# RECENT DEVELOPMENTS IN INDIANA CIVIL PROCEDURE

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## INTRODUCTION

In 2000, Indiana realized two long term goals affecting civil practice—passage of the constitutional amendment relieving the Indiana Supreme Court from the burden of direct appeals in most criminal cases[1] and promulgation of the New Appellate Rules.[2] The change in the court's jurisdiction will enable it more effectively to supervise pleading and practice in Indiana's courts as its docket is freed for civil matters. The New Appellate Rules—effective in all appeals taken on or after January 1, 2000—clarify and modernize appellate practice on the model of the federal rules, making appeals in civil cases more efficient and less costly.

Aside from these developments, the Indiana Supreme Court's decisions affecting civil procedure were significant. It issued important opinions on personal jurisdiction, exhaustion of administrative remedies, the further implications of *Martin v. Richey*,[3] summary judgment, and the nonparty defense, among others. The supreme court has also promulgated new rules affecting its original jurisdiction,[4] alternative dispute resolution,[5] and court administration,[6] among other topics. The Indiana Supreme Court also released proposed amendments to the Trial Rules, Rules for Administrative Proceedings, and Small Claims Court Rules for public comment.[7] These pending matters, as well as the pilot project for a specialized family court and the "Juries for the 21st Century Project," portend further changes in Indiana civil practice.[8]

Decisions emanating from the court of appeals touched on a range of procedural questions from default to venue, and showed the appellate courts grappling with the standards for motions to dismiss and motions for summary judgment, among other recurring issues. In one notable opinion, *Sims v. United States Fidelity & Guaranty Co.*,[9] the court of appeals invalidated section 22-3-4-

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1. *See* IND. CONST. art. VII, § 4 (amended 2000).

2. *See* Order Amending Rules of Appellate Procedure, Ind. Order No. 2000-26 (2000).

3. 711 N.E.2d 1273 (Ind. 1999). *Martin* invalidated on constitutional grounds the Medical Malpractice statute of limitations when applied to plaintiffs who could not have discovered alleged malpractice prior to the expiration of the time limit specified in the statute.

4. *See* Order Amending Indiana Rules of Procedure for Original Actions, Ind. Order No. 2000-24 (2000).

5. *See* Order Amending Rules for Alternative Dispute Resolution, Ind. Order No. 2000-30 (2000).

6. *See* Order Amending Administrative Rules, Ind. Order No. 2000-25 (2000).

7. *See Comment Sought on Proposed Rule Amendments*, RES GESTAE, Dec. 2000, at 23.

8. *Available* at http://www.ai.org/judiciary/citizen/final_report.pdf.

9. 730 N.E.2d 232 (Ind. Ct. App. 2000), *trans. granted by* No. 49502-0105-CV-229, 2001 IND. LEXIS 416, at *1 (Ind. May 4, 2001).

12.1 of the Indiana Code (worker's compensation jurisdiction) as a violation of the Indiana Constitution's "open courts" provision and the right to jury trial.[10]

At the federal level, changes to the Federal Rules of Civil Procedure governing mandatory disclosures and the scope of discovery, among others things, were effectuated and the United States Supreme Court continued to issue decisions articulating the "new federalism" that further restrict the ability of Congress to legislate. The United States Court of Appeals for the Seventh Circuit decided numerous cases involving civil practice, from dismissals of actions, to determination of citizenship for diversity, to costs, and many other topics. Finally, the United States District Courts for the Northern and Southern Districts of Indiana both modified their local rules. What follows is a general survey of the high points of these developments beginning with the Indiana Supreme Court.

## I. THE INDIANA SUPREME COURT'S JURISDICTION

In the November 2000 election, Indiana voters approved a measure amending article 7, section 4 of the state constitution.[11] This amendment removes from the Indiana Supreme Court direct appellate jurisdiction in criminal matters other than capital cases. Prior to its adoption, changes in Indiana's mandatory sentencing laws required that numerous criminal matters be directly reviewed in the court,[12] rather than being subject to discretionary review.[13] The influx of criminal matters reduced the court's time to consider civil cases. From 1995 to 2000, the number of opinions issued by the court in direct criminal appeals increased from

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10. *See infra* text accompanying notes 157-68.

11. The amended text reads:

> The Supreme Court shall have no original jurisdiction except in admission to the practice of law; discipline or disbarment of those admitted; the unauthorized practice of law; discipline, removal, and retirement of justices and judges; supervision of the exercise of jurisdiction by the other courts of the State; and issuance of writs necessary or appropriate in aid of its jurisdiction. The Supreme Court shall exercise appellate jurisdiction under such terms and conditions as specified by rules except that appeals from a judgment imposing a sentence of death shall be taken directly to the Supreme Court. The Supreme Court shall have, in all appeals of criminal cases, the power to review all questions of law and to review and revise the sentence imposed.

IND. CONST. art. VII, § 4 (amended 2000).

12. The greatest impact came from 1995 legislation that increased the typical penalty for murder so that sentences in excess of fifty years became common. *See* IND. CODE § 35-50-2-3 (2000). In 1988 the state constitution had been previously amended to reserve the right of direct appeal in criminal cases to sentences of greater than fifty years. With the legislative change, the fifty-year threshold no longer functioned as an adequate gatekeeper on direct criminal appeals to the court. *See* Hon. Randall T. Shepard, *Equal Access to the Indiana Supreme Court Requires Amending the Indiana Constitution*, RES GESTAE, Sept. 2000, at 12.

13. *See* IND. APPELLATE RULE 57 (formerly IND. APP. R. 11).

thirty-eight to 106.[14] Correspondingly, the amount of time it could devote to civil matters decreased from two thirds to one quarter.[15] Now criminal appeals from a sentence of life imprisonment or a prison term of more than fifty years follow the same procedure to the Indiana Supreme Court as civil appeals.[16] The new constitutional amendment should have a significant long term impact on Indiana civil procedure, for it will enhance the court's ability to supervise pleading and practice as it is able to grant more petitions for transfer in civil matters.

## II. THE NEW APPELLATE RULES

Aside from changes in the jurisdiction of the Indiana Supreme Court, the most significant development affecting civil practice in Indiana was the promulgation of the New Appellate Rules, which apply to all appeals taken on or after January 1, 2001. These rules replace the piecemeal approach often obtained in Indiana with a unified system similar to the federal appellate rules. But, while the New Appellate Rules make changes, they do not fundamentally alter the principles governing appeals in Indiana. Instead, they clarify issues that were previously uncertain, modernize documentation of the record on appeal, and make explicit practices that were not codified.

## III. INDIANA SUPREME COURT DECISIONS

The Indiana Supreme Court decisions of the year 2000 impact some of the most practical, but decisive aspects of civil litigation–the geographical reach of state courts, the relationship between those courts and administrative agencies, the interplay between constitutional protections and statutes of limitations, and the termination of litigation without trial through summary judgment. In each of these areas, the court has been careful to elaborate the grounds for the conclusions it has reached to make the difficult legal and policy choices involved clear. The Indiana Supreme Court continues to be one of the most articulate tribunals in the country.

### *A. Personal Jurisdiction*

*Anthem Insurance Cos. v. Tenet Healthcare Corp.*,[17] is a major case involving allegations of health care fraud. It resolves a dispute in the court of appeals regarding the standard of review to apply to trial court decisions on personal jurisdiction, and it may enlarge what counts as sufficient activity to establish general jurisdiction over an out-of-state defendant in Indiana courts.

Anthem sued Tenet, a Nevada corporation with headquarters in California and the parent company of other defendants who were involved in the provision of inpatient psychiatric services. The lawsuit alleged that Tenet and its affiliates obtained improper payments from Anthem by fraudulently seeking

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14. *See* Shepard, *supra* note 12, at 12.
15. *See id.* at 13.
16. *See* IND. CONST. art.7, § 4 (amended 2000).
17. 730 N.E.2d 1227 (Ind. 2000).

reimbursement for patients. Tenet (and others) moved to dismiss for lack of personal jurisdiction. Anthem contended that Tenet's activities involved spending substantial monies in Indiana, settling a large lawsuit with the State of Indiana, defending a lawsuit in Indiana, dealing with Indiana regulators, and holding itself out as doing business in Indiana through a Web page and other business listings. The facts also showed that Tenet executives had made more than twenty-eight business trips to Indiana to recruit, litigate, deal with real estate transactions, and engage in other functions. However, Tenet emphasized that it had no employees in Indiana, was not registered to do business in the state, owned no property located in the state and had no officers or directors living in Indiana. The trial court granted Tenet's motion and this was affirmed on appeal.[18] Although the court of appeals used an abuse of discretion standard in its review of the trial court's grant of Tenet's motion to dismiss,[19] the supreme court held that where the jurisdictional facts are not in dispute, a de novo standard of review is required, because jurisdictional questions on agreed facts raise issues of law.[20]

The Indiana Supreme Court began its review with a discussion of Trial Rule 4.4(A), which it characterized as "Indiana's equivalent of a long-arm statute."[21] The supreme court disapproved those court of appeals' opinions that interpreted Rule 4.4(A) as extending personal jurisdiction to the extent consistent with the U.S. Constitution, underlining that T.R. 4.4(A) is an "enumerated act" statute.[22] Such a statute requires a determination of whether an out-of-state defendant's behavior fits within one of the acts it describes before a due process analysis is appropriate.[23] Only if T.R.4.4(A) is satisfied should a court inquire whether jurisdiction comports with the Federal Due Process requirements of the Fourteenth Amendment,[24] under the criteria developed in *International Shoe Co. v. Washington*[25] and its progeny. In reviewing the *Shoe* framework, the court followed the distinction between "general" (claims unrelated to contacts with the

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18. *See id.* at 1230-31, 1240.

19. *See id.* at 1237.

20. *See id.*

21. *Id.* at 1231.

22. *Id.* at 1232.

23. *See id.* at 1231-33.

24. U.S. CONST. amend XIV, § 1.

25. 326 U.S. 310 (1945). Under *Shoe* and related decisions, a two-part inquiry is appropriate: first, whether the defendant's activities constitute minimum contacts (whether "the defendant could reasonably anticipate being haled into court there") and second, whether exertion of jurisdiction would be too unfair to comport with due process under the totality of circumstances ("whether 'traditional notions of fair play and substantial justice'" would be offended.). Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985). The latter inquiry constitutes a balancing test between these factors: the burden on the defendant, the forum state's interest in the litigation, the plaintiff's interest in convenient and effective relief, the interstate judicial system's interest in efficiency, and the states' shared interest in furthering social policies. *See Anthem Ins. Cos.*, 730 N.E.2d at 1236.

forum) and "specific" jurisdiction (claims related to contacts with the forum)[26] and reversed the court of appeals' determination that Indiana had no power over Tenet. In so doing, it enlarged the definition of conduct giving rise to general jurisdiction.

The court advanced the analysis by stating that although the different types of activities a defendant conducts in Indiana might not be enough standing alone for general jurisdiction, those activities can be accumulated into "groups of contacts."[27] Thus, even though Tenet "does not meet traditional bases for establishing general personal jurisdiction, such as office or property in Indiana, its contacts with Indiana are nonetheless 'continuous and systematic.'"[28] Because the court aggregated activities that alone have not traditionally been associated with general jurisdiction, it signaled its willingness to test the boundaries of the doctrine as established by the U.S. Supreme Court in *Helicopteros Nacionales de Colombia, S.A. v. Hall.*[29] The Indiana Supreme Court also stated an asymmetrical rule for a defendant's post-event contacts and a finding of jurisdiction: "Nonresident defendants cannot defeat personal jurisdiction by severing all contact with the forum state . . . . [h]owever, they can tip the balance of factors toward personal jurisdiction by expanding their contact with the forum after the [alleged bad act]."[30]

Finally, the court conducted the analysis required by the fairness tier of due process and concluded that it was not unfair to have jurisdiction over Tenet in Indiana due to the number of the defendant's contacts with Indiana, Tenet's size, and the fact that it already had defended a lawsuit in the state.[31] The court also gave weight to the consideration that no other state would likely have jurisdiction over all defendants; thus, Indiana provided an efficient forum that advanced the interests of the judicial system as a whole.[32] The decision in *Anthem* abrogates *Torborg v. Fort Wayne Cardiology, Inc.*[33] and *Ryan v. Chayes Virginia, Inc.*[34]

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26. "General jurisdiction" means that a defendant's activities are so systematic and continuous that it can be sued in the forum state on any claim–related or unrelated to those activities; in contrast, "specific jurisdiction" sufficient to establish minimum contacts for the first tier of due process analysis is present when the lawsuit in the forum is based on the defendant's very contacts with the state. For an articulation of general jurisdiction, see *North Texas Steel Co. v. R.R.Donelley & Sons Co.*, 679 N.E.2d 513, 519 (Ind. Ct. App. 1997) (cited with approval in *Anthem Ins. Cos.*, 730 N.E.2d at 1227).

27. *Anthem Ins. Cos.*, 730 N.E.2d at 1239.

28. *Id.* at 1239-40.

29. 466 U.S. 408 (1984).

30. *Anthem Ins. Cos.*, 730 N.E.2d at 1238 n.13 (quoting Simpson v. Quality Oil Co., 723 F. Sup. 382, 391 n.6 (S.D. Ind. 1989)).

31. *See id.* at 1240.

32. *See id.*

33. 671 N.E.2d 947 (Ind. Ct. App. 1996) (jurisdiction over nonresident in action to secure reimbursement for medical services).

