

1993 FEDERAL PRACTICE AND PROCEDURE UPDATE FOR SEVENTH CIRCUIT PRACTITIONERS

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INTRODUCTION

Indiana practitioners litigating in federal court encountered drastic changes in federal civil practice during 1993. At the national level, substantial amendments to the Federal Rules of Civil Procedure took effect December 1, 1993. In the Seventh Circuit, several questions of first impression were decided. Locally, the Southern District of Indiana partially opted out of the mandatory disclosure provisions of amended Fed. R. Civ. P. 26(a), and the Northern District of Indiana enacted new local rules effective January 1, 1994. This Article highlights these and other key developments in an effort to assist Indiana attorneys in their federal civil litigation. The subjects are presented in the order in which they often arise in litigation.

I. SUBJECT MATTER JURISDICTION

A. Diversity Jurisdiction

Although diversity jurisdiction should be simple and rarely litigated, neither proposition held true during the survey period. One recurring mistake is the failure to consider the citizenship of *all* partners—general and limited—when a limited partnership is a party. In *Carden v. Arkoma Associates*,¹ the Supreme Court held several years ago that a limited partnership is a citizen of every state of which any partner, general or limited, is a citizen.

In a recent Seventh Circuit case, however, the *Carden* rule was ignored at every stage, leading to a dismissal on appeal after a full trial on the merits. In *America's Best Inns v. Best Inns of Abilene*,² the complaint identified the defendant as a “Kansas limited partnership” without elaboration. The defendant's answer did not detect the problem, nor did the Magistrate Judge in Southern Illinois, who held trial and entered judgment on the merits for defendant.

Appeal was taken, but the failure to address jurisdiction continued. Despite a Seventh Circuit rule specifically requiring the citizenship of all members of a partnership to be listed,³ neither party did more than simply list the defendant

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

2. 980 F.2d 1072 (7th Cir. 1992).

3. Seventh Circuit Rule 28(b)(1) (“If any party is an unincorporated association or

as a limited partnership with its principal place of business in Kansas. Oral argument was likely unpleasant, for the panel reminded counsel of the deficiency and ordered the record to be enlarged to show the citizenship of every partner as of the date the complaint was filed. Counsel failed to do this, however, and instead supplied cursory affidavits of their own stating that they believed diversity existed.

This was the final blow leading to an outright dismissal of the action:

These litigants have had chance after chance to establish diversity of citizenship—the complaint, the answer, the jurisdictional statements in their appellate briefs, and finally the memoranda and filings . . . called for at oral argument. Despite receiving express directions about what they had to do, counsel did not do it. At some point the train of opportunities ends. The parties' reluctance to supply the court with essential details supports an inference that jurisdiction is absent; at all events, it is the obligation of the plaintiff to establish jurisdiction, and in this obligation the plaintiff failed.⁴

The *Best Inns* decision also reiterates that the inquiry for diversity is *citizenship*, not residence. As the panel explained,

In federal law citizenship means domicile, not residence. *Gilbert v. David*, 235 U.S. 561 (1915). The jurisdictional statutes, the Rules of Civil Procedure, this court's rules, and the instructions at oral argument all required counsel to identify the “citizenship” of the partners. We have been told by authority we are powerless to question that when the parties allege residence but not citizenship, the only proper step is to dismiss the litigation for want of jurisdiction.⁵

Practitioners should thus use the terms “citizenship” or “domicile” for purposes of diversity, and avoid the terms “resident” and “residence.”

Determining a corporation's principal place of business is also a recurring issue. In *Chamberlain Mfg. v. Maremont Corp.*,⁶ an Illinois plaintiff sued Indiana-based Arvin Industries and its subsidiary, Maremont. Defendants moved to dismiss asserting diversity was lacking due to Maremont's status as an Illinois citizen.

The court denied the motion in a thorough opinion. Judge Alesia first confirmed that the “nerve center” test applies in the Seventh Circuit to determine

partnership, the [jurisdictional] statement shall identify the citizenship of all members.”).

4. *America's Best Inns*, 980 F.2d at 1074.

5. *Id.* (citing *Steigleder v. McQuesten*, 198 U.S. 141 (1905); *Denny v. Pironi*, 141 U.S. 121 (1891); *Robertson v. Cease*, 97 U.S. 646 (1878)).

6. 828 F. Supp. 589 (N.D. Ill. 1993).

a corporation's principal place of business.⁷ The dispute centered on what factors should be considered in determining a corporation's nerve center.

Judge Alesia noted that the Seventh Circuit has not precisely delineated what factors should be addressed. In fashioning a standard, Judge Alesia nonetheless found guidance in the *Wisconsin Knife* decision, where the Seventh Circuit stated that “[j]urisdiction ought to be readily determinable.”⁸ He thus rejected more detailed tests such as the “locus of the operations of the corporation” test. Judge Alesia wrote:

Wisconsin Knife indicates that the court should look for the corporation's brain and will ordinarily find it where the corporation has its headquarters. *Wisconsin Knife*, 781 F.2d at 1282. Hence, this court concludes that any factors involving, to continue the metaphor, any part of the body other than the brain are irrelevant to this test. Accordingly, . . . only the factors which deal with the brains of the organization should be considered for the 'nerve center' test and factors dealing with 'day-to-day operating responsibilities' . . . should be disregarded.⁹

Applying this standard, the court held that even though Maremont's operations are concentrated in Illinois, its “brain” is in Indiana. Specifically, Maremont's directors, 70% of its officers, its CEO, CFO, Treasurer, Secretary, and General Counsel all worked and resided in Indiana. Further, major corporate decisions were undertaken and signed in Indiana. Finally, all of Maremont's bank accounts were funded by Arvin, and its cash receipts were commingled with Arvin's at the end of each business day. With its nerve center in Indiana, diversity was thus present, and the motion to dismiss was denied.¹⁰

Several other diversity issues were addressed during the survey period, but are merely highlighted below so that practitioners are aware of these developments:

(1) The Seventh Circuit held that a non-diverse insurer with partial subrogation rights can be dismissed as a dispensable party without destroying diversity.¹¹

(2) Although the Seventh Circuit now recognizes the doctrine of fraudulent joinder,¹² the Northern District of Illinois held that the

7. *Id.* at 590 (citing *Wisconsin Knife Works v. National Metal Crafters*, 781 F.2d 1280, 1282 (7th Cir. 1986)).

