. Abbott Lab.*, No. TH93-97-C, slip op. (S.D. Ind. March 29, 1994). *Garcia* was decided as a matter of federal procedural law. As a matter of Indiana procedural law, the Indiana Court of Appeals has held that ex parte communications with physicians are disfavored. *Cua v. Morrison*, 626 N.E.2d 581 (Ind. Ct. App. 1993).

76. *Hartford Fire Ins. v. Pure Air On The Lake Ltd.*, 154 F.R.D. 202 (N.D. Ind. 1993).

77. *Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1426 (7th Cir. 1993).

78. 30 F.3d 854 (7th Cir. 1994).

79. *See Jepson, Inc. v. Makita Elec. Works*, 143 F.R.D. 657 (N.D. Ill. 1992).

80. *Jepson*, 30 F.3d at 860.

81. *Halas v. Consumer Services, Inc.*, 16 F.3d 161, 164-165 (7th Cir. 1994).

82. 152 F.R.D. 145 (S.D. Ind. 1993).

*Fisher* involved an action under the Federal Employers' Liability Act (FELA)<sup>83</sup> for injuries sustained by a railroad worker. The defendant conducted secret surveillance to monitor the plaintiff's physical activities. The plaintiff served interrogatories asking whether any such surveillance had been taken.<sup>84</sup> The defendant objected on the grounds that such evidence constituted trial preparation materials, and also encompassed impeachment material not discoverable under local rules.<sup>85</sup>

The plaintiff initially did not challenge the objection. After the plaintiff's deposition, the defendant produced a single videotape, noting that it was the only tape the defendant intended to introduce at trial. The plaintiff moved to compel disclosure of all videotapes, not just those to be used at trial.

After noting that courts "[a]most uniformly" require evidentiary videos to be produced, Judge Tinder turned to the issue at hand: whether "surveillance tapes of a [p]laintiff which [d]efendant does not intend to introduce at trial, but which it possesses, are discoverable by the [p]laintiff prior to trial."<sup>86</sup> Judge Tinder determined that the work-product doctrine precluded discovery of the tapes that the defendant did not intend to introduce at trial and that the plaintiff had not shown a "substantial need" for the videos.<sup>87</sup> He concluded: "Although today's decision is, of course, confined to the facts and arguments presented by the present parties, it is difficult to conceive of any circumstances which might prove so compelling as to justify disclosure of non-evidentiary videotapes and the concomitant intrusion into attorney work product."<sup>88</sup>

*Fisher* is an excellent primer on the issue, and strikes an appropriate balance between open discovery and the work-product doctrine. The only uncertainty left by the posture of the case is whether surveillance tapes that are solely for impeachment or rebuttal would actually be protected by the Southern District's Local Rule 16.1(f)(5) and (7). On its face, *Fisher* only addresses surveillance videotapes to be used as *substantive* evidence, and not "solely for impeachment or rebuttal" per the Southern District's Local Rule 16.1(f)(5) and (7). In the surveillance context, however, it is difficult to imagine a tape that would be used solely for impeachment or rebuttal; most tapes would not only impair the plaintiff's credibility, but they would also be relevant to the substantive issue of damages. Defense counsel should thus presume that any tapes to be used at trial will be discoverable.

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83. Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1988).

84. As will be seen, this was a prudent course of action that should be taken by every plaintiff.

85. See S.D. IND. LR 16.1(f)(5),(7) (As directed by the court, each party shall submit to the court and opposing counsel a "list of exhibits to be offered at trial, except those to be used solely for impeachment or rebuttal," and a "list of names and addresses of witnesses to be called, except for those to be called solely for impeachment or rebuttal."). The Northern District's local rule is identical. See N.D. IND. LR 16.1(f)(5), (7).

86. *Fisher*, 152 F.R.D. at 145.

87. *Id.* at 158.

88. *Id.*

## VIII. EXPERTS

As discussed in the 1993 Federal Practice Article,<sup>89</sup> the Supreme Court's 1993 decision in *Daubert v. Merrell Dow Pharmaceuticals*<sup>90</sup> changed the standard for addressing the admissibility of expert testimony. The old *Frye* rule of "general acceptance" was abandoned in favor of a more flexible, but probably more restrictive, standard that focuses on the scientific, technical, or otherwise specialized basis of the testimony.<sup>91</sup> *Daubert* also emphasized the district judge's responsibility to serve as "gatekeeper" and screen out expert testimony that does not satisfy the *Daubert* standards.