34. 553 N.E.2d 1237 (Ind. Ct. App. 1990) (fiduciary shield doctrine and jurisdiction over out-of-state corporate officers).

### *B. Exhaustion of Administrative Remedies*

In a pair of decisions involving constitutional challenges to Indiana's Health Care for the Indigent program ("HCI"), the Indiana Supreme Court vigorously enforced the requirement that administrative remedies be exhausted before subject-matter jurisdiction arises for judicial review. *State Board of Tax Commissioners v. Montgomery*[35] was a declaratory relief action instituted by Lake County and taxpayers seeking to have the HCI declared unconstitutional under the privileges and immunities clause[36] and property assessment and taxation clause[37] of the Indiana Constitution. Taxpayers originally challenged the HCI by writing a letter to the state board of tax commissioners ("state board"), which requested, among other things, a refund of monies allegedly overpaid. The chairman of the board responded that it was a ministerial entity with no power to either adjust the HCI tax levy or order a refund.[38] The taxpayers then brought suit in the Indiana Tax Court against the state board and argued that jurisdiction was proper because the chairman's letter was a "final determination."[39] The state board responded that the tax court was without jurisdiction because the plaintiffs had not exhausted their administrative remedies by filing an objection petition[40] or formally seeking a refund under the procedure of the tax code.[41] The tax court conceded that the chairman's letter did not constitute a final determination, but the court excused taxpayers from the requirement of exhausting administrative remedies because the remedies were inadequate.[42] This allowed taxpayers to invoke jurisdiction in the tax court, rather than to reach it on appeal. The questions involved were certified to the Indiana Supreme Court.[43]

In *State v. Sproles*,[44] the Indiana Supreme Court had held that a taxpayer could not challenge the constitutionality of a tax directly by judicial review "even if the administrative agency . . . is without the power to grant the exact remedy

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35. 730 N.E.2d 680 (Ind. 2000).

36. IND. CONST. art. I, § 23.

37. IND. CONST. art. X, § 1. "The General Assembly shall provide . . . for a uniform and equal rate of property assessment." *Id.*

38. *See Montgomery*, 730 N.E.2d at 682.

39. *Id.* at 682.

40. *See* IND. CODE § 6-1.1-17-5(b) (2000).

41. *Id.* § 6-1.1-26-1.

42. *See Montgomery*, 730 N.E.2d at 683. The objection petition procedure requires that at least ten taxpayers join to object to a tax; the tax court concluded that a constitutional right should not depend the willingness of others to join in a procedural device. With respect to a refund, the tax court found the remedy "impractical" due to the problem of a county being required to refund monies with no clear obligation on the state's part to reimburse it. *Id.* at 683. In addition, it noted that the HCI statute makes no reference to a refund process and concluded that the legislature did not intend that the county be required to grant refunds of money sent to the state. *See id.*

43. *See id.*

44. 672 N.E.2d 1353 (Ind. 1996).

the taxpayer seeks."[45] Following this precedent, the Indiana Supreme Court concluded that taxpayers had not exhausted administrative remedies because they had not formally sought a refund,[46] despite the absence of a statute authorizing the state board to give a refund even if it had concluded that the HCI was "illegal."[47] However, formal denials of refunds are eventually reviewable in the tax court on direct appeal and the statutory refund process follows a specific procedure that includes time deadlines.[48] In the court's view, requiring a claim for a refund to be presented first to the state board is "not irrational"[49] because it forces the dispute into a path that ultimately leads to the tax court—that is, it prevents litigation from being initiated directly in courts of general jurisdiction—and "provides for the legal infrastructure to process the case in an orderly manner, including timetables for decision."[50] As the court said:

> For the reasons discussed in Sproles, it is not irrational to require plaintiffs who wish to present such a claim to proceed through the administrative apparatus the legislature has set up to deal with tax disputes, even if the ultimate constitutional issue may be resolved only at the Tax Court stage [on appeal, not through original jurisdiction]. That requirement assures that an adequate record is developed and that nonconstitutional issues that may moot the constitutional challenge will be considered. The advantages of consolidating the litigation in a forum with expertise are retained. If the cost in time and effort imposed by this procedure is too great, the remedy lies with the General Assembly.[51]

In the companion case, *State v. Costa*,[52] seven of the plaintiffs in *Montgomery* filed an action challenging the constitutionality of the HCI tax in the Lake County Superior Court while *Montgomery* was pending.[53] On interlocutory appeal, the court ordered dismissal of the action following its opinion in *Montgomery*, stating that

> [W]e concluded [in *Montgomery*] that a taxpayer seeking to challenge the HCI levy must file a claim for a refund . . . . This claim is then reviewable by the State Board . . . and if denied, constitutes a final determination of the State Board that is reviewable in the Tax Court. The plaintiff-taxpayers have not filed a claim for a refund . . . . Accordingly, this claim, filed as an original action in a court of general

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45. *Montgomery*, 730 N.E.2d at 684.

46. *See id.* at 684-86. The court did conclude that the objection petition procedure was not an administrative remedy that had to be exhausted, for it would require numerous pro forma objections to any property valuation. *See id.* at 684.

47. *Id.* at 685.

48. *See* IND. CODE § 6-1.1-26-1 (2000).

49. *Montgomery*, 730 N.E.2d at 686.

50. *Id.* at 685.

51. *Id.* at 686.

52. 732 N.E.2d 1224 (Ind. 2000).

53. *See id.* at 1224-25.

jurisdiction, must be dismissed.[54]

*Montgomery* and *Costa* teach that the court will interpret the exhaustion requirement broadly to serve policies other than complete remedial relief; as a result, it may require resort to administrative remedies that are non-obvious, or even ineffective. This has been especially true of cases touching on the appellate jurisdiction of the tax court, but this approach could be applied beyond that context. At a minimum, *Montgomery* and *Costa* show that the Indiana Supreme Court is strongly committed to the requirement of exhausting administrative remedies and that constitutional challenges to administrative action cannot easily find their way into Indiana courts on original jurisdiction.

In a recently released 2001 decision, *Turner v. City of Evansville*,[55] the Indiana Supreme Court cited to *Montgomery* in a new context. There, a police officer who had been disciplined brought various constitutional and statutory challenges to the City of Evansville's actions against him, but did so while his appeals were pending with the Merit Commission. Although his lawsuit challenged the Merit Commission's compliance with statutory requirements, the court reasoned that he should not have obtained an injunction against its actions.[56] Instead, the officer should have made his arguments to the Merit Commission itself before seeking judicial review.[57] As in *Montgomery*, the Court required what most probably was an ineffective remedy to be pursued to satisfy the exhaustion principle. The court's willingness to rely on *Montgomery* outside the confines of tax disputes portends that the expansive understanding developed there is applicable to other controversies.

In contrast to *Montgomery* and *Costa*, *Town Council of New Harmony v. Parker*,[58] a takings case, provided a more straightforward application of the doctrine of exhaustion of administrative remedies. In *Parker*, the plaintiff and property owner, Parker, brought a constitutional challenge to New Harmony's refusal to install utility services on her property. The court opined that Parker should have applied for an improvement permit and if the permit had been denied, Parker should have then appealed to the Board of Zoning Appeals.[59] Parker argued that an alleged moratorium on improvement permits would have been futile.[60] Remarking on the informality of the plaintiff's communications with the Town Council and the evidence that the zoning administrator was "pretty accommodating,"[61] the court did not excuse the exhaustion of administrative remedies requirement and held that trial court lacked subject matter jurisdiction to consider whether New Harmony's failure to issue permits

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54. *Id.* at 1225 (internal citations omitted).
55. 700 N.E.2d 860 (Ind. 2001).
56. *See id.* at 862.
57. *See id.*
58. 726 N.E.2d 1217 (Ind. 2000).
59. *See id.* at 1223-24.
60. *See id.* at 1224.
61. *Id.*

was an unconstitutional taking.[62]

### C. Martin, Van Dusen *and Statutes of Limitations*

In 2000, the Indiana Supreme Court continued to refine its holdings in *Martin v. Richey*[63] and *Van Dusen v. Stotts*.[64] These decisions established that the two-year statute of limitations of the Medical Malpractice Act (the "Act"),[65] was unconstitutional when applied to litigants who could not discover their injury prior to the running of the statute.[66] The *Van Dusen* court held that such plaintiffs would receive the full two years of the statute, running from the time they discover, or should have discovered, the wrong.[67] One of the questions left open by these cases was whether the statute of limitations is constitutional as applied to patients who discover malpractice before the expiration of the limitations period, but some time after the act giving rise to their claims. In *Boggs v. Tri-State Radiology, Inc.*,[68] the Indiana Supreme Court answered the question, at least with regard to a plaintiff who had discovered the true facts "well within" the two-year limitations period. In that circumstance, the court held that the Act does not violate the Indiana Constitution when it requires the action to be brought within the limitations period.[69]

In *Boggs*, the defendant failed to diagnose the plaintiff's wife's breast cancer when a mammogram was conducted in July 1991. Approximately one year later, the patient discovered she metastatic cancer, which caused her death in July 1993. Plaintiff husband did not present an action for medical malpractice until July 1994. Defendant made a motion for a preliminary determination of its statute of limitations defense. The trial court granted the defendant judgment on that ground, but the appellate court reversed. The court of appeals opined that plaintiff had an opportunity to bring his claim after discovery; thus, the open courts provision, article 1, section 12,[70] of the state constitution was not violated. However, it did hold the statute unconstitutional as applied to the plaintiff as a violation of equal privileges and immunities.[71]

The Indiana Supreme Court agreed with the court of appeals' open courts analysis, but disagreed that the principle of equal privileges and immunities was violated. In its view, the plaintiff was not similarly situated with the plaintiffs in *Martin* and *Van Dusen*, and so need not be given the full two-year period after

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62. *See id.* at 1225.
63. 711 N.E.2d 1273 (Ind. 1999).
64. 712 N.E.2d 491 (Ind. 1999).
65. IND. CODE § 34-18-7-1(b) (2000).
66. *See Van Dusen*, 712 N.E.2d at 493.
67. *See id.* at 497.
68. 730 N.E.2d 692 (Ind. 2000).
69. *See id.* at 694.
70. *See* IND. CONST. art. I, § 12.
71. *See Boggs*, 730 N.E.2d at 695. The requirement of equal privileges and immunities is found in the Indiana Constitution, article 1, section 23.

discovery.[72] It relied on *Collins v. Day*,[73] and noted that it had already approved a different statute of limitations for medical malpractice patients versus other tort victims.[74] The opinion means that plaintiffs who discover medical malpractice "well-before" the running of the limitations period but after the event itself cannot easily invoke *Martin* and *Van Dusen*.[75] Explaining its reasoning, the court said:

> Here . . . we are not facing the practical impossibility of asserting the claim. Rather [the plaintiffs] . . . could have brought a claim within the statutory period. As long as the claim can reasonably be asserted before the statute expires, the only burden imposed upon the later discovering plaintiffs is that they have less time to make up their minds to sue. The relatively minor burden of requiring a claimant to act within the same time period from the date of occurrence, but with less time to decide to sue, is far less severe than barring the claim altogether.[76]

*Boggs* signals that the court will not necessarily take an expansive view of *Martin* and *Van Dusen* but neither does it establish a bright-line rule; instead it leaves open the possibility that extremely limited time periods between discovery and the running of the statute might run afoul of the constitution.[77] The court will consider this question on a case-by-case basis.[78]

Whether the logic of *Martin v. Richey* should be extended to the Products Liability Act statute of limitations was one of the major issues in *McIntosh v. Melroe Co.*[79] Over a spirited dissent by Justice Dickson, the court upheld the ten-year statute of limitations for products liability actions in the face of constitutional attack. The products liability statute bars actions brought more than ten years from delivery of the product to the initial user or consumer.[80] Plaintiffs alleged injury from a product that was sold to the initial user thirteen years prior. The trial court granted summary judgment on the basis of the ten-year time limit. The court of appeals affirmed, and the Indiana Supreme Court granted transfer.