8. *Chamberlain Mfg.*, 828 F. Supp. 591 (citing *Wisconsin Knife*, 781 F.2d at 1282).

9. 828 F. Supp. at 592.

10. *Id.* at 592-94.

11. *Krueger v. Cartwright*, 996 F.2d 928 (7th Cir. 1993).

12. *Poulos v. Naas Foods*, 959 F.2d 69 (7th Cir. 1992).

doctrine did not apply where there was a "reasonable possibility" that the allegedly fraudulently joined defendant could be held liable.¹³

(3) An action was dismissed for want of diversity where the corporate plaintiff's complaint failed to list the plaintiff's principal place of business.¹⁴

B. Amount-in-Controversy Requirement

Several decisions addressed the diversity jurisdiction amount-in-controversy requirement that the matter exceed the sum or value of \$50,000.¹⁵ In *Oder v. Buckeye State Mutual Ins.*,¹⁶ plaintiffs sued for unspecified damages in an Indiana state court. Defendant removed the action. Plaintiffs then moved to remand, asserting that the amount in controversy did not exceed \$50,000. With their motion, plaintiffs even represented that they did not seek a recovery exceeding \$50,000. Based on this certification, the court remanded the action to state court.

Although *Oder* has logical appeal, the Seventh Circuit issued an opinion in 1993 that effectively supersedes the *Oder* holding. In *In re Shell Oil Co.*,¹⁷ the Seventh Circuit held that it is improper to remand removed cases in which the plaintiff files a post-removal stipulation to seek no more than \$50,000. According to the Seventh Circuit, the time for determining jurisdiction is the time of removal, thus making any subsequent attempt to destroy jurisdiction of no avail.

A subsequent opinion from the Seventh Circuit further shows that *Oder* is no longer good law. In *Shaw v. Dow Brands*,¹⁸ a consumer sued Dow Brands for unspecified damages due to personal injury. Dow removed the case, stating in its petition for removal that the amount in controversy exceeded \$50,000. On appeal of subsequent rulings on the merits, plaintiff argued that the amount at issue did not exceed \$50,000.

The Seventh Circuit found jurisdiction present, holding that in removed cases the amount in controversy is satisfied if the defendant "can show to a reasonable probability that more than \$50,000 is in controversy."¹⁹ Because the plaintiff did not contest jurisdiction at the time of removal or in its opening brief in the Seventh Circuit, but only raised the issue after prompted by the Seventh Circuit,

13. *County of Cook v. Mellon Stuart Co.*, 812 F. Supp. 793 (N.D. Ill. 1992).

14. *First Access of Northern Illinois, Inc. v. TKX Leasing*, 812 F. Supp. 863 (N.D. Ill. 1993).

15. 28 U.S.C. § 1332(a) (1988).

16. 817 F. Supp. 1413 (S.D. Ind. 1992).

17. 970 F.2d 355 (7th Cir. 1992).

18. 994 F.2d 364 (7th Cir. 1993).

19. *Id.* at 367 n.2.

the court held that plaintiff had admitted jurisdiction. Despite a vigorous dissent on this issue, rehearing and rehearing en banc were denied.²⁰

As discussed at length in last year's article,²¹ these amount-in-controversy issues frequently arise because of state procedural rules prohibiting personal injury plaintiffs from pleading specific dollar amounts in state court.²² Even after *Shaw* there are no clear guidelines for removing defendants in such cases. All that is certain is that plaintiffs cannot certify away jurisdiction after removal,²³ and that jurisdiction exists where plaintiffs do not contest removal and state in an appellate brief that the amount at issue exceeds \$50,000. How, then, do removing defendants ensure that the action stays in federal court?

As suggested by this author in last year's article, defendants should include specific allegations and supporting documents (if feasible) in the removal petition to demonstrate the amount at issue, and should consider serving an interrogatory on plaintiffs regarding the scope of claimed damages.²⁴ The *Shaw* panel further suggested that such an interrogatory be served during the state-court action as well.²⁵ One risk of this option, however, is that state-court-minded plaintiffs could effectively preclude removal by responding that damages of \$50,000 or less are sought. Indeed, there is nothing in Indiana's Trial Rule 8(A)(2) prohibiting state-court plaintiffs from doing this in the first place in their state complaint (except the likely inability to later recover more than that amount in state court).²⁶

Finally, in *Gould v. Airtisoft, Inc.*,²⁷ the Seventh Circuit addressed diversity jurisdiction in a declaratory judgment and injunctive relief action, which can often cause problems in determining the amount in controversy. The case involved a former high-ranking employee's suit to compel payment of a bonus in the form of privately held company stock. After noting that the Seventh Circuit has "struggled before with the problem of determining the actual amount in controversy when plaintiffs request only declaratory or equitable relief,"²⁸ the court held "that the shares of stock themselves are at issue and that the amount in controversy therefore depends on the value of those shares."²⁹

20. *Id.* at 364.