As expected, there has been much litigation on the issue since *Daubert*, and the real battlefield is in the trial court. The following cases illustrate the profound effects of *Daubert*:

(1) In *O'Conner v. Commonwealth Edison Co.*,<sup>92</sup> the plaintiff sued the operator of a nuclear power plant for allegedly causing cataracts. The defendant moved for summary judgment on a number of grounds, including causation. The district court granted the summary judgment motion, ruling, in part, that the plaintiff's expert's testimony was inadmissible. The Seventh Circuit affirmed, holding that the expert's opinions did not satisfy *Daubert* and Federal Rule of Evidence 702. The doctor's testimony that he "know[s] what cataracts look like when they've been induced by radiation" was held to be unscientific.<sup>93</sup> No other sources supported the opinion that mere observation could discern whether cataracts were caused by radiation, and the "expert" had not tested his opinion.<sup>94</sup>

(2) In *Pries v. Honda Motor Co.*,<sup>95</sup> the Seventh Circuit similarly rejected an expert's methodology as unscientific. The plaintiff sued Honda for an allegedly defective seatbelt. The district court granted summary judgment. On appeal, the plaintiff pointed to her expert's opinion that the seatbelt latch opened during the crash. However, the expert conducted no tests and could not explain the forces that would cause the latch to open. In affirming summary judgment, Judge Easterbrook cited *Daubert* and concluded, "Evidence of this kind is not scientific and does not satisfy Federal Rule of Evidence 702."<sup>96</sup>

(3) In *Bradley v. Brown*,<sup>97</sup> Judge Moody applied *Daubert* to reject two expert opinions that the plaintiff suffered from "multiple chemical sensitivity" due to exposure to defendant's products. In a thorough opinion tracing *Daubert* and its progeny, Judge Moody concluded that "the 'science' of MCS's etiology has not

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89. 1993 Federal Practice, *supra* note 22, at 833-36.

90. 113 S. Ct. 2786 (1993).

91. The *Frye* rule stemmed from *Frye v. United States*, 293 F. 1013 (1923).

92. 13 F.3d 1090 (7th Cir. 1994).

93. *Id.* at 1107.

94. *Id.* at 1106-07.

95. 31 F.3d 543 (7th Cir. 1994).

96. *Id.* at 545.

97. 852 F. Supp. 690 (N.D. Ind. 1994).

progressed from the plausible, that is, the hypothetical, to knowledge capable of assisting a fact-finder, jury or judge."<sup>98</sup>

(4) On appeal, the Seventh Circuit affirmed, and refused to disturb Judge Moody's evidentiary ruling.<sup>99</sup> The court applied a two-tiered standard of review, asking first by de novo review whether the district court properly followed the framework set forth in *Daubert*.<sup>100</sup> Upon finding no error in that regard, the court stated that it would "not disturb the district court's findings unless they [were] clearly erroneous."<sup>101</sup> The Seventh Circuit ultimately concluded that it would "not replace the district court's careful decision with our own judgment."<sup>102</sup>

(5) The Seventh Circuit, through Chief Judge Posner, blasted an expert in a trademark infringement case involving the Indianapolis Colts.<sup>103</sup> Judge Posner noted that the expert provided a "perfunctory affidavit," that it was a "kindness" for Judge McKinney to give the affidavit any weight at all, and that the expert had been criticized by another federal court for his methodology.<sup>104</sup> Judge Posner added, "[W]e hope that he will take these criticisms to heart in his next courtroom appearance."<sup>105</sup>

(6) In the most telling post-*Daubert* decision, on remand from the Supreme Court's decision in *Daubert* itself, the Ninth Circuit rejected the plaintiff's expert opinions that Bendectin causes birth defects.<sup>106</sup> Of particular note is the Ninth Circuit's skepticism of experts who offer opinions for the first time in litigation without any prior testing or experience in the matter at issue.<sup>107</sup>

Finally, in what may be the most significant development in expert testimony during the Survey period, the Federal Judicial Center published its *Reference Manual on Scientific Evidence* ("the Manual").<sup>108</sup> The Federal Judicial Center began work on the Manual in 1990 after the Federal Courts Study Committee recommended such a work.<sup>109</sup> The stated purpose of the 637-page Manual "is to assist judges in managing expert evidence, primarily in cases involving issues of science or technology."<sup>110</sup>

The Manual was distributed to all federal judges in early 1995. It is being provided at no or low cost to subscribers of *Weinstein's Evidence* or Professors Wright and Miller's

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98. *Id.* at 700.