On review, the court held that the statute was constitutional as a rational "legislative decision to limit the liability of manufacturers of goods over ten years old."[81] *Martin* was distinguishable because it turned on the fact that an already compensable injury could not be discovered until after the statute of limitations had run. In contrast, the provision in *McIntosh* determined in the first

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72. *See Boggs*, 730 N.E.2d at 695-96.
73. 644 N.E.2d 72 (Ind. 1994).
74. *See Boggs*, 730 N.E.2d at 696.
75. *Id.*
76. *Id.* at 697.
77. *See id.* at 697-98.
78. *See id.* at 698.
79. 729 N.E.2d 972 (Ind. 2000).
80. *See* IND. CODE § 34-20-3-1(b)(2) (2000).
81. *See McIntosh*, 729 N.E.2d at 973.

instance what the legislature judged to be a legally recognizable injury: "The holding in *Martin v. Richey* is that a claim that exists cannot be barred before it is knowable. Here, we are dealing with a rule of law that says . . . that products that produce no injury for ten years are no longer subject to claims under the Product Liability Act."[82]

The court also stated that the plaintiffs had no vested right in the common law of tort that preexisted prior to the enactment of the Products Liability Act, so that the legislature's passage of the Act did not violate the due course of law provision of the Indiana Constitution.[83] Finally, the majority rejected the equal privileges and immunities argument of the plaintiffs, stating that the "inherent characteristics" requirement for construing article I, section 23 established by *Collins v. Day*[84] applies not to the differences between the plaintiff's injured by products, but to the differences between products that are greater or lesser than ten years of age.[85] Because rational distinctions could be made between older and newer products, the legislature's classification was upheld.[86]

### *D. Summary Judgment*

Recent summary judgment decisions of the Indiana Supreme Court show that the court takes seriously the requirement to carefully review decisions to ensure that the parties are not denied their day in court.[87] The standard of review on appeal from the grant of summary judgment is the same as it is in the trial court, i.e., de novo;[88] thus, the court has ample opportunity to develop principles under Trial Rule 56 that insure litigation is not prematurely curtailed. As it looks at the record on appeal, the court has insisted that all inferences drawn from the facts are to be made in favor of the nonmoving party,[89] and it has limited review to those materials before the trial court when making its decision.[90]

Within these guidelines, *Indiana University Medical Center v. Logan*[91] is a decision with particular impact on the procedure for summary judgment because it relaxes time limits for presenting counteraffidavits. Normally, after one party moves for summary judgment, and if the moving papers show prima facie that no genuine issue exists for trial, the nonmoving party must file competent opposition within thirty days. The nonmovant must present admissible evidence that raises a triable issue of fact.[92] Typically this is achieved by furnishing counteraffidavits that meet the requirements of the rules of evidence. A number of Indiana cases

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82. *Id.* at 979.
83. *See id.* at 978 (citing IND. CONST. art. I, § 12).
84. 644 N.E.2d 72 (Ind. 1994).
85. *McIntosh*, 729 N.E.2d at 981.
86. *See id.* at 981-83.
87. *See* Estate of Shebel v. Yaskawa Elec. Am., Inc., 713 N.E.2d 275, 277 (Ind. 1999).
88. *See* Shell Oil Co. v. Lovold Co., 705 N.E.2d 981, 983-84 (Ind. 1998).
89. *See* Colonial Penn Ins. Co. v. Guzorek, 690 N.E.2d 664, 667 (Ind. 1997).
90. *See* Rosi v. Bus. Furniture Corp., 615 N.E.2d 431, 434 (Ind. 1993).
91. 728 N.E.2d 855 (Ind. 2000).
92. *See* IND. TRIAL RULE 56(c).

hold that a trial court may not consider responses filed after that time, and presumably, affidavits filed after that time as well.[93]

*Logan* involved a medical malpractice action for harms caused when defendant hospital overdosed the plaintiff's child with medication. Plaintiff timely opposed the defendant's motion for summary judgment with her own properly executed affidavit, but it alone was incompetent to contradict the allegations of the defendant's medical expert. However, she included materials that could have shown a triable issue, had they been admissible. After the thirty days for filing a response had elapsed, the plaintiff presented additional affidavits that were proper and did raise triable issues. The hospital moved to strike and for summary judgment, but the trial court denied relief. The appeals court reversed, holding that all Plaintiff's opposition materials—save her affidavit—were either inadmissible or untimely.[94]

The Indiana Supreme Court disagreed, construing Trial Rule 56 to give courts discretionary power to consider later filed affidavits as supplementary affidavits under Rule 56(E).[95] It was important to the court that the plaintiff admitted overdosing the child and had not been prejudiced by the later filings. Moreover, the late affidavits had been foreshadowed by statements in her affidavit. In a recent case, the court characterized *Logan* as giving trial courts "discretion to accept an affidavit filed later than the date specified by [Rule 56]."[96] *Logan* certainly advances the policy of allowing parties their day in court, but it might do so at the cost of introducing greater indeterminacy for the procedure on summary judgment.

In contrast to *Logan*, one of the more abstract questions of summary judgment is how to allocate burdens of proof and production between the parties when it is not possible to determine if a triable issue of fact exists. This problem often arises when it is difficult to know whether a defendant has manufactured a product or when intricate causal inferences must be made on limited scientific data. The U.S. Supreme Court's well-known opinion in *Celotex Corp. v. Catrett*[97] speaks to these situations. In *Celotex*, the Court held that with regard to an issue upon which the nonmoving party has the burden of proof, the moving party may show that no genuine issue of material fact exists for trial under FRCP 56 by pointing to the record and arguing the nonmoving party's inability to establish an element of its claim.[98] Under *Celotex*, the moving party does not have to affirmatively negate a claim by producing its own affidavits or similar materials.[99] The decision in *Celotex* has proven controversial, and its nuances are difficult to apply.

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93. *See, e.g.*, Markley Enters., Inc. v. Grover, 716 N.E.2d 559, 563 (Ind. Ct. App. 1999).

94. *See Logan*, 728 N.E.2d at 857-59.

95. *See id.* at 859.

96. Tom-Wat, Inc. v. Fink, No. 2001 WL 29182, at *3 (Ind. Jan.12, 2001) (quoting *Logan*, 728 N.E.2d at 858).

97. 477 U.S. 317 (1986).

98. *See id.* at 323-24.

99. *See id.* at 322-24.

In 1994, with *Jarboe v. Landmark Community Newspapers of Indiana, Inc.*,[100] the Indiana Supreme Court rejected the approach of *Celotex*, stating that "Indiana's summary judgment procedure abruptly diverges from federal summary judgment practice."[101] That procedure requires the moving party to affirmatively negate the elements of a plaintiff's claim, before the burden shifts to the nonmoving party to demonstrate a triable issue of fact.[102]

*Lenhardt Tool & Die Co., Inc. v. Lumpe* raised these questions again.[103] *Lenhardt* involved injuries sustained by the plaintiff in an explosion at the Olin Brass plant. The explosion may have been caused by molds manufactured by Lenhardt. Because the molds were destroyed in the blast, Lenhardt argued its manufacture of them could not be established. However, Lenhardt presented no evidence in support of its motion for summary judgment to disprove it made the products. The trial court refused to require the plaintiff to come forward with evidence that the molds were manufactured by Lenhardt and denied summary judgment.[104] Following *Jarboe*, the Indiana Court of Appeals affirmed, and the Indiana Supreme Court denied the petition for transfer over a dissent by Justice Boehm joined by Chief Justice Shepard.[105] Their views suggest that at least two members of the court wish to revisit *Jarboe*.

In his dissent, Justice Boehm argued that *Jarboe* has been misunderstood and that it does not require the moving party "to establish a negative proposition."[106] For Justice Boehm, *Jarboe*'s rejection of *Celotex* was prompted by a concern that *Celotex* shifted the burden of production under Rule 56 to the nonmoving party, in essence confusing burdens of production with burdens of proof.[107] But Justice Boehm argues this is not a correct reading of *Celotex*, which really requires that the moving party support the motion for summary judgment by something beyond a conclusory statement that the plaintiff is unable to prove his claim.[108] Where "the undisputed facts establish that we cannot determine whose version [of the facts] is correct," Justice Boehm would allow summary judgment if the nonmovant carries the burden of proof at trial and the moving party has shown, based on the undisputed facts, that the nonmoving party cannot carry this burden.[109] His approach implies that the moving party could carry the burden of production by explaining with specificity why the plaintiff cannot adduce evidence on essential elements. This could be accomplished by pointing to the record in an appropriate case, so that submitting affidavits to prove a negative would not be necessary. If the explanation is persuasive, then the burden of

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100. 644 N.E.2d 118 (Ind. 1994).
101. *Id.* at 123.
102. *See id.*
103. 703 N.E.2d 1079 (Ind. Ct. App. 1998), *trans. denied*, 722 N.E.2d 824 (Ind. 2000).
104. *See id.* at 1080.
105. 722 N.E.2d at 825 (Boehm, J., dissenting).
106. *Id.* at 825.
107. *See id.*
108. *See id.* at 826.
109. *Id.* at 827-28.

production shifts to the nonmovant and he must muster evidence showing a triable issue of fact to avoid summary judgment.

Finally, in *Butler v. City of Peru*,[110] the Indiana Supreme Court underscored that in deciding a motion for summary judgment, all reasonable inferences to be drawn from the facts must be made in favor of the nonmoving party. In *Butler*, decedent, a maintenance worker for the Peru Community Schools, was electrocuted while trying to restore power to an outlet near the high school baseball field. Decedent's wife and his estate presented claims for negligence and product's liability against the Peru Municipal Utilities and the City of Peru, which operated the utility. The defendants countered with a motion for summary judgment. With respect to the negligence claim, they argued that because the power facilities were owned by the school, they owed decedent no duty of care.[111] With regard to products liability, defendants asserted that decedent was not a user or consumer within the Products Liability Act. Plaintiffs countered with evidence that, though minimal, tended to show that defendants helped to design the electrical system and had some control over it.[112] Nonetheless, the trial court granted defendants' motion for summary judgment.

The Indiana Supreme Court disapproved, opining that "at this summary judgment stage it is Peru's burden to foreclose the reasonable inferences raised by the Butlers' designated evidence."[113] Moreover, with regard to the defendants' contributory negligence defense the court stated that "[c]ontributory negligence is generally a question of fact, and, as such, is not an appropriate matter for summary judgment if there are conflicting factual inferences."[114] In an important point for tort law, the court also held, citing *Thiele v. Faygo Beverage, Inc.*,[115] that an employee may be a user or consumer for purposes of the Products Liability Act.[116]

### *E. Settlement and Nonparties*

With the passage of the Comparative Fault Act (the "Act") in Indiana[117] came the phenomenon of the nonparty affirmative defense. Under that practice, a named party may seek to attribute fault to an entity not joined in the action, rather than to himself, so that the jury may apportion fault between them on appropriate instructions.[118] When fault is allocated to the nonparty in this fashion, the court reduces the named party's responsibility for any damages. To claim the benefits

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110. 733 N.E.2d 912, 917 (Ind. 2000).
111. *See id.* at 916.
112. *See id.*
113. *Id.* at 915-16.
114. *Id.* at 917.
115. 489 N.E.2d 562 (Ind. Ct. App. 1986).
116. *Butler*, 733 N.E.2d at 919.
117. *See* IND. CODE § 34-51-2-1 (2000).
118. *See id.* § 34-51-2-14.

of this rule, the named party must affirmatively plead the nonparty defense.[119] However, under common law principles, a claimant is to have but one satisfaction for a wrong.[120] To avoid double recovery, amounts a plaintiff gains in settlement are typically credited against any damages that are assessed against parties who do not settle a controversy.[121] This occurs whether a settling entity is formally named as a party or not.[122] In *Mendenhall v. Skinner & Broadbent Co.*,[123] a case of first impression, the Indiana Supreme Court faced the question whether the Act requires changing the common law practice regarding the one satisfaction principle. If so, in actions subject the Act, the only method for reducing a damage award pursuant to another entity's settlement is to present the nonparty affirmative defense.[124]

In *Mendenhall*, the plaintiff Mendenhalls sued for injuries Mr. Mendenhall incurred in a slip-and-fall in a parking lot owned by the defendant Skinner and Broadbent Company. Users of the parking lot were actually patrons of Stewart Tire Co. Plaintiffs named both Skinner and Stewart as defendants, but Stewart settled with the Mendenhalls on the morning of the trial. The trial proceeded against Skinner and the jury apportioned fault, fifty percent to plaintiff Mr. Mendenhall and fifty percent to defendant Skinner. Damages were calculated at $80,000, so Skinner's pro rata share without reference to Stewart's settlement was $40,000. The judgment was eventually amended after motion to allow Skinner credit for the Stewart settlement amount, as well as other sums paid. These credits reduced the judgment to $15,000. Plaintiffs appealed, and the court of appeals affirmed.[125]

After surveying the Comparative Fault Act, as well as the case law bearing on credit for settlement, the court concluded that it was left with a policy choice.[126] Skinner argued that the better policy was to prevent overcompensation, so that settlements should be credited against damages even where the nonparty defense is never raised.[127] The Mendenhalls stressed the risks plaintiffs take in making predictions about the amount of damages a jury might find or about how fault might be allocated.[128] In resolving these arguments, the court observed that when the nonparty is defense is raised by a defendant, "the jury necessarily provides the court with a visible allocation of fault" and that efforts to calculate a credit are "more speculative" when the

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119. *See id.* § 34-51-2-15.

120. *See* Nehi Beverage Co., Inc. v. Petri, 537 N.E.2d 78, 86 (Ind. Ct. App. 1989).

121. RESTATEMENT (SECOND) OF TORTS § 885(3) (1979) (superceded by RESTATEMENT (THIRD) OF TORTS, § 16 (2000)).

122. *See id.*

123. 728 N.E.2d 140 (Ind. 2000).

124. *See id.* at 141.

125. *See id.*

126. *See id.* at 143.