21. John R. Maley, *1992 Federal Practice and Procedure Update for Seventh Circuit Practitioners*, 26 IND. L. REV. 817, 819-23 (1993) [hereinafter *1992 Federal Practice*].

22. *See, e.g.*, IND. TRIAL R. 8(A)(2). *See also* *Oder v. Buckeye State Mut. Ins.*, 817 F. Supp. 1413, 1414 (S.D. Ind. 1992) (noting same).

23. *In re Shell Oil Co.*, 970 F.2d 355, 356 (7th Cir. 1992).

24. *1992 Federal Practice*, *supra* note 21, at 823.

25. *Shaw*, 994 F.2d at 367.

26. Trial Rule 8(A)(2) only bars specific dollar prayers; it does not preclude a statement that plaintiff seeks fair and reasonable compensation *not to exceed* \$50,000.

27. 1 F.3d 544 (7th Cir. 1993).

28. *Id.* at 547 (citing *Jadair, Inc. v. Walt Keeler Co.*, 679 F.2d 131, 132 (7th Cir. 1982), *cert. denied*, 459 U.S. 944 (1982); *McCarty v. Amoco Pipeline Co.*, 595 F.2d 389, 391-95 (7th Cir. 1979)).

29. 1 F.3d at 547.

Determining the value of those shares was not easy because the company was privately held but was in the process of going public. Nonetheless, defendant successfully met its burden of proof to show the amount-in-controversy by submitting a draft of the prospectus for the planned public offering. By the terms of the prospectus, plaintiff's shares would have had an expected value ranging from \$115,000 to \$135,000. Even though this estimate was speculative, plaintiff offered nothing to the contrary, so the court was satisfied that the amount at issue exceeded \$50,000.³⁰

Again, the lesson is that parties advancing or resisting diversity jurisdiction should seriously consider and evaluate the amount-in-controversy requirement, and should support their arguments with evidence.

C. Supplemental Jurisdiction

The former doctrines of pendent and pendent-party jurisdiction are now codified at 28 U.S.C. § 1367, and are known as supplemental jurisdiction.³¹ Although few reported decisions have addressed this subject in much detail since the creation of supplemental jurisdiction in 1990, several key holdings on the subject were issued during the survey period.

In *Bonilla v. City Council of City of Chicago*,³² the court addressed whether a state-law claim was covered by supplemental jurisdiction. In *Bonilla*, a group of Hispanic voters from Chicago sued the Chicago City Council and others over the mapping of aldermen districts. Two of plaintiffs' claims raised federal questions under the Voting Rights Act and the U.S. Constitution, challenging the validity of the re-mapping and the process used therein. Plaintiffs also raised state-law claims challenging the city clerk's failure to certify vacancies in two aldermen wards.

The court dismissed the state-law claim, finding that it did not fall within the court's supplemental jurisdiction under 28 U.S.C. § 1367(a), which allows jurisdiction over all non-federal claims "that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution."³³ The court further defined this standard, explaining that claims are part of the same case or controversy "if they 'derive from a common nucleus of operative fact' such that a plaintiff 'would ordinarily be expected to try them all in one judicial proceeding.'"³⁴

30. *Id.* at 547-48.

31. See John R. Maley, *1990 Federal Practice and Procedure Update for the Seventh - Circuit Practitioner*, 24 IND. L. REV. 632, 641-46 (1991) (discussing supplemental jurisdiction at length).

32. 809 F. Supp. 590 (N.D. Ill. 1992).

33. 28 U.S.C. § 1367(a) (1990).

34. *Bonilla*, 809 F. Supp. at 599 (quoting *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966)).

Applying this language, the court found that the state-law claim over vacancies in two wards and the federal re-mapping claims did not derive from a common nucleus of operative facts. The court thus lacked supplemental jurisdiction and dismissed the state-law claim.³⁵ Furthermore, the court held that even if supplemental jurisdiction existed, it would decline to exercise such jurisdiction under 28 U.S.C. § 1367(c)(1), which allows courts to dismiss supplemental claims that raise “a novel or complex issue of State law.”

The Seventh Circuit issued seemingly conflicting opinions on another aspect of supplemental jurisdiction. Under 28 U.S.C. § 1367(c)(3), a district court “may decline to exercise supplemental jurisdiction over a [supplemental claim] if . . . the district court has dismissed all claims over which it has original jurisdiction.” One Seventh Circuit decision accords district courts broad discretion here, while another virtually removes any discretion.

In the first case, *Wentzka v. Gellman*,³⁶ plaintiffs sued their investment broker for federal securities law violations and related state-law claims. The federal claims were dismissed by the district court in March of 1991, but the state-law claims remained pending. In January of 1992, the district court reached the merits of the state-law claims, and entered summary judgment for the broker.

On appeal, both parties focused on the merits, but the Seventh Circuit turned to jurisdiction. In a decision by Judge Leinenweber from the Northern District of Illinois joined by Judges Ripple and Kanne, the Seventh Circuit held that the district court abused its discretion by retaining the supplemental claim after dismissal of the federal claims.

The *Wentzka* panel relied on prior Seventh Circuit decisions addressing the same issue under pendent jurisdiction.³⁷ “In these cases,” the panel explained, “we said quite clearly that, where a federal claim drops out before trial, a district court should not retain the state claims absent extraordinary circumstances.”³⁸ The panel then identified two such extraordinary exceptions: (1) where the state-law claim invokes a federal defense (e.g., preemption); or (2) where the statute of limitations has run on the state-law claim. Because neither was present in *Wentzka*, and because the state law at issue was unsettled, the panel vacated summary judgment and ordered the state-law claim dismissed without prejudice.