99. *Bradley v. Brown*, 42 F.3d 434 (7th Cir. 1994).

100. *Id.* at 436.

101. *Id.* at 436-37.

102. *Id.* at 439.

103. *Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club*, 34 F.3d 410 (7th Cir. 1994).

104. *Id.* at 415.

105. *Id.*

106. *Daubert v. Merrell Dow Pharmaceuticals*, 43 F.3d 1311, 1319 (9th Cir. 1995).

107. *Id.* at 1318-19.

108. FEDERAL JUDICIAL CENTER, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE (1994).

109. *Id.* at vii.

110. *Id.* at 1.

*Federal Practice and Procedure*. It is also available from major legal publishers such as West and Lawyer's Co-Op for as low as \$12.50.

Divided into three distinct sections, the Manual is an essential source for any practitioner encountering experts in federal litigation. The opening section provides an overview of basic principles for expert testimony, including *Daubert* and the Federal Rules of Evidence. The second section is a series of detailed "Reference Guides" on specific expert topics, including epidemiology, toxicology, survey research, DNA, statistics, multiple regression, and economic losses. Each reference guide provides an excellent overview of the subject, and is loaded with citations to technical publications and reported cases addressing key issues. Finally, the third section addresses court-appointed experts and special masters.

As district judges exercise their "gatekeeper" roles under *Daubert*, they are likely to turn to the Manual for assistance. Practitioners are well-advised to get their own copy and use it to their advantage.

## IX. SUMMARY JUDGMENT

### A. Detail In The Trial Court

Three Seventh Circuit decisions reinforce the maxim that parties opposing summary judgment must focus on details in the district court. In *Waldridge v. American Hoechst Corp.*,<sup>111</sup> Judge Tinder granted summary judgment for the defendants in a personal injury action. One of the grounds for granting summary judgment was the plaintiff's failure to comply with the Local Rules by failing to properly identify the evidence supporting her claims.<sup>112</sup>

The Seventh Circuit affirmed, offering a lengthy opinion on the importance of local rules such as the Southern District's summary judgment rule. Judge Rovner explained the Seventh Circuit's favorable view of these rules, noting:

We have endorsed the exacting obligation these rules impose on a party contesting summary judgment to highlight which factual averments are in conflict as well as what record evidence there is to confirm the dispute, explaining that district courts are not obliged in our adversary system to scour the record looking for factual disputes and may adopt local rules reasonably designed to streamline the resolution of summary judgment motions. . . . We have also repeatedly upheld the strict enforcement of these rules, sustaining the entry of summary judgment when the non-movant has failed to submit a factual statement in the form called for by the pertinent rule and thereby conceded the movant's version of the facts.<sup>113</sup>

The Seventh Circuit further held that even though the defendants had not raised the plaintiff's failure to follow the local rule, the district court was within its discretion to detect the omission and apply the local rule strictly.<sup>114</sup>

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111. 24 F.3d 918 (7th Cir. 1994).

112. *Id.* at 922. See also S.D. IND. LR 56.1.

113. *Id.* at 921-22 (citations omitted).

114. *Id.* at 923-24.

Similarly, in *Doe v. R.R. Donnelley & Sons Co.*,<sup>115</sup> Chief Judge Barker granted summary judgment for the defendant in an employment discrimination case. In affirming her decision, the Seventh Circuit noted the plaintiff's failure to provide sufficient detail in the trial court record:

Like the district court, we can rule only on the basis of what is in the record before us—a record that was made by the parties in the district court. This case, like so many other cases that come before us on appeal from the grant of a summary judgment, brings with it a record that can be charitably characterized as “under nourished.” The standards established by the Supreme Court . . . have been repeated time and time again in our reported decisions, and we must expect that the parties will live up to the obligations imposed by those decisions by making an adequate record in the district court. *Cases such as this one are won by attention to detail and completeness in the litigation of the summary judgment motion in the district court; they cannot be won in this court when the appropriate record has not been made.*<sup>116</sup>

Finally, in *Wallace v. Tilley*,<sup>117</sup> the district court granted summary judgment. Four days later, the plaintiff filed a deposition taken three months before the court's ruling and asked the court to supplement the record and deny summary judgment. The district court refused, and the Seventh Circuit affirmed. Writing for the panel, Judge Flaum explained:

Neither [the plaintiff's] brief nor his oral argument provided any reason for this delay. [His] “wait and see” approach conflicts with the procedure established in the Federal Rules for dealing with unavailable discovery materials. If [the plaintiff] needed additional time for discovery to prepare his response to the summary judgment motion, he should have filed an affidavit to that effect pursuant to Federal Rule of Civil Procedure 56(f).<sup>118</sup>

The lessons of these cases are clear. Parties opposing summary judgment must strictly comply with local rules, must pay particular attention to detail in the record, and must seek leave through Rule 56(f) when more time is required to obtain evidence for summary judgment.<sup>119</sup>

#### *B. Conversions From Rule 12(b)(6)*

Rule 12(b) provides that when a 12(b)(6) dismissal motion is supported by matters outside the pleadings, “the motion shall be treated as one for summary judgment and

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115. 42 F.3d 439 (7th Cir. 1994).

116. *Id.* at 447-48 (emphasis added).

117. 41 F.3d 296 (7th Cir. 1994).

118. *Id.* at 302.

119. Indeed, in *Doe*, the plaintiff argued on appeal that her position was supported by one of her interrogatory answers. Unfortunately, however, plaintiff's counsel failed to include the interrogatory in the record on appeal, so the Seventh Circuit wrote that it could not “consider her interrogatory because it is not contained in the record.” 42 F.3d at 447 n.7.

disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."<sup>120</sup>

In *Burick v. Edward Rose & Sons*,<sup>121</sup> the district court converted a 12(b)(6) dismissal motion into a summary judgment motion but failed to give the plaintiff notice of the conversion.<sup>122</sup> The Seventh Circuit reversed, requiring remand so that notice could be given along with an opportunity to respond. Judge Kanne explained:

In this circuit, to avoid the problems raised by such surprise, we have urged district judges to give notice when they intend to convert a 12(b)(6) motion to dismiss into a motion for summary judgment. . . . [However,] [r]ather than applying a bright-line rule when a district judge fails to give notice, we determine whether the parties could have submitted specific controverted material factual issues to the trial court had they been given notice that the 12(b)(6) motion was to be treated as a motion for summary judgment.<sup>123</sup>

Because the plaintiff had evidence to create an issue of fact, the court held that reversal and remand was necessary.<sup>124</sup>

### C. Specificity Suggested In Summary Judgment Denials

In *Pasquino v. Prather*,<sup>125</sup> the district court denied a motion for summary judgment raising qualified immunity, stating simply that "there are issues of material fact that are in dispute which preclude summary judgment."<sup>126</sup> The Seventh Circuit remanded the matter for an explanation of the basis for the denial, explaining, "Conclusory rulings are inadequate material for the tools of the appellate bench."<sup>127</sup>

Writing for the panel, Judge Ripple noted that Circuit Rule 50 requires a district court to state its reasons for dismissals and grants of summary judgment. Although the rule is silent on denials, he concluded that "[t]he same reasons that justify the application of Circuit Rule 50 to dismissals . . . and grants of summary judgment . . . apply to appealable denials of summary judgment."<sup>128</sup> Although Judge Ripple left it to the court's procedures committee to consider an absolute rule requiring explanation of qualified immunity summary judgment denials, he did find such explanation necessary in *Pasquino*.

Although *Pasquino* involved qualified immunity, an issue that is immediately appealable as a collateral order,<sup>129</sup> the rationale for the decision, coupled with Circuit Rule 50, suggests that denials of summary judgment should be explained. Indeed, if nothing else, such clarification could help the parties analyze the strengths and weaknesses of their cases and perhaps lead to an informed settlement.

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120. FED. R. CIV. P. 12(b).

121. 18 F.3d 514 (7th Cir. 1994).

122. *Id.* at 515.

123. *Id.* at 516 (citations omitted).

124. *Id.* at 516-17.

125. 13 F.3d 1049 (7th Cir. 1994).

126. *Id.* at 1050.

127. *Id.* at 1051.

128. *Id.*

129. *Mitchell v. Forsythe*, 472 U.S. 511, 530 (1985).