127. *See id.*

128. *See id.*

nonparty is not identified.[129] Following these concerns, the court required that in order to receive a reduction in damages for settlement amounts in cases under the Act, the nonparty defense must be presented: "We think the ability of courts to implement the common law policy of credit during an age of litigation under the Comparative Fault Act is best served by a rule that obliges defendants to name the settling nonparty if they are to seek a credit for the settlement."[130] Noting that the one satisfaction principle reduces overcompensation but can discourage settlement, the court decided that these contradictory effects are best mediated when "a thorough allocation of damages by the jury provides the court with a respectable basis upon which to adjust a judgment to avoid a double credit."[131]

*Mendenhall* provides clarity on a complex question with many policy implications. The majority opinion asserts that it should have a neutral effect on settlement behavior. However, as Justice Boehm noted in his concurring opinion, while the rule of *Mendenhall* penalizes those who do not name a nonparty, it may promote the involvement of entities with only marginal liability.[132]

### *F. Miscellaneous Issues*

The Indiana Supreme Court decided other cases in 2000 covering a wide range of issues. These include:

*1. Injunctions.*—In *State v. Monfort*,[133] which arose from the controversy surrounding the legislature's abolition of the Jasper County Superior Court, the Indiana Supreme Court did not allow an erroneously granted injunction to be saved by grounds the appellee did not raise an appeal.[134] *IDEM v. Medical Disposal Services, Inc.*,[135] recognized that IDEM was authorized to assess civil penalties for the defendant's violation of waste permit requirements that occurred during the pendency of a preliminary injunction—later dissolved—prohibiting IDEM from interfering with the defendant's operations.[136]

*2. Trial Rule 53.2.*—In *State v. Cass Circuit Court*,[137] the court held that the running of the ninety-day period for ruling on matters taken under advisement pursuant to T.R. 53.2 is triggered by the conclusion of the submission of evidence and is not extended by additional briefing or other events.[138]

*3. Limitations of Action Generally.*—In *Fort Wayne International Airport*

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129. *Id.* at 144.
130. *Id.*
131. *Id.* at 145.
132. *See id.* at 145-47 (Boehm, J. dissenting.)
133. 723 N.E.2d 407 (Ind. 2000).
134. *See id.* at 408.
135. 729 N.E.2d 577 (Ind. 2000).
136. *See id.* at 580.
137. 723 N.E.2d 866 (Ind. 2000).
138. *See id.* at 869.

*v. Wilburn*,[139] the court held that in order to toll the running of the statute of limitations the summons, complaint, and filing fee must all be properly tendered to the clerk of the court.[140] *Troxel v. Troxel*[141] involved a probate proceeding. The Indiana Supreme Court held that when a will is improperly admitted to probate after the expiration of the statute of limitations, the court's subsequent orders are voidable, not void. Thus, although they may be attacked by a timely will contest, persons with notice of the late probate must present their objections within the five-month period for a will contest or be barred themselves.

*4. Motions "Deemed Denied" and the Final Judgment Rule.*—What is the status of a belated grant of a motion to correct errors, when the motion was "deemed denied" for purposes of fixing the date of final judgment? This was the issue in *Cavinder Elevators Inc. v. Hall*.[142] In *Cavinder*, the plaintiff timely commenced an appeal when his motion to correct error was deemed denied because the trial judge did not rule on it within thirty days. Later when the motion was belatedly granted, the defendant immediately took an appeal and the plaintiff curtailed the appeal to raise the same issues on cross-error. The court of appeals treated the belated granting of the motion as a nullity, leaving the plaintiff in jurisdictional limbo. The Indiana Supreme Court reversed, treating the belated ruling as voidable, but not a nullity.[143] Because the plaintiff had timely filed an original appeal, this preserved his right to present issues on appeal. This case leaves the status of orders belatedly granting motions to correct error in some doubt as to the final judgment rule.

*5. Oral Mediation Agreements.*—In a significant case for mediation practice, the Indiana Supreme Court ruled that a mediator may not testify in an action to enforce an oral settlement agreement where the agreement was reached through a mediation process governed by the Indiana Alternative Dispute Resolution Rules.[144] Statements made in settlement negotiations are not admissible in evidence.[145] However, once a settlement agreement is reached, it is enforceable.[146] Nonetheless, the A.D.R. rules direct that settlements reached through mediation should be reduced to a writing.[147]

In *Vernon v. Acton*,[148] the defendant asserted the existence of a settlement agreement as an affirmative defense to the plaintiffs' action for damages arising from an automobile collision. To enforce the settlement, the defendant

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139. 723 N.E.2d 967 (Ind. Ct. App. 2000)

140. *See id.* at 968.

141. 720 N.E.2d 731 (Ind. Ct. App. 1999), *trans. granted and order vacated by* 737 N.E.2d 745 (Ind. 2000).

142. 726 N.E.2d 285 (Ind. 2000).

143. *See id.* at 291.

144. *See* Vernon v. Acton, 732 N.E.2d 805 (Ind. 2000).

145. IND. EVIDENCE RULE 408.

146. Germania v. Thermasol, Ltd., 569 N.E.2d 730, 732 (Ind. Ct. App. 1991).

147. *See* IND. ALTERNATIVE DISPUTE RULE 2.7(E)(2),GUIDELINE 8.8 (amended 2000). The guideline has since been amended to clarify that such settlements must be in writing. *See id.*

148. 732 N.E.2d at 805.

introduced evidence at a pre-trial hearing tending to show that an oral agreement had been reached during a mediation process. The parties had agreed the process would be governed by the A.D.R. rules. The mediator was called over the objections of the plaintiffs that the information was confidential and privileged. The trial court allowed the mediator to testify that an agreement was reached, but did not allow evidence regarding the events leading up to it.[149] The court of appeals affirmed the trial court's action, but the Indiana Supreme Court reversed.[150]

Noting that the question of whether oral mediation agreements should be enforceable is an issue in law reform,[151] the court held that "the mediation confidentiality provisions of our A.D.R. rules extend to and include oral settlement agreements undertaken or reached in mediation."[152] In the court's view, this result is consistent with the policies of the alternative dispute resolution rules, especially their emphasis on confidentiality and the need to memorialize mediated settlements in writing. The practical effect of this holding is that settlement agreements reached in mediation will hereafter be unenforceable unless reduced to a writing in compliance with the alternative dispute resolution rules because, in the court's view, they are "compromise settlement regulations." Following *Vernon, Silkey v. Investors Diversified Services, Inc.*,[153] which ordered an oral agreement reached in mediation reduced to a writing, is disapproved.

## IV. DECISIONS FROM THE COURT OF APPEALS

The Indiana Court of Appeals addressed a myriad of issues affecting civil practice during the survey period. Standards for motions to dismiss and motions for summary judgment under Indiana Trial Rules 12 and 56 were recurring themes, as was the proper interpretation of the venue rule, Trial Rule 75, particularly as it affects the concept of "preferred venue."[154] Perhaps the most important decision is *Sims v. United States Fidelity & Guaranty*.[155]

In *Sims*, the court of appeals held that section 22-3-4-12.1 of the Indiana Code (worker's compensation "bad faith" statute) violated the open courts provision of the Indiana Constitution and the right to jury trial. In *Sims*, the plaintiff employee was injured and repeatedly attempted to contact his insurance carrier to arrange for medical services, but the carrier allegedly did not respond. He filed an action for gross negligence, intentional infliction of emotional distress, and intentional deprivation of his statutory rights under the Worker's

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149. *See id.* at 806-07.

150. *See id.*

151. *See id.* at 809.

152. *Id.* at 810.

153. 690 N.E.2d 329 (Ind. Ct. App. 1997).

154. IND. TRIAL RULE 75.

155. 730 N.E.2d 232 (Ind. Ct. App. 2000), *trans. granted*, No. 49502-0105-CV-229, 2001 IND. LEXIS 416, at *1 Ind. May 4, 2001).

Compensation Act.[156] The trial court granted the insurance company's motion to dismiss for lack of subject matter jurisdiction on the ground that section 22-3-4-12.1 of the Indiana Code invested the Worker's Compensation Board with exclusive jurisdiction over claims that an insurance carrier had committed an independent tort in dealing with an employee's claim for coverage.[157]

On review, the court of appeals held this rule unconstitutional, following the Indiana Supreme Court's opinion in *Stump v. Commercial Union*.[158] *Stump* had addressed the extent to which claims by an employee against third parties would be subject to the worker's compensation schema, rather than trial court jurisdiction, and indicated that such claims would not be within the exclusive jurisdiction of the Worker's Compensation Board.[159] The legislature responded and amended the worker's compensation statute to expressly provide that the Board had "the exclusive jurisdiction to determine whether the . . . [employer's] worker's compensation insurance carrier has . . . committed an independent tort in adjusting or settling the claim for compensation."[160] Notwithstanding this sequence of events, the appellate court struck the amendment on the authority of *Stump* and the later decided *Martin v. Richey*.[161] As the court of appeals stated:

> *Martin* unequivocally held that the General Assembly can abrogate common law rights and remedies, as long as doing so does not interfere with constitutional rights. Removing a worker's access to the court for a determination of the worker's independent cause of action against a worker's compensation insurance carrier is not constitutionally permissible. The result is to deprive injured workers who have been subsequently harmed by the malfeasance of the insurer the right to a complete tort remedy. This is not the type of harm that the Worker's Compensation Act was intended to compensate.[162]

*Sims* was not the only important court of appeals' opinion issued in 2000. Following are brief summaries of some of the most significant decisions organized alphabetically by topic.

### *A. Default*

Again illustrating that Indiana's courts prefer to reach the merits of a case, the court of appeals in *Kelly v. Bennett*,[163] reversed a denial of a motion to set aside a default for service defects, where the sheriff merely left a copy of the summons and complaint at defendant's business address so the attempt at service

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156. *See id.* at 233.

157. *See id.*

158. 601 N.E.2d 327 (Ind. 1992).

159. *See id.* at 330-32.

160. IND. CODE. § 22-3-4-12.1(a) (2000). *See also* Borgman v. State Farm Ins. Co., 713 N.E.2d 851, 855 (1999).

161. 711 N.E.2d 1273 (Ind. 1999).

162. *Sims*, 730 N.E.2d at 236.

163. 732 N.E.2d 859 (Ind. Ct. App. 2000).

was a total failure. Because the service defects could not be cured, the grounds for relief were not merely technical.[164]

### *B. Discovery*

In *Andreatta v. Hunley*,[165] the court of appeals approved the trial court's use of its discretionary power to fashion a discovery procedure under Trial Rule 34. The trial court had required the plaintiff to execute authorizations so that out-of-state medical records not reachable by subpoena could be made available in an Indiana action.[166] In *Old Indiana Limited Liability Co. v. Montano*,[167] the court of appeals stated in dicta that all examinations under Trial Rule 35 must be conducted under the direction of a physician, even if they concern psychological conditions.

### *C. Failure to Prosecute*

*Metcalf v. Estate of Hastings*,[168] established that once a party or his attorney has been given the required notice of a hearing on a motion to dismiss for failure to prosecute, dismissal may be granted, even if no one attends on behalf of the party whose claim is the subject of the motion.[169]

In *Indiana Insurance Co. v. Insurance Co. of North America*,[170] the court of appeals allowed an action to be reinstated more than one year after a dismissal for failure to prosecute. The appellate court concluded that it was appropriate for the trial court to grant relief under Trial Rule 60(B)(8), because neither party had received notice of the dismissal, the parties had continued litigating, and there was a good faith dispute on the merits.[171]

### *D. Final Judgment*

The court in *Waas v. Illinois Farmers Insurance Co.*[172] held that a final judgment ousts a trial court from jurisdiction to consider a motion for reconsideration. Instead, matters to be reconsidered should be raised as a motion to correct errors, which motion must be made within thirty days of the entry of judgment. Moreover, the appellate court reiterated that trial courts do not have the discretion to grant extensions of time for motions to correct errors.[173]

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164. *See id.* at 861-62.

165. 714 N.E.2d 1154 (Ind. Ct. App. 1999), *trans. denied*, 735 N.E.2d 220 (Ind. 2000).

166. *See id.* at 1157-58.

167. 732 N.E.2d 179, 185 n.2 (Ind. Ct. App.), *trans. denied*, No. 06A01-9904-CV-142, 2001 IND. LEXIS 18, at *1 (Ind. Jan. 11, 2001).

168. 726 N.E.2d 372 (Ind. Ct. App.), *trans. denied*, 741 N.E.2d 1247 (Ind. 2000).

169. *See id.* at 374.

170. 734 N.E.2d 276 (Ind. Ct. App. 2000).

171. *See id.* at 278-81.

172. 722 N.E.2d 861 (Ind. Ct. App. 2000)

173. *See id.* at 863.

### *E. Intervention*

In *Warsco v. Hambright*[174] the court of appeals determined that a "legal interest" sufficient to justify intervention into a paternity action by a trustee in bankruptcy existed when the bankrupt mother was owed arrearages for child support.[175] Under Indiana law, an applicant must have a direct interest in an action to intervene as of right.[176] The court reasoned that once child support is past due and the custodial parent expends monies for the child's maintenance, any trusteeship over the delinquent monies ceases, and the arrearage is due to the custodial parent directly. When that parent files for bankruptcy protection, the arrearages become an asset of the bankrupt estate. This provides the bankruptcy trustee with a sufficient interest to intervene in a paternity action where support is at issue.[177]

### *F. Jurisdiction*

In *Brickner v. Brickner*,[178] the court of appeals construed the Uniform Interstate Family Support Act[179] and the federal Full Faith and Credit for Child Support Orders Act[180] to confer continuing jurisdiction on Indiana courts to enforce child support orders. This is the case so long as the obligor, obligee, or child is an Indiana resident. In that circumstance, Indiana law also determines whether a minor has been emancipated.[181]

Paralleling the approach taken by the Indiana Supreme Court in *State Board of Tax Commissioners v. Montgomery*,[182] in *Save the Valley, Inc. v. Indiana Department of Environmental Management*,[183] the court of appeals concluded that even though a challenge to an Indiana state permit scheme for animal feed lots was based on constitutional grounds, administrative remedies still had to be exhausted before the trial court had subject matter jurisdiction.