In *Brazinski v. Amoco Petroleum Additives*,³⁹ by contrast, the Seventh Circuit apparently held that supplemental claims can be retained after dismissal of federal claims, even absent extraordinary circumstances as required by

35. *Bonilla*, 809 F. Supp. at 599.

36. 991 F.2d 423 (7th Cir. 1993).

37. *Wentzka*, 991 F.2d at 425 (citing *Manor Healthcare Corp. v. Guzzo*, 894 F.2d 919, 922 (7th Cir. 1990); *Blau Plumbing, Inc. v. S.O.S. Fix-It, Inc.*, 781 F.2d 604, 611 (7th Cir. 1986); *Bernstein v. Lind Waldock & Co.*, 738 F.2d 179, 186-88 (7th Cir. 1984)).

38. *Wentzka*, 991 F.2d at 425.

39. 6 F.3d 1176 (7th Cir. 1993).

Wentzka. In *Brazinski* a panel of the Seventh Circuit found supplemental jurisdiction present even though the federal claims had been dismissed. Judge Posner, joined by Judges Flaum and Kanne (who was on the *Wentzka* panel), observed that prior to the supplemental jurisdiction statute,

it was the practice for district judges in the exercise of their discretion to relinquish a pendent claim or suit if the main claim was dismissed before trial . . . but to retain the pendent claim if the claim conferring federal jurisdiction was dismissed after the case had been tried, in order to save the parties the expense of having to try the pendent claim twice.⁴⁰

“The new statute,” Judge Posner wrote, “surely did not change this practice merely by providing that the district judge ‘may’ relinquish supplemental jurisdiction if the main claim is dismissed, 28 U.S.C. § 1367(c)(3), without expressly qualifying this permission by excluding from its scope cases in which that claim is dismissed after the case had been tried.”⁴¹

According to Judge Posner, however, this practice was not inflexible. “[T]here was no rule that if the main claim had not been tried, the pendent claim must be dismissed, and if it had been tried, the pendent claim must be retained, these were at most presumptions.”⁴² Judge Posner then appeared to subtly question *Wentzka*, writing that “*Wentzka* . . . contains some strong language about how narrow this principle is” “But,” he added, “as it was a case where the state law was unsettled, it did not really test the outer bounds of the principle.” Finally, Judge Posner noted that “the statute says the court ‘may’ relinquish its supplemental jurisdiction if various conditions such as the dismissal of all the claims within the court’s original jurisdiction are satisfied, not that it must always do so.”⁴³

The contrast between *Wentzka* and *Brazinski* is both dramatic and problematic. The former holds that, absent narrow extraordinary circumstances, supplemental claims must be relinquished after dismissal of federal claims. The latter states instead that dismissing supplemental claims is discretionary, as the language of the statute suggests.

Although the reasoning of *Brazinski* is more persuasive because it does justice to the permissive statutory language, lower courts cannot lightly cast aside the *Wentzka* reversal. To the contrary, until the apparent conflict is resolved, lower courts are likely to and should probably follow the more restrictive holding of *Wentzka*.

40. *Id.* at 1182.

41. *Id.*

42. *Id.*

43. *Id.*

II. REMOVAL

A common question in multi-defendant cases is whether all defendants must join in the removal notice, and if so, when the notice is due. It can be difficult to accomplish such a feat in thirty days, particularly when the various defendants are served at different times. For instance, if defendant A is served on January 1 and defendant B is served on January 29, is the removal notice still due on January 31, and must it be signed by both defendants? Several decisions during the survey period address but do not resolve these issues.

Some background from the removal statute is necessary. Under 28 U.S.C. § 1446(a), a “defendant or defendants desiring to remove any civil action . . . shall file in the district court . . . a notice of removal signed pursuant to Rule 11” Under § 1446(b), the notice shall be filed “within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading” If the initial state-court complaint does not reveal a basis for removal, a notice of removal may be filed “within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.”⁴⁴ However, diversity claims may not be removed more than one year after the commencement of the state-court action.⁴⁵ Unfortunately the statute does not provide more specific guidance on multiple-defendant removals.

The first question in multi-defendant cases is whether all defendants must join in removal. With several established exceptions, all defendants must join in the petition. This was confirmed during 1993 in *Shaw v. Dow Brands*,⁴⁶ *Siderits v. State of Indiana*,⁴⁷ and *Production Stamping Corp. v. Maryland Casualty Co.*⁴⁸ The exceptions are: (1) when the co-defendant has not been served;⁴⁹ (2) when the co-defendant is a nominal party;⁵⁰ (3) when the co-defendant is fraudulently joined;⁵¹ or (4) when there is a “separate and independent” claim under 28 U.S.C. § 1441(c).⁵²

The second issue is whether all defendants who must join in removal must actually *sign* the removal notice. Courts across the country treat this different-

44. 28 U.S.C. § 1446(b) (1990).

45. *Id.*

46. 994 F.2d 364, 368 (7th Cir. 1993) (“A [removal notice] is considered defective if it fails to explain why the other defendants have not consented to removal.”).

47. 830 F. Supp. 1156, 1159 (N.D. Ind. 1993) (“[A]ll defendants must join in the removal petition.”) (per Judge Miller).

48. 829 F. Supp. 1075, 1076 (E.D. Wis. 1993) (“As a general rule, all defendants must join in a removal petition in order to effect removal.”).