*D. Denials Of Summary Judgment Cannot Be Appealed After Trial*

Finally, in *Watson v. Amedco Steel, Inc.*,<sup>130</sup> the plaintiff moved for summary judgment in his age-discrimination claim. Chief Judge Barker denied the motion, and the case was tried to a jury, which found for the employer. The plaintiff appealed but did not challenge the unfavorable verdict. Instead, the plaintiff argued on appeal that summary judgment should have been granted. The Seventh Circuit affirmed judgment for the employer, holding that a denial of summary judgment cannot be challenged after a full trial on the merits. Absent an "extraordinary circumstance," such review is unavailable in the Seventh Circuit.<sup>131</sup>

To preserve the issue raised at summary judgment, the plaintiff would have had to move for judgment as a matter of law pursuant to Rule 50(a)(1) at the close of the defendant's case or at the conclusion of the evidence and then renew that motion after the jury's verdict pursuant to Rule 50(b). The plaintiff never made such Rule 50 motions, so the Seventh Circuit held that he had waived the claimed error.<sup>132</sup>

## X. SETTLEMENT

Several significant decisions were rendered involving settlements, as follows:

(1) When parties settle a case in federal court, unless the district court specifically retains jurisdiction over the settlement, any action for breach of the settlement agreement must have its own independent basis for subject-matter jurisdiction (*e.g.*, diversity jurisdiction). Otherwise, it is a mere state-law breach of contract action that must be brought in state court.<sup>133</sup>

(2) When a case was settled the morning of oral argument, the Seventh Circuit nonetheless issued an opinion reminding the bar that when settlement is delayed to the last minute, significant costs are incurred that could be avoided.<sup>134</sup>

(3) In an unrelated case, Chief Judge Posner chastised counsel for failing to advise the district court of a settlement, writing, "We repeat our admonition . . . that in order to spare busy courts unnecessary work, parties must advise a court when settlement is imminent. . . . The duty is implicit in the characterization of lawyers as officers of the court, and a breach of it therefore opens a lawyer to sanctions."<sup>135</sup>

130. 29 F.3d 274 (7th Cir. 1994).

131. *Id.* at 280. In *Trustees of Ind. Univ. v. Aetna Cas. & Sur. Co.*, 920 F.2d 429 (7th Cir. 1990), the court reviewed a denial of summary judgment after trial. In *Watson*, however, the Seventh Circuit "disavow[ed]" *Trustees*. Indeed, in light of the departure from *Trustees* and pursuant to Circuit Rule 40(f), the panel circulated *Watson* to all judges of the Seventh Circuit, but no judge desired to rehear the case en banc. *Watson*, 29 F.3d at 278 n.7. Thus, *Watson* stands as the authoritative Seventh Circuit decision on the subject.

132. *Watson*, 29 F.3d at 280.

133. *Kokkonen v. Guardian Life Ins.*, 114 S. Ct. 1673 (1994).

134. *Chicago Title & Trust Co. v. Verona Sports Inc.*, 11 F.3d 678 (7th Cir. 1993).

135. *Gould v. Bowyer*, 11 F.3d 82 (7th Cir. 1993). Notably, the Southern District of Indiana has a local rule requiring parties to "immediately notify the Court of any reasonably anticipated settlement of a case or the

(4) Where parties agreed to a settlement orally in open court but later disagreed over final terms, the district court enforced the oral settlement agreement, and the Seventh Circuit affirmed.<sup>136</sup>

(5) The Supreme Court held that when settlement is reached after an appeal is taken, the underlying judgment ordinarily should not be vacated due to the public's interest in the judgment.<sup>137</sup>

(6) A district court's refusal to enforce a settlement agreement during litigation is not immediately appealable as a collateral order.<sup>138</sup>

## XI. POST-JUDGMENT

### A. *Determining Whether A Motion Is Based On Rule 59 or Rule 60*

In *Helm v. Resolution Trust Corp.*,<sup>139</sup> the plaintiff's suit was dismissed for lack of subject matter jurisdiction. Plaintiff moved to reconsider the dismissal twenty-eight days later. The district court treated the motion as a Rule 59(e) motion to alter or amend the judgment. Because Rule 59(e) motions must be served not later than ten days after judgment, the district court denied the motion as untimely.