### *G. Limitations of Actions*

In *Troyer v. Cowles Products Co.*,[184] a seller of goods brought a third-party action on an account against a buyer. The trial court applied a six-year statute of limitations to the action. On review, the court of appeals held that the Uniform Commercial Code's four-year limitations period for breach of contracts

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174. 735 N.E.2d 844 (Ind. Ct. App. 2000), *trans. granted*, No. 02504-0104-CV-212, 2001 IND. LEXIS 348, at *1 (Ind. Apr. 16, 2001).

175. *Id.* at 846.

176. *See* IND. TRIAL RULE 24.

177. *See Warsco*, 735 N.E.2d at 846-47.

178. 723 N.E.2d 468 (Ind. Ct. App.), *trans. denied*, 735 N.E.2d 235 (Ind. 2000).

179. IND. CODE § 31-18-2-5 (2000).

180. 28 U.S.C.A. § 1738B (2000).

181. *See Brickner*, 723 N.E.2d at 473.

182. 730 N.E.2d 680 (Ind. 2000).

183. 724 N.E.2d 665 (Ind. Ct. App.), *trans. denied*, 741 N.E.2d 1248 (Ind. 2000).

184. 732 N.E.2d 246 (Ind. Ct. App.), *trans. denied*, 741 N.E.2d 1258 (Ind. 2000).

applied, rather than the six-year limitations period for actions on accounts because the case involved a transaction in goods and legislation designates that the UCC's statute governs.[185]

In *Ling v. Stillwell*,[186] the principles of *Martin v. Richey*[187] were used in a new context. The decedent was one of the people murdered by Orville Lynn Majors. Because the representative of his estate could not have known that the real cause of his death was homicide, the court of appeals concluded that the statute of limitations for action against the hospital was unconstitutional as applied to him.[188]

In *Burton v. Elskens*,[189] a summary judgment decision for the defendant that was based on the statute of limitations was held proper, despite the allegation that the defendant doctor's conduct constituted a continuing wrong. The decedent's condition, a stroke, was not a latent condition that would have made it difficult to discover the malpractice before the limitations period ran.[190]

### *H. Motions to Dismiss: Indiana Trial Rule 12(b)(6)*

As least one commentator asserts that confusion has emerged from several appellate cases regarding the standard of review for a rule 12(b)(6) motion to dismiss for failure to state a claim for relief.[191] Rule 12(b)(6) motions are to be determined on the basis of the allegations in the pleadings, not on facts outside them. If facts outside the pleadings are considered, then the motion should be treated as one for summary judgment. For instance, in *Yoder Grain Inc. v. Antalis*,[192] the court stated that the grant of dismissal under Rule 12(b)(6) should be sustained on any basis "found in the record." This is appropriate for summary judgment, where evidentiary matter can be considered, but not for a motion to dismiss under Rule 12(b)(6). The Indiana Supreme Court should clarify the appropriate standard for motions to dismiss for failure to state a claim for relief to resolve this and similar ambiguities.

With regard to the substance of rulings on 12(b)(6) motions, in *Ledbetter v. Ross*[193] the court of appeals found the elements to make out a claim for invasion of privacy lacking because, inter alia, no public disclosure of private fact was made. In *American Dry Cleaning & Laundry v. State*[194] the court of appeals

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185. *See id.* at 247.

186. 732 N.E.2d 1270 (Ind. Ct. App. 2000), *trans. denied*, No. 49A02-002-CV-119, 2001 IND. LEXIS 54, at *1 (Ind. Jan. 17, 2001).

187. 711 N.E.2d 1273 (Ind. 1999).

188. *See id.* at 1274-75.

189. 730 N.E.2d 1281 (Ind. Ct. App. 2000).

190. *See id.* at 1284-85.

191. *See* William F. Harvey, *Mediation Agreements, Insurance Contracts, Motions to Dismiss*, RES GESTAE, Dec. 2000, at 46-48.

192. 722 N.E.2d 840, 845 (Ind. Ct. App. 2000).

193. 725 N.E.2d 120 (Ind. Ct. App. 2000).

194. 725 N.E.2d 96 (Ind. Ct. App. 2000).

dismissed an action for defamation and tortious interference with business relations. These claims were based on a previous action filed against the now plaintiff by the state for environmental violations. The court found that statements at issue were absolutely privileged because they were contained in pleadings in the prior litigation. Moreover, out-of-court statements made by the Attorney General were protected by immunity as they were within the scope of her public duties. Hence, the plaintiff could not establish claims on both theories and the grant of a 12(b)(6) motion was proper.[195]

### *I. Pleading*

Whether an amendment adding a party will relate-back to satisfy the statute of limitations was the issue in *Red Arrow Stables, Ltd. v. Velasquez.*[196] The appellate court concluded that notice given to the insurance carrier functions as constructive notice to the new party for purposes of Rule 15(C).[197] The court disapproved of cases requiring actual service of process on the carrier under Trial Rule 4. It relied on the Indiana Supreme Court's opinion in *Waldron v. Waldron,*[198] which held that a party received notice of the pendency of an action before the statute had run due to the notice given to the insurer and construed it to apply both to misnomer of a party and to the addition of new parties under Trial Rule 15.

### *J. Penalties*

Penalties against landowners who fail to make mandated repairs under section 36-7-9-7(d) of the Indiana Code are civil, not criminal; thus, they do not violate either the Indiana or federal constitutions for failing to follow criminal procedural safeguards.[199]

### *K. Summary Judgment*

Indiana courts continue to struggle with the standards for granting review of motions for summary judgment. One point of controversy is whether the appellate court is bound by findings and conclusions of the trial court or may affirm on any basis supported by the record. In *Ward v. First Indiana Plaza Joint Venture,*[200] a slip-and-fall action against a property management company, the court asserted that the trial court's grant of summary judgment for the defendant was sustainable on any theory or basis supported by the record, even if it is one

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195. *See id.* at 98-99.

196. 725 N.E.2d 110 (Ind. Ct. App.), *trans. denied,* Girl Scouts of Calumet Council v. Velasquez, 735 N.E.2d 238 (Ind. 2000).

197. *See id.* at 114-15.

198. 532 N.E.2d 1154 (Ind. 1989).

199. *See* Freidline v. Civil City of South Bend, 733 N.E.2d 490 (Ind. Ct. App. 2000).

200. 725 N.E.2d 134 (Ind. Ct. App.), *trans. denied,* 735 N.E.2d 238 (Ind. 2000).

not relied upon at the trial level.[201] At the same time, the court refused to consider a new basis for opposition to the motion, arguing that a party cannot change the theory of opposition to a motion for summary judgment on appeal.[202]

In *Coffer v. Arndt*,[203] the court of appeals affirmed summary judgment based on the statute of limitations in a medical malpractice action, despite the argument that the defendant's conduct constituted a continuing wrong and involved fraudulent concealment. Because the patient learned of the malpractice twenty-two months before expiration of the limitations period, the statute of limitations was constitutional as applied to him.[204] Moreover, for purposes of the "continuing wrong" doctrine, the statute ceased to be tolled upon the patient's last visit for services to the provider.[205] Even if fraudulent concealment occurred, the patient's delay in bringing the action after discovering the true facts was unreasonable.

In *Aldrich v. Coda*,[206] another malpractice action, the court grappled with the question of whether an affidavit raised a genuine issue of material fact. The court of appeals held that the affidavit of an orthopedic surgeon was sufficient to raise a triable question of fact as to a podiatrist's malpractice, although it only alleged familiarity with the general standard of care.[207]

In *Estate of Verdi v. Toland*,[208] the court looked at how questions of soundness of mind and undue influence should be analyzed for purposes of summary judgment. The court of appeals concluded that evidence of a prior diagnosis of a condition that affected mental competence was admissible to oppose a motion for summary judgment. Moreover, the prior diagnosis created a triable issue of fact as to the soundness of the testator's mind when the will was executed, thereby precluding summary judgment.[209]

In *Auto-Owners Insurance Co. v. Cox*[210] the court of appeals had to consider the effect of the plaintiff's argument that the defendant insurer had waived the statute of limitations defense—either expressly or impliedly. Waiver is a fact sensitive issue unlikely to be determined on summary judgment. Thus, where the insured asserted facts showing that the defendant impliedly waived the statute of limitations by failing to make repairs as contemplated, summary judgment was precluded.[211]

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201. *See id.* at 136.

202. *See id.* at 137.

203. 732 N.E.2d 815 (Ind. Ct. App. 2000).

204. *See id.* at 821.

205. *Id.*

206. 732 N.E.2d 243 (Ind. Ct. App. 2000).

207. *See id.* at 245-46.

208. 733 N.E.2d 25 (Ind. Ct. App. 2000), *trans. denied*, No. 74A01-9908-CV-277, 2001 IND. LEXIS 94, at *1 (Ind. Jan. 30, 2001).

209. *See id.* at 28-29.

210. 731 N.E.2d 465 (Ind. Ct. App. 2000).

211. *See id.* at 467-68.

The issue in *Brannon v. Wilson*[212] was how proximate causation should be handled. The trial court concluded that the question of whether an injury worsened the plaintiff's pre-existing condition created a genuine issue of material fact, but the appellate court disagreed. The plaintiff's decedent suffered from a chronic liver disease, which appeared to cause his death. Defendant's medical expert stated that the accident did not cause or exacerbate decedent's condition. The plaintiff submitted a counteraffidavit by a medical expert that opined it was only "possible" the liver condition may have been worsened due to the defendant's acts. The court of appeals reversed the trial court's denial of the motion for summary judgment, asserting that "a plaintiff should not be permitted to require a defendant to enter into a full-scale trial defense of a claim which is supported solely by speculation or mere possibility."[213] This case continues the dispute over the proper scope of summary judgment and how the Indiana Supreme Court's construction of the rule is being interpreted by lower courts.

### *L. Trial*

In *Webber v. Miller*[214] the court of appeals ruled it reversible error where the trial court conducted a bench trial, although the draft pre-trial order, signed by both parties, set the cause for a jury trial. It reached this conclusion even though no party had requested a jury in the pleadings.[215] In *In re Roberts*[216] the court of appeals held that a trial judge may question witnesses in a commitment proceeding, even in the absence of the attorney for the social worker, without violating the duty of impartiality or the due process rights of the patient. The appellate court stressed the special nature of commitment proceedings and that more latitude is given judges to question witnesses in bench trials.[217].

### *M. Venue*

The question of a litigant's bona fides in making personal property allegations so as to come within Trial Rule 75(A)(2) continues to be an issue for Indiana courts. In *Halsey v. Smeltzer*,[218] which parallels the analysis in *Banjo Corp. v. Pembor*,[219] the court refused to consider the plaintiff's motive in pleading damage to personal property though the allegations may have been a "subterfuge."[220] Instead, the court permitted the venue because it fit within the literal language of the statute.

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212. 733 N.E.2d 1000 (Ind. Ct. App. 2000).
213. *Id.* at 1001.
214. 731 N.E.2d 476 (Ind. Ct. App. 2000).
215. *See id.* at 477.
216. 723 N.E.2d 474 (Ind. Ct. App. 2000).
217. *See id.* at 476.
218. 722 N.E.2d 871 (Ind. Ct. App.), *trans. denied*, 735 N.E.2d 237 (Ind. 2000).
219. 715 N.E.2d 430 (Ind. Ct. App. 1999).
220. *Halsey*, 722 N.E.2d at 873.

In *Shelton v. Wick*,[221] the court of appeals addressed various issues concerning proper venue that arose in a medical malpractice action against the estate of a deceased physician. In essence, the court held that the estate and personal representative could not be treated as "individual defendants" for preferred venue purposes.[222] Moreover, the action was not a probate claim for venue purposes. Finally, the court stated that venue is to be determined at the time the complaint is filed, so that preferred venue questions can only be determined at that time.[223]

A written stipulation as to preferred venue must be signed by all parties to the lawsuit when the action is filed. If it is not, the stipulation is ineffective according to the court of appeals in *City of South Bend, Department of Public Works v. D & J Gravel Co.*[224] Moreover the court stated that the preferred venue rule makes no distinctions between the grounds of preferred venue, and if a suit is initially filed in a county of preferred venue, a transfer of venue will not be granted to another location of preferred venue. The court stressed that a trial court's disposition of a motion for transfer of venue is an interlocutory order that must be reviewed under an abuse of discretion standard, but that abuse occurred where the trial court did not transfer action to a county where the city was located.[225] In *Trustees of Purdue University v. Hagerman Construction Corp.*,[226] the court of appeals reiterated that the granting of motions venue under 75(A) are reviewed for abuse of discretion and that a sufficient nexus for preferred venue based on the location of land existed where action for breach of construction contract was brought.

In *Ford v. Culp Custom Homes, Inc.*,[227] transfer of venue pursuant to Trial Rule 75 is the remedy where the contractor files suit to enforce a mechanic's lien in a county other than where the realty is located. When a case has been transferred for improper venue, the only precondition to jurisdiction being transferred is the payment of costs in the transferor court and not the transfer of the record to the transferee court.[228] Thus, in *Ahmad v. Duncan*,[229] the court of appeals reversed the original trial court's resumption of jurisdiction, even though the defendant had not filed the record in the new court.[230]

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221. 715 N.E.2d 890 (Ind. Ct. App.), *trans. denied*, 735 N.E.2d 219 (Ind. 2000).