49. *Shaw*, 994 F.2d at 369; *Siderits*, 830 F. Supp. at 1159.

50. *Shaw*, 994 F.2d at 369; *Siderits*, 830 F. Supp. at 1159.

51. *Siderits*, 830 F. Supp. at 1160.

52. *Id.*

ly,⁵³ and the issue is still unclear in the Seventh Circuit. In *Shaw* the Seventh Circuit excused a defendant's failure to explain why other defendants had not consented to removal, but did so only because the co-defendants either had not been served or were nominal parties.⁵⁴ Neither *Shaw* nor any other Seventh Circuit decision specifically addresses whether signature is required by each defendant.

Two district court opinions within the Circuit, however, cause concern. In *Mechanical Rubber & Supply v. American Saw and Mfg.*,⁵⁵ the Central District of Illinois held several years ago that it was sufficient for the removing defendant to state that the co-defendant joined in removal. However, the court added that absent the co-defendant's signature, the removing defendant "should be required to obtain an affidavit from [the co-defendant] stating that it joined in [removal] at that time."⁵⁶ More than mere recitation of consent is thus required in the Central District of Illinois.

Worse yet, in *Production Stamping*,⁵⁷ the Eastern District of Wisconsin recently held that signature of all defendants *is* required. As typically occurs, the removing defendant had merely recited in the notice of removal signed under obligations of Rule 11 that the co-defendant consented to removal. This was insufficient for Judge Randa, who interpreted the majority view to require separate signatures. Apparently distrustful of counsel's representation, Judge Randa reasoned that by "requiring each defendant to formally and explicitly consent to removal, one defendant is prevented from choosing a forum for all."⁵⁸ Judge Randa added, "Requiring an independent statement of consent from each defendant ensures that the Court has a clear and unequivocal basis for subject matter jurisdiction before taking the serious step of wresting jurisdiction from another sovereign."⁵⁹

In this era of purported civil justice reform aimed at making litigation less cumbersome and less expensive, this holding is unfortunate. Requiring every served defendant to sign the removal petition—or otherwise make some separate filing to join in removal—will add nothing but expense and additional paper to federal litigation. Furthermore, the holding implicitly assumes that representations by counsel made under Rule 11 cannot be accepted as true. This is truly unprecedented, and indeed is contrary to the assumption of honesty implicit in

53. Compare *Knickerbocker v. Chrysler Corp.*, 728 F. Supp. 460, 461-62 (E.D. Mich. 1990) (each defendant must communicate his consent by an "official filing or voicing of consent"), with *Jasper v. Wal-Mart Stores*, 732 F. Supp. 104, 105 (M.D. Fla. 1990) (notice must be signed "or the signer must allege consent of all defendants.").

54. *Shaw*, 994 F.2d at 368-69.

55. 810 F. Supp. 986 (C.D. Ill. 1990).

56. *Id.* at 990.

57. 829 F. Supp 1074 (E.D. Wis. 1993).

58. *Id.* at 1076.

59. *Id.* at 1077.

other facets of federal procedure.⁶⁰ Moreover, if co-defendants have not, in fact, consented to removal, certainly they can object accordingly.

In addition, as a matter of statutory construction—which is what should govern the inquiry—nothing in the language of the removal statute compels such a requirement. The statute says merely that a “defendant or defendants . . . shall file . . . a notice of removal signed pursuant to Rule 11”⁶¹ A reasonable interpretation of this language would be that a single notice can be filed, and that it need not be signed by all defendants. Had Congress intended otherwise, it could have easily said so by adding language such as “signed by all defendants.” Indeed, in the context of stipulations of dismissals, Rule 41(a)(1)(ii) uses such language by requiring such stipulations to be signed “by all parties”⁶²

Until the Seventh Circuit addresses this issue head-on, which is not likely to occur any time soon given the general non-reviewability of remand orders,⁶³ practitioners should be extremely cautious in this area. The *Production Stamping* and *Mechanical Rubber* decisions, although not binding on Indiana’s federal judiciary, are nonetheless on the books and potentially persuasive.⁶⁴ It is thus recommended that removing counsel attempt to secure the signature of all served co-defendants on removal notices whenever possible.

If logistics and time constraints simply preclude this, counsel should at least specifically recite that consent was obtained from each co-defendant (giving specifics such as date, time, and name of consenting attorney), preferably attaching an affidavit or letter to that effect from co-defense counsel. Further, removing counsel should also ensure that co-defendants file something—perhaps simply titled a “Notice of Consent to Removal”—indicating that *prior to removal* the co-defendant gave consent to removal.

As this Article went to press Judge McKinney addressed this issue in *Mutual Security Life Insurance v. Fail*.⁶⁵ Judge McKinney rejected *Production Stamping* and followed *Mechanical Rubber*, and thus denied remand where removal petition recited all defendants’ consent, and where all non-signing defendants thereafter filed papers with the court within thirty days of service indicating their consent to removal.

The third and final removal problem is whether the thirty day removal period is renewed by the subsequent service of additional co-defendants, another issue that has not been addressed by the Seventh Circuit. In *Scialo v. Scala Packing Co.*,⁶⁶ the Northern District of Illinois answered no, holding that there

60. See, e.g., FED. R. CIV. P. 65(b) (allowing counsel to make ex parte representations to court for temporary restraining orders).

61. 28 U.S.C. § 1446(a) (1990).

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

63. 28 U.S.C. § 1447(d) (1990); *In re Shell Oil*, 966 F.2d 1130, 1132 (7th Cir. 1992).