On appeal, the Seventh Circuit reversed, holding that the motion should have been considered timely under Rule 60(b)'s standards. Writing for the panel, Judge Kanne explained that the Seventh Circuit has

established a bright-line rule for distinguishing 59(e) motions from 60(b) motions. The time of a motion's service controls whether a motion challenging a judgment is a 60(b) or 59(e) motion. Such a motion, if served within ten days of a final judgment, is a 59(e) motion. Conversely, a motion served more than ten days after a final judgment is a 60(b) motion.<sup>140</sup>

Of course, the standards and effects of the two motions are different (e.g., a Rule 59(e) motion tolls the time for appeal and generally requires a lower threshold of proof than Rule 60(b)). Thus, practitioners ordinarily should seek to submit any post-judgment motion within ten days of judgment.

### B. *Timeliness Of Fee Petitions*

As amended on December 1, 1993, Rule 54(d)(2)(B) provides that unless "otherwise provided by statute or order of the court," a motion for attorneys' fees must be filed and served no later than fourteen days after entry of judgment.<sup>141</sup> In *Johnson v. Lafayette Fire Fighters Ass'n Local 472*,<sup>142</sup> the prevailing plaintiffs overlooked the rule when they filed

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resolution of any pending motion." S.D. IND. LR 7.1(d).

136. *Wilson v. Wilson*, 46 F.3d 660 (7th Cir. 1995).

137. *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386 (1994).

138. *Digital Equipment Corp. v. Desktop Direct, Inc.*, 114 S. Ct. 1992 (1994).

139. 43 F.3d 1163 (7th Cir. 1995).

140. *Id.* at 1166-67 (citations omitted).

141. FED. R. CIV. P. 54(d)(2)(B).

142. No. 4:92-C-V-60-AS, slip op. (N.D. Ind. Apr. 20, 1994).

their fee petition thirty-nine days after judgment. The defendant objected to the petition as untimely. Chief Judge Sharp, however, relied on the Northern District's Local Rule 54.1, which at the time allowed ninety days for fee petitions.<sup>143</sup> The *Johnson* decision was affirmed on appeal, with the Seventh Circuit reasoning that "a local rule is an order of the court, at least for the purposes of [Federal Rule of Civil Procedure] 54(d)(2)(B)."<sup>144</sup>

It is respectfully submitted that the Southern District correctly determined that the old ninety-day period of the local rule was inconsistent with amended Federal Rule of Civil Procedure 54. Although Judge Sharp and the Seventh Circuit concluded that the language of Rule 54 "is large enough to encompass Local Rule 54.1 as an 'order of the court,'"<sup>145</sup> the drafters of the federal rules specifically use the term "local rule" in other opt-out provisions (*e.g.*, Federal Rule of Civil Procedure 26(a)(1)). Thus, the argument goes, if the drafters wanted to allow local rules to provide a different time period, they would have said so.

## XII. COSTS

Several significant costs decisions were rendered during the Survey period, including the following:

- (1) When the clerk taxes costs, Rule 54(d) provides that "[o]n motion served within five days thereafter, the action of the clerk may be reviewed by the court." When a party filed its motion for review one day late, the Seventh Circuit held that the five-day rule of Rule 54(d) is not jurisdictional such that the court did not err in hearing the motion.<sup>146</sup>
- (2) Under Rule 54(d)(1), costs "shall be allowed as of course to the prevailing party unless the court otherwise directs." Applying this rule, the Seventh Circuit reversed a district court's unexplained denial of costs to a prevailing party.<sup>147</sup> Judge Easterbrook chastised the district court, noting that "[d]iscretion without a criterion for its exercise is authorization of arbitrariness" and holding that the defendant "[was] entitled to costs as a matter of law" because the defendant "prevailed on every claim."<sup>148</sup>
- (3) The Seventh Circuit affirmed an award of costs against a prisoner who claimed indigency, noting that a plaintiff's indigency "does not require the court to automatically waive costs."<sup>149</sup>

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143. N.D. IND. LR 54.1 (1994). The Northern District has since promulgated an amendment that would track the corresponding federal rule and require fee petitions to be filed within 14 days of judgment. *See Proposed Amendments To The Local Rules* (N.D. Ind. Nov. 1, 1994). The Southern District has similarly promulgated, and passed, an amendment deleting the old 90-day period for fee petitions of S.D. IND. LR 54.1 as "inconsistent" with FED. R. CIV. P. 54.

144. 1995 WL 147024 (7th Cir. Apr. 5, 1995) (To be reported at 51 F.3d 726).

145. *Johnson*, No. 4:92-C-V-60-AS at 2.