222. *Id.* at 893.

223. *See id.* at 895.

224. 727 N.E.2d 719, 722 (Ind. Ct. App. 2000).

225. *See id.* at 721.

226. 736 N.E.2d 819, 820 (Ind. Ct. App. 2000) (citing *D. & J. Gravel Co.*, 727 N.E.2d at 721).

227. 731 N.E.2d 468 (Ind. Ct. App.), *trans. denied*, No. 46A03-0002-CV-39, 2000 IND. LEXIS 1182, at *1 (Ind. Dec. 4, 2000).

228. *See id.* at 473-74.

229. 732 N.E.2d 862 (Ind. Ct. App. 2000), *trans. denied*, No. 49A04-0001-CV-31, 2001 IND. LEXIS 16, at *1 (Ind. Jan. 10, 2001).

230. *See id.* at 865.

## V. RULE CHANGES

In addition to the New Appellate Rules, the Indiana Supreme Court also promulgated rule amendments affecting Alternative Dispute Resolution, the Indiana Supreme Court's original jurisdiction, some trial rules, and court administration.

### *A. Amendments to the Rules for Alternative Dispute Resolution*

On January 1, 2001, a series of amendments to the Indiana Rules for Alternative Dispute Resolution became effective.[231] Rules 1.4, 1.6, 2.6, 2.7, 7.3, Guideline 8.8 and Form B were the subject of these changes.

With regard to scope, Rule 1.4 was simplified such that the rules now "apply in all civil and domestic relations litigation filed in all Circuit, Superior, County, Municipal, and Probate Courts in the state."[232] Moreover, some enumerated exclusions of particular actions from alternative dispute resolution were deleted.[233] Rule 2.6 has been modified to make the setting of hourly rates for mediation discretionary, not mandatory, when the parties cannot otherwise agree.[234] After the amendments, Rule 2.7(A)(1) is deleted so that the mediator is not explicitly required to inform the parties of factual documentation revealed in mediation, where the parties agree to its disclosure.[235] Rule 2.7(C) is also amended to delete the five-day time limit for making supplementary materials, such as damage brochures or videos, available to opposing counsel. The last sentence of section 2.7(C), relating to sharing information about settlement authority, is deleted. The neutral party (i.e., mediator, arbitrator, etc.) is no longer required by A.D.R. rule 7.3 to affirmatively explain the extent to which information obtained through alternative dispute resolution may not be protected from disclosure.[236] Finally, Guideline 8.8, governing settlement agreements, is amended to make clear that such agreements must be reduced to a writing.[237] This amendment conforms with the Indiana Supreme Court's recent opinion in *Vernon v. Acton*,[238] which has the effect of making oral settlements reached in mediation unenforceable.[239]

### *B. Original Jurisdiction in the Indiana Supreme Court*

To conform the Indiana Rules of Procedure for Original Actions to the New

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231. *See* Order Amending Rules for Alternative Dispute Resolution, Ind. Order No. 2000-30 (2000).

232. *See* IND. ALTERNATIVE DISPUTE RESOLUTION RULE 1.4 (amended 2000).

233. *See id.*

234. *See* A.D.R. 2.6.

235. *See* A.D.R. 2.7; *see also* Order Amending Rules for Alternative Dispute Resolution, Ind. Order No. 2000-30 (2000).

236. *See* A.D.R. 7.3(A).

237. *See* A.D.R. 8.8.

238. 732 N.E.2d 805 (Ind. 2000).

239. *See id.* at 810.

Appellate Rules, Rule 1 on scope has been amended. Various amendments to Rules 2, 3, 5, and 6 regarding writs of prohibition and mandamus have also been made.[240] In addition, to accommodate the repeal of section 34-1-58-1 of the Indiana Code[241] governing writs of mandate and prohibition and its recodification in section 34-27-3-1 of the Indiana Code,[242] Rule 1(D) on scope is amended to reflect the new statute. Rule 2 clarifies the procedure of filing and service for applications for such writs. Rule 2(G) thereof stipulates the meaning of "parties" and "party." Rule 3 has also been modified so that the filing of an alternative writ form is optional, not mandatory.[243] New Rule 4 relaxes the time limit for setting any hearing.[244] Rule 5 details the procedure on disposition of writs of mandamus and prohibition, including time limits, and Rule 6 governs service of papers before any hearing.[245]

### *C. Trial Rules*

Trial Rule 25 on substitution of parties has been amended to delete the option of making a motion in the appellate court for the substitution; the procedure now is to file a notice with the Clerk of the Court.[246] Trial Rule 63 has also been amended to require locally appointed judges pro tempore to be paid twenty-five dollars per day for their service.[247] Ministerial changes have been made to Trial Rules 50 (motion for judgment on the evidence), 53.3 ( time limit on motion to correct errors), 59 (motion to correct errors), and 60 (motion for relief from judgment or order) to conform them to the New Appellate Rules and correct other language. Trial Rule 62 on stays of judgment has also been amended to make it clear that any party may seek such a stay, not just the appellant.[248]

### *D. Possible Rule Changes*

Late in 2000, the Indiana Supreme Court released a series of proposed amendments to the Indiana Trial Rules for public comment.[249] Indiana

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240. For the text of the order amending these rules, see Order Amending Rules of Procedure for Original Actions, Ind. Order No. 2000-24 (2000).

241. IND. CODE § 34-1-58-1 (repealed 1998).

242. *See id.* § 34-27-3-1 (2000).

243. *See* IND. ORIGINAL ACTION RULE 3(E) (amended 2000).

244. *See* ORIG. ACT. R. 4(A).

245. *See* ORIG. ACT. R. 5, 6.

246. *See* T.R. 25.

247. *See* T.R. 63(D).

248. *See* T.R. 50, 53.3, 59, 60, 62.

249. These amendments affect Trial Rules 4 (process), 5 (service and filing of pleadings and other papers), 15 (relation back of amendments), 45 (subpoenas), 53.1 (exception for failure to timely rule on motions), 53.153.3 (final judgment and failure to rule on a motion to correct errors), 56 (summary judgment), and 79 (special judges), *available at* http://www.state.in.us/judiciary/ruleamnd/Allrules.pdf. Notable are changes to T.R. 5 allowing for service of documents by commercial carriers; to T.R. 15 clarifying the time limits for relation-back of amendments; to T.R.

practitioners would be well served in closely following the progress of these proposed amendments. In addition to these pending changes, the court also sought public comment on a series of amendments to the Indiana Rules for Small Claims.[250]

## VI. FEDERAL PRACTICE

In 2000, the most significant activity affecting federal civil practice arose from rule changes and U.S. Supreme Court decisions further curtailing congressional statutory authority under principles of federalism. Amendments to the Federal Rules of Civil Procedure now make automatic disclosures mandatory for discovery in all federal district courts, and other rule revisions are proceeding through the rulemaking process. At the level of the U.S. Supreme Court, decisions carry forward the themes of *United States v. Lopez*[251] (commerce clause), *Seminole Tribes of Florida v. Florida*[252] (Eleventh Amendment), and *City of Boerne v. Flores*[253] (enforcement powers under the Fourteenth Amendment), which restrict federal power to legislate, and apply them in new contexts. In Congress, there were few enactments that affected federal practice. However, procedural decisions from the Seventh Circuit Court of Appeals did cover a diverse array of topics.

### *A. Procedural Legislation*

Perhaps due to the distractions of the election cycle, very little activity on procedural questions issued from the 106th Congress. The Federal Courts Improvement Act of 2000[254] was enacted in November. It clarifies various matters regarding the retirement, status, and powers of bankruptcy and magistrate judges and, most notably, extends the contempt powers of magistrate judges in several contexts. H.R. 1875[255] and S. 353[256] would have conferred subject-matter jurisdiction on federal courts over state class actions on merely minimal, not full,

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45 allowing attorneys to issue subpoenas in pending actions where the attorney has entered an appearance for a party; to T.R. 53.1 establishing that referring a case to alternative dispute resolution creates an exception to the time limits for ruling on motions; to T.R. 53.3 explicitly providing that, after the passage of time limits for ruling on a motion to correct errors so that the motion is deemed denied, the judgment shall become final and also providing that a judge's actual notice of the running of the time period obviates the requirement of service on him and allows the final judgment rule to apply; and to T.R. 56 imposing an outside limit of 120 days before trial for moving for summary judgment.

250. *See Comment Sought on Proposed Rule Amendments*, *supra* note 7.

251. 514 U.S. 549 (1995).

252. 517 U.S. 44 (1996).

253. 521 U.S. 507 (1997).

254. Federal Courts Improvement Act of 2000, Pub. L. No. 106-518, 114 Stat. 2410 (2000).

255. H.R. 1875, 106th Cong. (1999).

256. S. 353, 106th Cong. (1999).

diversity; however, these measures were not enacted. H.R. 2112[257] would have authorized federal district courts presiding over multidistrict litigation to retain those matters for trial, thus legislatively overruling the decision in *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*.[258] However, actions would still have had to be remanded to the transferor court for assessment of compensatory damages, unless the Panel on Multidistrict Litigation allowed retention. This bill, too, was not passed. Finally, legislation was also introduced, but not enacted, in the 106th Congress that would have established an Asbestos Resolution Corporation to determine eligibility for awards for asbestos injuries.[259]

Legislation entitled the "Paycheck Fairness Act" [260] is pending in the 107th Congress. It would amend the Fair Labor Standards Act[261] to provide additional relief for gender discrimination in wages and expand possible remedies, including the availability of class actions.[262] Also, in the 107th Congress, H. R. 199[263] has just been introduced to amend rule 26 of the Federal Rules of Civil Procedure to protect the personnel records and personal information of law enforcement officials from discovery.

### *B. U.S. Supreme Court and Seventh Circuit Decisions*

In the 1999-2000 Term, the U.S. Supreme Court continued to narrow the ambit of Congress' legislative power as it maintained a focus on federalism. Following the themes introduced by *United States v. Lopez*,[264] *Seminole Tribes of Florida v. Florida*,[265] and *City of Boerne v. Flores*,[266] the Court decided a number of cases that implicate the limits of federal authority. Although *Lopez*, *Seminole Tribes*, and *City of Boerne* all involve different aspects of the constitution, they function synergistically to quite dramatically shift power from the federal government to the states. In *Lopez*, the Court narrowed the definition of "commerce" by closely associating it with mercantile activity; at the same time it restricted Congress's power to aggregate the effects of intrastate activities on interstate commerce to provide a basis for legislation under the commerce power. In *Seminole Tribes* it interpreted the states' Eleventh Amendment immunity from private damage actions expansively, so that Congress' ability to abrogate that immunity in the exercise of its Article I enumerated powers was cast in doubt. In *City of Boerne v. Flores*, the Court signaled that it would narrowly construe the nature and extent of constitutional rights in order to insulate the states from

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257. H.R. 2112, 106th Cong. (1999).
258. 523 U.S. 26 (1998).
259. S. 758, 106th Cong. (1999); H.R. 1283, 106th Cong. (1999).
260. S. 8, 107th Cong. (2001); S. 77, 107th Cong. (2001).
261. Fair Labor Standard Act of 1938, 29 U.S.C. § 201 (2000).
262. S. 8, § 203, 107th Cong. (2001); S. 77, § 3(e), 107th Cong. (2001).
263. H.R. 1999, 107th Cong. (2001).
264. 514 U.S. 549 (1995).
265. 517 U.S. 44 (1996).
266. 521 U.S. 507 (1997).

Congressional legislation designed to enforce them. All of these opinions function together to limit a plaintiff's power to use federal law to secure relief. The result should be the redirection of litigation to the state courts and the attempted reframing of federal rights in terms of state law.

Following *Lopez*, in *United States v. Morrison*,[267] by a 5-4 margin, the Court invalidated the civil remedies provisions of the Violence Against Women Act,[268] holding these provisions beyond the powers of Congress both under the commerce clause and the Fourteenth Amendment.[269] In so doing, it underlined the distinctly economic definition given interstate commerce in *Lopez*, further curtailed the power of Congress to aggregate effects of intrastate activity on commerce, and also held that the remedial provisions of the Act were directed to private behavior, so that the state action requirement of the Fourteenth Amendment was not satisfied.[270]

In a recent opinion, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*,[271] the Supreme Court held that the Army Corps of Engineers exceeded the powers of the Clean Water Act (CWA),[272] when the Corps enlarged by rule the definition of "navigable waters." The litigation involved an environmental dispute over the development of a hazardous waste facility on wetlands in the path of migratory birds. The Corps had crafted a rule, the "Migratory Bird Rule,"[273] under which it exerted jurisdiction over wetlands that were not part of interstate navigable waters. The rule was justified on the theory that intrastate harm to migratory bird species created a substantial effect on interstate commerce.[274] Following the reasoning of *United States v. Morrison*,[275] the Court stated that congressional power to regulate intrastate activities that substantially affect interstate commerce, "raises significant constitutional questions."[276] It went on to invalidate the Migratory Bird Rule on the ground that, in the absence of clear congressional intent, the agency should not be allowed to interpret the CWA so as to take it to the limits (and perhaps beyond) of federal power.[277] By this reasoning the Court reveals that it will even scrutinize environmental legislation for violations of federalism, as well other statutory schema.