64. See *Cortright v. Thompson*, 812 F. Supp. 772, 776 (N.D. Ill. 1992) (decisions of other district judges have persuasive rather than authoritative effect).

65. No. IP94-I-C, slip op. (S.D. Ind. Apr. 20, 1994).

66. 821 F. Supp. 1276 (N.D. Ill. 1993).

is a single date of removal that starts with service upon the first defendant. In *Scialo* the first defendant served in the action filed a timely removal notice. The action was remanded, however, because not all served defendants joined in the removal. Later, indeed more than thirty days after the first defendant attempted removal, a previously unserved defendant was properly served and filed a notice of removal. The next day the other defendants (including those who had initially sought removal) joined by filing an amended notice of removal.

Judge Shadur remanded the action again, however, reasoning that there is a single date of removal. He explained, "By far the majority of courts that have dealt with the timeliness issue have adopted the single-date-of-removal rule, with Section 1446(b)'s thirty day time clock beginning to run with service on the *first* defendant entitled to remove."⁶⁷ Relying on this rule, Judge Shadur held that the time for removal had long since passed. Indeed, under 28 U.S.C. § 1447(c) he went so far as to require the removing defendant to pay the plaintiff's costs and fees in opposing removal.⁶⁸

Practitioners should obviously be leery of *Scialo*, and should carefully consider any removals attempted more than thirty days after the first defendant was served. Judge Shadur does not cite any authority contrary to his holding, so counsel attempting such removals should conduct up-to-date research to find support for "tardy" removals.

Scialo does not close the door on all subsequent removals. As Judge Shadur acknowledged, there is authority from the Fourth Circuit that each defendant has 30 days from the date they were served to join an otherwise timely and valid removal notice. Specifically, in *McKinney v. Bd. of Trustees of Maryland Community College*,⁶⁹ the court held that when a removal notice is filed within thirty days of service on the first defendant, subsequently served defendants have thirty days from their date of service to join in removal. Presumably this would be done by filing a separate notice in compliance with § 1446.

Thus, when served with a removable state-court complaint, defense counsel should *immediately* ascertain whether and when every other defendant was served. Under *Scialo* and *McKinney*, the most important date for removal is the date that service was first effected on any defendant. To be safe, any removal notice must be filed within thirty days of such service. Thereafter, any individual defendant can join in removal within thirty days from the date any such defendant was served.

67. *Id.* at 1277 (citing *Martin Pet Products v. Lawrence*, 814 F. Supp. 56 (D. Kan. 1993), and *Getty Oil Corp. v. Insurance Co. of North America*, 841 F.2d 1254, 1262-63 (5th Cir. 1988)).

68. 821 F. Supp. at 1278. Judge Shadur held that good faith is not relevant in the inquiry under § 1447(c) for costs and fees. It is true that § 1447(c) does not include such a standard. Other case law, however, holds that costs are generally inappropriate if there were legitimate and substantial grounds for removal and they were asserted in good faith. *E.g.*, *Wisconsin v. Missionaries to the Preborn*, 798 F. Supp. 542, 544 (E.D. Wis. 1992).

69. 955 F.2d 924, 926-28 (4th Cir. 1992).

III. SERVICE OF PROCESS

Drastic changes to service of process took effect December 1, 1993, with a nearly total revision to Rule 4.⁷⁰ Although this Article outlines the highlights, practitioners are advised to study the new text of Rule 4 (as well as all other rule changes included in the December 1, 1993, amendments). Thirty different rules are amended, with 13 of the amendments being quite significant.⁷¹

The most significant change to Rule 4 is the creation of a new method by which service of process can be avoided by use of notice and waiver of service. Rule 4(d) allows for plaintiffs to issue a notice and request for waiver of service to non-governmental defendants upon filing an action.⁷² The notice, an official sample of which is provided at Form 1A to the Rules, basically notifies the defendant of the existence of the suit and requests the defendant to waive the formalities of service.

If such notice is issued in compliance with the technical requirements of Rule 4(d), defendants have a "duty to avoid unnecessary costs of serving . . . summons."⁷³ If a domestic defendant fails to comply with a request to waive service, "the court *shall* impose the costs subsequently incurred in effecting service on the defendant unless good cause for the failure be shown."⁷⁴ Such costs include the costs and fees of bringing any motion to collect the costs of subsequent service.⁷⁵ This is one reason for defendants to timely return requests for waivers of service within the standard thirty-day period.⁷⁶

Another reason to accept and return waivers is Rule 4(d)(3)'s provision allowing sixty days to answer from the date the notice was sent. With answers otherwise initially due twenty days from service of summons,⁷⁷ defendants should find the additional time attractive. Finally, executing a waiver of service does not waive jurisdictional or venue defenses.⁷⁸

Significantly, notice and waiver of service are *optional* for plaintiffs.⁷⁹ If this voluntary procedure is not used, or if it is used but not returned by a

70. FED. R. CIV. P. 4 (1993).

71. FED. R. CIV. P. 4, 11, 12, 16, 26, 30, 32, 33, 34, 36, 37, 54, and 58 include major changes.

72. FED. R. CIV. P. 4(d)(2).

73. *Id.*

74. *Id.* (emphasis added).

75. FED. R. CIV. P. 4(d)(5).

76. FED. R. CIV. P. 4(d)(2)(F). This subsection states that the notice and request for waiver must allow the defendant a "reasonable time to return the waiver, which shall be at least 30 days from the date on which the request is sent, or 60 days from that date [for foreign defendants]."