146. *Lorenz v. Valley Forge Ins. Co.*, 23 F.3d 1259, 1261 (7th Cir. 1994).

147. *York Center Park Dist. v. Krilich*, 40 F.3d 205, 209 (7th Cir. 1994).

148. *Id.* at 209.

149. *McGill v. Faulkner*, 18 F.3d 456, 459 (7th Cir. 1994).

(4) The Seventh Circuit affirmed Judge Barker's award of costs exceeding \$37,000 to a party that prevailed in the "substantial part of the litigation," even though it did not prevail on all claims.<sup>150</sup>

(5) The Seventh Circuit reversed an award of costs exceeding \$30,000 for computerized legal research, holding that such research costs are to be considered attorneys' fees.<sup>151</sup>

### XIII. SANCTIONS

As in past years, several awards of sanctions were made in the Seventh Circuit. Among the most interesting decisions are the following:

(1) In *Rice v. Nova Biomedical Corp.*,<sup>152</sup> Judge Posner stated that: "Their arguments . . . fall far below professional standards of advocacy in this circuit. We do not tolerate blunderbuss appeals loaded with frivolous scattershot that wastes our time and appellees' money."<sup>153</sup>

(2) The Seventh Circuit noted in *Widell v. Wolf*<sup>154</sup> that "Widell's appeal was doomed, and accordingly it appears to be frivolous within the meaning of [Federal Rule of Appellate Procedure] 38."<sup>155</sup>

(3) *Stookey v. Teller Trading Distributors, Inc.*<sup>156</sup> held that "[S]anctions are warranted because defendants' blatant disregard for this court's rules needlessly resulted in added expense to appellees and the waste of judicial resources."<sup>157</sup>

(4) The Northern District of Indiana imposed sanctions of \$6000 in *Baker v. American Juice, Inc.*<sup>158</sup> for counsel's prosecution of a "baseless" lawsuit.

(5) In *Ormsby Motors, Inc. v. General Motors Corp.*,<sup>159</sup> the Seventh Circuit denied appellate sanctions where the appellant had dismissed its appeal. The court noted that a voluntary dismissal will not preclude sanctions, but explained that "only in an exceptional case would we be inclined to grant such relief" where the appellant has dismissed its appeal.

Finally, in perhaps the most amusing decision of the year, an Indianapolis attorney challenged Judge Tinder's award of Rule 11 sanctions.<sup>160</sup> In his defense, counsel waxed

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150. *O.K. Sand & Gravel, Inc. v. Martin Marietta Tech., Inc.*, 36 F.3d 565 (7th Cir. 1994).

151. *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 38 F.3d 1429 (7th Cir. 1994).

152. 38 F.3d 909 (7th Cir. 1994).

153. *Id.* at 918.

154. 43 F.3d 1150 (7th Cir. 1994).

155. *Id.* at 1151.

156. 9 F.3d 631 (7th Cir. 1993).

157. *Id.* at 638.

158. 870 F. Supp. 878 (N.D. Ind. 1994); No. 2:93 CV262 Jm., 1994 WL 750614 (N.D. Ind. Aug. 9, 1994).

159. 32 F.3d 240, 241 (7th Cir. 1994).

160. *Chambers v. American Trans Air*, 17 F.3d 998 (7th Cir. 1994).

nostalgic about his high school and college credentials, ranging from being a state debate champion, having two varsity letters in a "collision sport," and being president "of what may well have been the strongest fraternity on campus."<sup>161</sup> Not surprisingly, the Seventh Circuit was unmoved by the argument.

Writing for the panel, Judge Cudahy explained the court's decision in a style similar to that of Judges Easterbrook and Posner:

[U]nfortunately for [plaintiff's counsel], this long list of accolades and accomplishments provides no defense. As we noted in *Thornton*, the "[t]est under Rule 11 is objective." The point is that "every lawyer must do the necessary work to find the law before filing the brief." That admonition applies even to lawyers who have two varsity letters in a collision sport and who were presidents of their fraternities. [Counsel] failed to comply with the rule's clear edict, and the district court was correct to impose sanctions.<sup>162</sup>

The opinion confirms what is obvious to most practitioners: When sanctions are threatened or imposed, boasting of one's successes (particularly irrelevant ones) is not a prudent course.

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161. *Id.* at 1006.

162. *Id.* at 1006-07 (citing *Thornton v. Wahl*, 787 F.2d 1151, 1154 (7th Cir. 1986)).