The Eleventh Amendment was the focus in *Kimel v. Florida Board of*

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267. 120 S. Ct.1740 (2000).
268. Violence Against Women Act of 1994, Pub. L. 103-322, Title IV, 108 Stat. 1902.
269. *See id.* at 1752-59.
270. *See id.*
271. 121 S. Ct. 675 (2001).
272. Clean Water Act, 33 U.S.C. § 1344(a) (2000).
273. Migratory Bird Rule, 51 Fed. Reg. 41,217 (1986).
274. *See Solid Waste Agency*, 121 S. Ct. at 681.
275. 120 S. Ct. 1740 (2001).
276. *Solid Waste Agency*, 121 S. Ct. at 683.
277. *See id.* at 688.

*Regents*,[278] as it had been in *Seminole Tribe*.[279] In that case, which consolidated actions against universities in Alabama and Florida, middle-aged and older professionals sued for money damages alleging that the universities discriminated against them on the basis of their age. *Kimel* raised the question of the immunity of state employers from private damage actions under the Age Discrimination in Employment Act (ADEA).[280] In *Kimel* the Court used a two-part test to determine abrogation of immunity—whether Congress expresses an unequivocal intent to overcome state immunity and whether in so doing, it acts pursuant to a valid grant of constitutional authority. By another 5-4 decision, the Court concluded that although the Act showed Congress' clear intent to overcome state immunity for ADEA violations, it was an impermissible exercise of its enforcement powers under Section 5 of the Fourteenth Amendment.

In 1997 the Court had invalidated the Religious Freedom Restoration Act, (RFRA) in *City of Boerne v. Flores*.[281] Congress had predicated its power to pass RFRA on the notion that the free exercise of religion is a constitutional right incorporated and enforceable against the states under the Fourteenth Amendment. In passing on this claim, the Court introduced a new element into its analysis of Congress' powers—the requirement that to be proper under Section 5, any remedy legislated by Congress must be "congruent and proportional" with the Fourteenth Amendment right to be vindicated. According to the majority, this restriction was needed to prohibit Congress from creating "new" substantive rights under the rubric of Fourteenth Amendment enforcement and to police the separation of powers between the judiciary and Congress.[282] In practice this new proportionality test has allowed the Court to second guess important factual and policy determinations made by Congress. As it impacts the interface between civil rights legislation (such as the ADEA) and states' Eleventh Amendment immunity, it functions as a barrier to private damage actions.

Following *City of Boerne*, the *Kimel* majority asserted that to properly come within the scope of Section 5, ADEA remedies must show a congruent and proportional relation between the means adopted to prevent injury and the injury itself.[283] This standard was difficult to meet, because the Court also relied on the principle that states could constitutionally discriminate on the basis of age if the discrimination were rationally related to a legitimate state interest. In this way the lower standard of review for classifications based on age—rational basis—interacted with the majority's restrictive interpretation of Section 5 of the Fourteenth Amendment to virtually guarantee that congruence and proportionality would not be satisfied. Thus, the Court found that the state's immunity was not overcome.[284] Soon the Court would apply this analysis to

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278. 120 S. Ct. 631 (2000).

279. Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

280. Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 (2000).

281. 521 U.S. 507 (1997).

282. *See id.* at 509-10.

283. *See id.* at 644-45.

284. *See id.* at 646.

erode the protection of the Americans With Disabilities Act. [285]

In another case from Alabama, the Court has concluded that states are immune from private damage actions under the Americans With Disabilities Act (ADA). *University of Alabama at Birmingham Board of Trustees v. Garrett*,[286] presented consolidated damage actions filed by employees against the University of Alabama and the Alabama Department of Youth Services for, inter alia, violation of the ADA. The district court dismissed the claims on Eleventh Amendment grounds and the Eleventh Circuit reversed in part, holding that states are not immune from private ADA claims. On review and following *Kimel*, the U.S. Supreme Court concluded that Congress had gone beyond the enforcement powers granted it by Section 5 of the Fourteenth Amendment because the wrong it tried to reach and the remedy chosen were not proportional. As it had with the Commerce Clause cases, the Court did not defer to Congress' findings as to the nature and effects of disability discrimination—particularly as related to state employers.

In a different context, but following a related theme, the Court clarified that states may not be sued by whistle blowers under the False Claims Act[287] *qui tam* provisions in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*.[288] The fact that punitive damages are available under the Act and would implicate the Eleventh Amendment was an important factor in the Court's reasoning that the statutory term "persons"does not include states.[289]

While the decisions from *Morrison* to *Garrett* show the sea-change in the Court's federalism jurisprudence, the Court did recognize Congress' power over states in *Reno v. Condon*.[290] There it unanimously validated the Driver's Privacy Protection Act[291]against Tenth Amendment challenge. It held that motor vehicle personal data collected by states about drivers and then sold is an article of commerce and so can be regulated under the Commerce Clause.[292] Then, it concluded that because the Act was directed to states in their proprietary, not sovereign, capacity, the prohibitions imposed by the Act did not violate the Tenth Amendment.[293]

Aside from the emphasis on federalism, the Court also decided a number of cases more directly affecting the mechanics of federal civil procedure. One important case, *Green Tree Financial Corp.-Alabama v. Randolph*,[294] emphasizes the federal policy of enforcing arbitration provisions, even when they affect

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285. *See* Americans With Disabilities Act of 1990, 42 U.S.C. § 12101 (2000).

286. 193 F.3d 1214 (11th Cir. 1999), *cert. granted*, 120 S. Ct. 1669 (2000).

287. 31 U.S.C. § 3729 (2000).

288. 120 S. Ct. 1858 (2000).

289. *Id.* at 1869-70.

290. 120 S. C. 666 (2000)

291. Driver's Privacy Protection Act of 1994, Pub. L. 103-322, Title XXX, 108 Stat. 2099 1994).

292. *See id.* at 671.

293. *Id.* at 671-72.

294. 121 S. Ct. 513 (2000).

federally protected rights. *Green Tree* involved a class action brought under the federal Truth in Lending Act,[295] which was dismissed with prejudice by the trial court following the grant of the defendant's motion to compel arbitration. The Eleventh Circuit reversed and remanded, but the Supreme Court disagreed with this disposition. Although it held that an arbitration order resulting in the dismissal of an action is an appealable "final decision" for purposes of the Federal Arbitration Act,[296] it also established that an arbitration agreement is not unenforceable due to the risk of prohibitive expense, unless the party seeking to avoid it can show the likelihood that he will actually incur those expenses.[297]

Judgments as a matter of law under Federal Rule of Civil Procedure 50 also garnered attention from the Supreme Court. *Weisgram v. Marley Co.*,[298] addressed a split in the circuits concerning the powers of appellate courts in connection with judgments as a matter of law. The Court held that appellate courts may simply direct entry of judgment after a jury verdict is reversed where the trial court had denied a judgment as a matter of law. Although it is within the appellate court's discretion to remand to the trial court to allow the verdict loser to move for a new trial, the Supreme Court made it clear that this is not required.[299] *Reeves v. Sanderson Plumbing Products, Inc.*,[300] an age discrimination case, raised the issue of the evidence to be considered by a court in ruling on a judgment as a matter of law. The Fifth Circuit concluded that the plaintiff had introduced insufficient evidence on intent to discriminate; the Supreme Court reversed and underlined that in ruling on a motion for judgment as a matter of law, the trial court not only should consider all evidence and make inferences from the evidence favoring the nonmovant, but also should consider evidence supporting the moving party that is uncontradicted and unimpeached.[301]

In *Cortez Bird Chips, Inc. v. Bill Harbet Construction Co.*,[302] the Court clarified that motions relating to awards under the Federal Arbitration Act[303] may be filed either in the district where the award is made or in any other venue that is proper under the general federal venue statute.[304] *Sims v. Apfel*,[305] a 5-4 decision, dealt with exhaustion of administrative remedies in the context of Social Security benefit claims. The Court decided that an applicant who pursues all remedies in the Social Security process including an appeal to the Social Security Appeals Council is not required to present all *issues* to preserve those issues for judicial review. The Court had crafted previously an "issue

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295. Truth in Lending Act, 15 U.S.C. § 1601 (2000).
296. Federal Arbitration Act of 1947, 9 U.S.C. § 16 (2000).
297. *See Green Tree Fin.*, 121 S. Ct. at 522-23.
298. 528 U.S. 440 (2000).
299. *See id.* at 456-57.
300. 120 S. Ct. 2097 (2000).
301. *See id.* at 2110-11.
302. 529 U.S. 193 (2000).
303. Federal Arbitration Act of 1947, 9 U.S.C. § 16 (2000).
304. 28 U.S.C. § 1391 (2000).
305. 530 U.S. 103 (2000).

exhaustion" requirement in addition to a remedies exhaustion requirement in other contexts, but did not extend that doctrine to Social Security proceedings in the Council.[306]

The boundaries of Federal Rule of Civil Procedure 15(c) were tested in *Nelson v. Adams, USA, Inc.*[307] The trial court allowed a party to amend the pleadings *after* judgment to add a new party and also amended the judgment itself to make the new party liable for attorneys fees previously awarded. The Supreme Court unanimously concluded that this application of the rule was a violation of due process rights.[308]

In *Arizona v. California,*[309] a water rights case, the Supreme Court reviewed preclusion in the context of an original proceeding. It reiterated that claim preclusion is an affirmative defense that may be waived through the passage of time, and it also suggested that normal principles of preclusion apply to original proceedings as well as other forms of action.[310] *Semtek International Inc. v. Lockheed Martin Corp.*,[311] recently decided in February 2001, addresses the important question of whether state or federal law governs when the preclusive effect of a judgment rendered by a federal court sitting in diversity is at issue. There in dicta, the Court indicated that the claim preclusive effect of prior proceedings is a matter of federal common law, not the Federal Rules of Civil Procedure. Thus, because in a diversity action state law governs substantive rights and liabilities, the state approach should also generally govern the claim preclusive effect of a prior federal diversity proceeding. However, the Court held open the possibility that the federal common law of preclusion could trump state law, if the application of state preclusion principles impairs federal interests.[312]

Unfortunately, the potential of *Free v. Abbott Laboratories Inc.*[313] to answer the question whether the supplemental jurisdiction statute[314] legislatively overrules *Zahn International Paper Co.*[315] was not realized last term. The Court split 4-4 on the question, with Justice O'Connor not participating. *Zahn* had held that in a spurious class action based on diversity, each class member must independently satisfy the amount in controversy for federal subject matter jurisdiction.[316] In *Free*, the Fifth Circuit had held that the supplemental jurisdiction statute sections 1367(a)and (b) abrogated the rule of *Zahn* rule, so that supplemental jurisdiction over unnamed class members in a diversity action

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306. *See id.* at 106-07.
307. 529 U.S. 460 (2000).
308. *See id.* at 471-72.
309. 120 S. Ct. 2304 (2000).
310. *See id.* at 2316-18.
311. 121 S. Ct. 1021 (2001).
312. *See id.* at 1023.
313. 529 U.S. 333 (2000), *aff'd per curiam by equally divided court.*
314. 28 U.S.C. § 1367 (2000).
315. 414 U.S. 291 (1973).
316. *See id.* at 301-02.

would be permissible.[317] Due to the tie, the Fifth Circuit's ruling is affirmed, but the status of *Zahn* is still in doubt in other circuits.[318]

The U.S. Court of Appeals for the Seventh Circuit decided a variety of cases affecting civil practice. Perhaps the opinion with the greatest practical impact on Indiana lawyers is *Judge v. Pilot Oil Corp.*,[319] which involved a choice of law question concerning the death of a Utah man who was killed in Indiana by a security guard. Construing the Indiana Supreme Court's decision modifying the *lex loci* standard for choice of law,[320] the Seventh Circuit held that Indiana law applied to determine the issues, including the amount recoverable for wrongful death, because the last event necessary for liability occurred in that state and was not an insignificant factor.[321] The Seventh Circuit issued a number of other important decisions.[322]

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317. *See* Free v. Abbott Labs., 176 F.3d 298 (5th Cir. 1999) (final order dismissing action); *In re* Abbott Labs., 51 F.3d. 524, 528-29 (5th Cir. 1995) (interlocutory appeal).

318. *See, e.g.*, Meritcare Inc. v. St. Paul Mercury Ins. Co., 166 F.3d 214 (3d Cir. 1999) (finding supplemental jurisdiction statute does not overrule *Zahn* because Congress did not intend it to expand diversity jurisdiction); Leonhardt v. Western Sugar Co., 160 F.3d 631 (10th Cir. 1998) (finding no supplemental jurisdiction over claims of class members below jurisdictional amount even though named plaintiff did have a claim in excess of $75,000); *In re* Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 1337 (1998) (finding principle of *Stromberg* extended to class actions); Stromberg Metal Works, Inc. v. Press Mechanical, Inc., 77 F.3d 928 (7th Cir. 1996) (holding supplemental jurisdiction appropriate over claim closely related to claim against defendants that is clearly permissible in the federal forum).

319. 205 F.3d 335 (7th Cir. 2000).

320. *See* Hubbard Mfg. Co. v. Greeson, 515 N.E.2d 1071 (Ind. 1987).

321. *Judge*, 205 F.3d at 337.