77. FED. R. CIV. P. 12(a).

78. FED. R. CIV. P. 4(d)(1).

79. *Id.* ("To avoid costs, the plaintiff *may* notify such a defendant of the commencement of the action . . .") (emphasis added).

defendant, service of process proceeds in basically the same fashion as before the amendments.⁸⁰

As for whether plaintiffs should utilize this new procedure, this author's advice is that notice and waiver are beneficial in only one instance, which potentially involves significant expense in effecting service. When a defendant is expected to be evasive, it might be necessary to eventually utilize the relatively expensive method of personal service. If notice and waiver were initially used, an evasive defendant must pay such costs if and when eventually served. The only downside with evasive defendants is that the notice could simply alert the defendant of the need to flee. Although no reported case has yet addressed the issue, nothing in the amended rule suggests that unsuccessfully issuing a notice and waiver is constitutionally sufficient—without later service of process—to uphold a judgment against such an absentee defendant. Separately, the following decisions serve as reminders that Rule 4(m)'s 120-day limit on effecting service of process is taken seriously in this Circuit:⁸¹

(1) In *Robbins v. Brady*,⁸² plaintiff's action was dismissed for failure to effect service on the federal government within 120 days. The failure was due to a paralegal's misunderstanding of the service requirements. The court held this is not good cause, reasoning that it is the duty of counsel to ensure service is effected.

(2) In *Serlin v. Arthur Andersen & Co.*,⁸³ the court dismissed plaintiff's action for untimely service, even though service was only 18 days late, and even though the dismissal would effectively preclude a subsequent action.

(3) In *Bachenski v. Malnati*,⁸⁴ plaintiff's claims against a defendant were similarly dismissed for failure to serve within 120 days. Judge Shadur noted that plaintiff "voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent."⁸⁵

80. FED. R. CIV. P. 4(e), (f), & (h).

81. Former Rule 4(j)'s 120-day limit has been re-codified at Rule 4(m), with only modest substantive amendments making it clear that for good cause shown the court can extend the deadline.

82. 149 F.R.D. 154 (C.D. Ill. 1993).

83. 145 F.R.D. 494 (N.D. Ill. 1993).

84. 809 F. Supp. 610 (N.D. Ill. 1993).

85. 809 F. Supp. at 614 (quoting *Link v. Wabash R.R.*, 370 U.S. 626, 633-34 (1962)).

IV. DISCOVERY

A. Amended Discovery Rules

Sweeping changes to discovery also took effect December 1, 1993, with amendments to Rules 26, 30, 32, 33, 34, 36, and 37. Key amendments are analyzed below.

Rule 26(a) is drastically rewritten to require early disclosure of certain core information such as witnesses, documents, and damage computations.⁸⁶ It also requires extensive pre-trial disclosures for testifying experts.⁸⁷ Before addressing the burdens of Rule 26(a), the first question is whether these new requirements can be avoided. Fortunately, in most cases they can be.

1. *How To Avoid Mandatory Disclosure.*—The preamble to Rule 26(a)(1) provides, “Except to the extent *otherwise stipulated or directed by court or local rule*, a party shall, without awaiting a discovery request, provide to the other parties [certain specified core information]”⁸⁸ Because of this proviso, in all districts counsel can try to stipulate away the burdensome initial disclosure requirements of Rule 26(a)(1). Where stipulation is not possible, practitioners have two other options.

First, some districts have enacted new local rules to opt out of Rule 26(a)’s requirements, and others may follow suit. Significantly, on December 17, 1993, the Southern District of Indiana passed two emergency interim local rules to partially opt out of Rule 26(a). Under new Local Rules 26.3 and 16.1(d)(3), the initial disclosure requirements of Rule 26(a)(1) do *not* apply in the Southern District.⁸⁹ The pre-trial expert disclosure requirements of Rule 26(a)(2)(B), however, *do* apply, although in preparing case management plans parties are required to consider whether the expert disclosure provisions should be varied by stipulation.⁹⁰

To date, the Northern District of Indiana has not passed a similar opt-out rule. Furthermore, according to reports from court staff, no such proposal is being considered. In other districts outside Indiana where counsel may be litigating, practitioners should contact the court to ascertain any such local rules developments in this area.

Second, in districts where the local rules are of no assistance and where stipulations are not reached with opposing counsel, practitioners should consider seeking relief from the court. The federal bench and bar were not universally supportive of the Rule 26(a) changes, and many judges will likely want to do things their own way (as many have done, particularly since the Civil Justice

86. FED. R. CIV. P. 26(a)(1) (1993).

87. FED. R. CIV. P. 26(a)(2) (1993).

88. FED. R. CIV. P. 26(a)(1) (emphasis added).

89. S.D. IND. L.R. 26.3, 16.1(d)(3).

90. S.D. IND. L.R. 16.1(d)(3).

Reform plans were implemented). The best opportunity to avoid mandatory disclosure in Rule 26(a) districts is probably through early and amicable discussions with counsel. Should that fail, court intervention could be advisable depending on the case and the scope of mandatory discovery that would otherwise take place.

Another consideration is whether amended Rule 26(a) even applies to cases pre-dating December 1, 1993. Under the Supreme Court's order transmitting the rules to Congress, the amendments are effective on December 1, 1993, for all new cases and, "insofar as just and practicable," for all pending cases.⁹¹ This standard necessarily invokes a case-by-case, rule-by-rule analysis.

Prior case law interpreting this language after the 1991 amendments indicates, however, that amended rules should be given retroactive application to the "maximum extent possible."⁹² It is this writer's opinion that where a scheduling order or case management plan was already in place, it would not be "just and practicable" to impose the additional burdens of Rule 26(a). On the other hand, where no such order or plan was in place, it would seem appropriate for Rule 26(a) to apply. In either case, counsel might want to confirm the status of their case with opposing counsel by stipulation.