322. Bolt v. Loy, 227 F.3d 854 (7th Cir. 2000) (before dismissing for a party's failure to respond to a motion, trial court should warn of dismissal sanction, either explicitly or by making clear that no further extensions of time will be granted); Cash v. Ill. Div. of Mental Health, 209 F.3d 854 (7th Cir. 2000) (holding that where time for motion for new trial expired, Rule 60(b) could not be used to correct error; it redresses only special circumstances justifying an extraordinary remedy); CCC Info. Servs., Inc. v. Am. Salvage Pool Ass'n, 230 F.3d 342 (7th Cir. 2000) (finding that when a not-for-profit corporation has a direct interest in the controversy, the corporation's citizenship controls for diversity, not the citizenship of the members); Garcia v. Meza, 235 F.3d 287 (7th Cir. 2000) (holding due process rights of owner violated in forfeiture proceeding where notice given by overnight delivery service); Jessup v. Luther, 227 F.3d 993 (7th Cir. 2000) (giving right of access to public information gave newspaper sufficient interest to intervene to contest sealing of record in wrongful termination case); Kalis v. Colgate-Palmolive Co., 231 F.3d 1049 (7th Cir. 2000) (holding party not permitted to create issue of fact by submitting affidavit whose conclusions contradict prior deposition or other sworn testimony); Lehmann v. Brown, 230 F.3d 916 (7th Cir. 2000) (concluding that where claim alleges welfare-benefit plan committed tort and there is no parallel cause of action under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 (2000) (ERISA), action is not removable to federal court, even though state law claim may be preempted by ERISA); Perry v. Globe Auto Recycling, Inc., 227 F.3d 950 (7th Cir. 2000) (finding assignee not precluded by prior litigation of assignor);

It is beyond the scope of this Article to canvas the myriad of cases emanating from the U.S. District Courts for the Northern and Southern Districts of Indiana affecting civil procedure. However, major litigation that will generate national attention has been situated in the U.S. District Court for the Southern District of Indiana. This stems from the Judicial Panel on Multi-District Litigation assigning the Bridgestone/Firestone tire litigation to Judge Sarah Evans Barker for pre-trial proceedings.

### *C. Rules Changes*

In December 2000, important amendments to the Federal Rules of Civil Procedure concerning discovery became effective. Moreover, additional changes to the rules are in the rulemaking process. The U.S. District Courts for the Northern and Southern Districts of Indian have modified their Local Rules to conform to the newly amended federal rules.[323]

*1. Discovery.*—Ever since Federal Rule of Civil Procedure 26 was amended in 1993 to provide for automatic disclosures, there has been dispute over the success of the change.[324] Many federal courts took advantage of the opt-out provision of Rule 26(a),[325] so that automatic disclosure was not required in their jurisdictions. The possibility of opt-out has caused substantial disuniformity in federal discovery practice. At the same time, some believed that the scope of the information subject to automatic disclosure posed a substantial threat to both the attorney work product doctrine and material covered by the attorney-client privilege.[326] Effective December 1, 2000, Rule 26 and other discovery rules were amended to speak to these problems.

One commentator argues that the overarching purpose of amending the rules of discovery has been to make discovery an extra-judicial phenomenon.[327] To achieve this aim, the rules have been modified to establish specific guidelines of permissible discovery behavior.[328] Although, Rule 26 now mandates automatic disclosure in all federal actions, it also narrows the scope of

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Ramsden v. AgriBank, FCB, 214 F.3d 865 (7th Cir. 2000) (restricting power of federal courts to enjoin state court proceeding under the relitigation exception to the Anti-Injunction Statute); Tidemann v. Nadler Golf Car Sales, Inc., 224 F.3d 719 (7th Cir. 2000) (finding proper measure of costs for a prevailing defendant is determined by 28 U.S.C. §1920, not Federal Rule of Civil Procedure 68).

323. *See* H.R. Doc. No.106-228 (2000).

324. *See generally* Carl Tobias, A Progress Report on Automatic Disclosure in the Federal Courts, 154 F.R.D. 229 (1994).

325. *See id.*

326. *See, e.g.*, Samuel Issacharoff & George Loewenstein, *Unintended Consequences of Mandatory Disclosure*, 73 TEX. L. REV. 753, 780-81 (1995); Linda S. Mullenix, *Adversarial Justice, Professional Responsibility, and the New Federal Discovery Rules*, 14 REV. LITIG. 13, 43-44 (1994).

327. *See* Hon. Elizabeth A. Jenkins, *Amendments to the Federal Discovery and Evidence Rules, A Primer*, 74 FLA. B.J. 22 (Dec. 2000).

328. *See id.*

permissible discovery for the first time since 1971.[329] Now, unless the court orders otherwise, the scope of discovery is restricted to nonprivileged information that is relevant to "the claim or defense of any party," instead of information that is relevant to the subject-matter of the action.[330] At the same time, automatic initial disclosure of specified information is mandatory.[331] Generally, automatic disclosure requires parties to identify without request each person with knowledge of and each document or similar item that bears on that party's claims or defenses, although the scope of insurance coverage and damages information that must be disclosed has not changed.

Automatic disclosures must be made at or within fourteen days of the Rule 26(f) planning meeting. This meeting can no longer be dispensed with by local rule, but it can take the form of a conference without an actual face-to-face encounter.[332] It must occur at least twenty-one days before any scheduling conference or any scheduling order is due. However, matters exempted from automatic disclosure requirements are also exempted from the planning conference.[333] Prior to these amendments, the U.S. District Courts for the Northern and Southern Districts of Indiana had operated under different policies on automatic disclosure; thus, the amendments bring a welcome possibility of increased uniform practice in our state's federal venues.[334]

Other important changes to the discovery process in federal courts involve depositions and sanctions. Now Federal Rule of Civil Procedure 30 sets an outer time limit for each deposition of one day of no more than seven hours, unless the court orders otherwise.[335] With regard to sanctions, amended Rule 37 provides that a court may sanction a party who fails to amend a prior response to discovery under Rule 26(e) by excluding the party's subsequent use of that evidence, unless there is substantial justification for the failure or it is harmless.[336]

*2. Technical Amendments.*—In addition to the changes in the discovery rules, a variety of nonsubstantive, technical amendments to Federal Rules of Procedure 4 (service of process on federal officials sued individually and in an official capacity), 5 (no filing of discovery until used in proceeding), 12 (sixty-day answer period for federal officers sued in individual capacity), and 14 (admiralty rule changes), also became effective December 1, 2000.[337]

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329. FED. R. CIV. P. 26(b)(1)(amended 2000). Up to this most recent amendment, Rule 26 had delineated the scope of discovery as nonprivileged information "relevant to the subject-matter of the action." FED. R. CIV. P. 26(b)(1).

330. FED. R. CIV. P. 26(b)(1)(amended 2000). Information concerning insurance coverage is still freely discoverable. *See id.*

331. *See* FED. R. CIV. P. 26(a)(1) (amended 2000).

332. FED. R. CIV. P. 26(b) (amended 2000); Fed. R Civ. P. 26 (f) (amended 2000).

333. *Id.*

334. *See* Donna Stienstra, *Summary of Actions Taken by Federal District Courts in Response to Recent Amendments to Federal Rule of Procedure* 26, 154 F.R.D. LVII, LXVIII (1994).

335. *See* FED. R. CIV. P. 30 (amended 2000).

336. *See* FED. R. CIV. P. 37(c)(1) (amended 2000).

337. *See* Leonidas Ralph Mecham, Memorandum to the Chief Justice of the United States and

*3. Proposed Changes to the FRCP.*—Proposed changes to six Federal Rules of Civil Procedure have been submitted to the Judicial Conference for ultimate transmission to the Supreme Court. Rule 5(b) would allow for electronic service and service through court facilities.[338] To conform with this change, Rule 6(e) would also be amended to extend the time for response to documents so served for three days.[339] Following on the theme of technological innovation, Rule 77(d) would be modified to provide the clerk of the court with more alternatives for notifying parties of entry of an order or judgment, including facsimile and computer transmission. Rule 65 would add a new subdivision (f) to govern copyright impoundment.[340] Finally, Rule 81(a)(1) would be changed to clarify that the Federal Rules of Civil Procedure apply in bankruptcy proceedings, mental health proceedings, and copyright proceedings.[341]

The Advisory Committee has also recommended that proposed changes to rules 7, 54, 58 and 81 be published.[342] New rule 7.1 would be added and would require the disclosure of corporate parties' financial interests, including the disclosure of parent corporations and stock interests of at least 10% held by public corporations.[343] Rule 58 will be changed to remove a conflict with Federal Rule of Appellate Procedure 4, governing when the time runs for filing an appeal.[344] The amendments would make it clear that, except for final orders under Rules 50(b), 52(b), 54(d)(2)(B), 59, and 60, all judgments—even amended ones—must be entered on a separate document.[345] To be consistent with these changes, Rule 54 would also be amended to delete the requirement of service before the submission of a motion for attorneys fees and to delete the requirement of a separate judgment therefor.[346]

*4. Local Rules.*—Effective October 2, 2000, a number of Local Rules of the

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the Associate Justices of the Supreme Court (Oct. 20, 2000), *available at* http://www.uscourts.gov.rules/supcivil.pdf (last visited May 10, 2001).

338. Proposed FED. R. CIV. P. 5(b), *available at* http://www.uscourts.gov/rules/ 0010CV redlinetext.pdf (last visited May 10, 2001).

339. Proposed FED. R. CIV. P. 6(e), *available at* http://www.uscourts.gov/rules/ 0010CV redlinetext.pdf.

340. Proposed FED. R. CIV. P. 65, *available at* http://www.uscourts.gov/rules/0010CV redlinetext.pdf.

341. Proposed FED. R. CIV. P. 81(a)(d), *available at* http://www.uscourts.gov/rules/ 0010CV redlinetext.pdf.

342. Transmittal Memorandum of the Committee on Rules of Practice and Procedure of the U.S. Judicial Conference, *at* http://www.uscourts.gov/rules/comment2001/memoranda.htm. The full text of the proposed rules is available at http://www.uscourts.gov/rules/comment2001/amendments/cv.pdf (last visited May 10, 2001).

343. *See* Report of the Civil Rules Advisory Committee to Anthony J. Scirica, Chair, Standing Committee on Rules of Practice and Procedure (May 2000), *available at* htttp://www.uscourts.gov/rules/comment2001/summary.pdf (last visited May 10, 2001).

344. *See id.*

345. *See id.*

346. *See id.*

U.S. District Court for the Northern District of Indiana were revised.[347] Among the more important changes were amendments to Local Rules 5.1(d)[348] (prohibiting transmission of papers for filing to the judge, not the Clerk of the Court); 7.1(b)[349] (requiring the separate filing of motions and that alternative motions be listed in caption); 8.2[350] (new rule regarding corporate disclosures); 16.3[351]( requiring that attorneys consult with clients before requesting continuances); 30.1[352]( new rule for scheduling depositions); 54.1[353] (requiring taxation of costs on prescribed form; 56.1[354](extending time for filing affidavits or other documents in opposition to summary *judgment* to thirty, instead of fifteen, days—reply to opposition due in fifteen days); and 83.5 (b) and (g)[355](requiring attorneys and pro se litigants to certify to having read the Local Rules before admission to practice).

The U.S. District Court for the Southern District of Indiana has also effectuated changes to certain of its Local Rules. Effective January 1, 2001, Local Rule 53.1 on arbitration and alternative dispute resolution was deleted.[356] In addition, as of that date, Local Rule 16.1, governing pre-trial conferences and other judicial management proceedings has been amended to conform to the changes in the Federal Rules of Civil Procedure and to affect time limits for conduct of such proceedings, as well as other changes.[357] Other modifications include moving 26.1 (b), limiting the number of interrogatory questions, to Rule 36.1; deleting 26.2(d), affecting the filing of discovery material and motions to publish depositions; deleting entirely Rule 26.3, exempting compliance with the Federal Rules of Civil Procedure; deleting subsections (a) and (d) of 30.1, which had regulated attorney objections during depositions; 42.2, governing the procedure on case consolidation, and 83.5 dealing with bar admission.[358] Finally, a new fee schedule for the Southern District went into effect as of January 1, 2001.[359]

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347. The text of the amended Local Rules for the U.S. District Court for the Northern District of Indiana is available at http://www.innd.uscourts.gov/docs/notice.pdf (last visited May 10, 2001).

348. *See* Local Rule, N.D. Ind., 5.1(b) (amended 2000).

349. Local Rule, N.D. Ind., 7.1(b) (amended 2000).

350. Local Rule, N.D. Ind., 8.2 (amended 2000).

351. Local Rule, N.D. Ind., 16.3 (amended 2000).

352. Local Rule, N.D. Ind., 30.1(amended 2000).

353. Local Rule, N.D. Ind., 54.1 (amended 2000).

354. Local Rule, N.D. Ind., 56.1 (amended 2000).

355. Local Rule, N.D. Ind., 83.5 (amended 2000).

356. The full text of the Local Rules for the U.S. District Court for the Southern District of Indiana as amended is available at http://www.insd.uscourts.gov/publications.htm (last visited May 29, 2001).

357. Local Rule, S.D. Ind., 16.1 (amended 2001).

358. Local Rules, S.D. Ind., 26 (amended 2000), 30.1 (amended 2000), 42.2 (amended 2000), 83.5 (amended 2000), *at* http://www.insd.uscourts.gov/rules/adr.pdf (last visited May 10, 2001).

359. The full schedule of fees is available at http://www.insd.uscourts.gov/insd_fees.pdf (last visited May 10, 2001).