2. *Rule 26(a) Requirements.*—When Rule 26(a) does apply (indeed, there may be instances when it is advantageous to use), there are three primary components to address. First, until mandatory disclosure occurs, no other discovery is allowed without leave of court or stipulation.⁹³ Despite the Rule's professed purpose of expediting litigation,⁹⁴ this will likely lead to delays because automatic disclosure is not required for nearly four months after service of the complaint.

Second, mandatory disclosure of certain core information must occur within 10 days of a mandatory meeting of counsel required by amended Rule 26(f).⁹⁵ That mandatory meeting must occur no later than 106 days after service of the complaint (this time period is ascertainable only by tracing three different rules: 16(b), 26(b), and 26(f)). Thus, disclosure must take place, essentially, within four months (116 days) of service.

The third aspect is the scope of the mandatory disclosures, which is the real problem with the new rule. The information to be disclosed includes individuals "likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings."⁹⁶ This vague standard will undoubtedly cause

91. Letter of Transmittal from Chief Justice Rehnquist to Speaker Thomas S. Foley (April 22, 1993) (copy on file with author).

92. *Burt v. Ware*, 14 F.3d 256, 1994 WL 28026 (5th Cir. 1994); *accord*, *Diaz v. Shallbetter*, 984 F.2d 850, 852 (7th Cir. 1993) ("just and practicable" language "ordinarily" requires application of new rules to pending cases).

93. FED. R. CIV. P. 26(a).

94. Advisory Committee Notes to FED. R. CIV. P. 26(a).

95. FED. R. CIV. P. 26(a).

96. FED. R. CIV. P. 26(a)(1)(A).

problems. Similarly, parties must disclose “all documents . . . and tangible things . . . that are relevant to disputed facts alleged with particularity in the pleadings.”⁹⁷ Again, this standard is similarly vague, and will also cause difficulties.

Although not immediately apparent from the rule, a literal reading of the text indicates that when a pleading (e.g., the Complaint) alleges a fact with particularity, the defendant *and* plaintiff must disclose the required witnesses and documents. This is so because the rule says “parties” must disclose such information when facts are alleged with particularity in the “pleadings.”⁹⁸ There is no express limitation to opposing parties. Thus, parties drafting pleadings (whether a Complaint or Answer) should consider not only the potential advantages of pleading with particularity (e.g., obtaining information automatically from the opponent), but also the potential burden of self-imposed automatic disclosure.

For plaintiffs who are willing to disclose their own witnesses and documents, the best advice is to allege all facts with great particularity. This will require the defendant to wrestle with the standard, and where the allegation is disputed to *at least* disclose witnesses and documents that the defendant will use. For defendants willing to disclose their own witnesses and documents in exchange for the plaintiff’s, the Answer can also allege facts with particularity to invoke mandatory disclosure. Most defendants, however, will no doubt prefer to avoid such mandatory disclosure, and will tend not to allege facts with particularity.

Given the vagaries of Rule 26(a), even when mandatory disclosure applies parties are well advised to propound their own specific interrogatories and document requests. There is potentially great leeway in terms such as “likely to have discoverable information,” “disputed facts,” and “alleged with particularity.”

Practitioners should not risk overlooking key documents or witnesses in reliance on mandatory disclosure.

Rule 26(a) also requires an initial computation of damages and production of supporting documents at the time of mandatory disclosure.⁹⁹ For complex commercial cases where damages often are not known until shortly before trial, this requirement will likely be unworkable, and will require substantial extensions. Nonetheless, plaintiffs should make preliminary computations and disclosures to avoid forfeiting potential damages.

Finally, Rule 26(a)(2)(B) also requires disclosure of experts along with a written report.¹⁰⁰ Absent court order otherwise, disclosure is required no later than ninety days prior to trial, and must include the expert’s qualifications, list of publications in the last ten years, the compensation, a listing of testimony in other cases in the last four years, and all exhibits to be used to support the

97. FED. R. CIV. P. 26(a)(1)(B).

98. FED. R. CIV. P. 26(a).

99. FED. R. CIV. P. 26(a)(1)(C).

100. FED. R. CIV. P. 26(a)(2).

opinion. This amendment substantially broadens the scope of pre-deposition discovery available from experts. It should lead to increased understanding of an opponent's experts at reduced cost, but will increase cost in preparing your own experts.

As part of the same package of amendments, the discovery rules were also amended to limit parties to twenty-five interrogatories absent stipulation or leave of court,¹⁰¹ and ten depositions absent leave of court.¹⁰² In addition, depositions can now be recorded by audio or audio and video without agreement or leave of court.¹⁰³

Finally, to help deter the occasional hard-ball litigator, Rule 30(d) has new limitations on objections:

Any objection to evidence during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. A party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion [for protective order].¹⁰⁴

B. Case Law Highlights

Numerous decisions addressed discovery issues, the most significant of which are merely outlined below:

(1) Where a deponent makes written changes to deposition testimony pursuant to Rule 30(e) that contradict the prior testimony, specific reasons for each change must be given. Those reasons, however, need not be convincing. When a deposition does not include a reason for each change, explanations must be added. The deposition should be reopened only if the changes make the deposition incomplete or useless without further testimony. Where forty-one changes were made to a 500-page transcript covering three days of testimony, reopening was not required.¹⁰⁵

(2) In a highly publicized case from Pennsylvania, a federal judge barred a lawyer from interrupting a deposition to confer with his client.¹⁰⁶

101. FED. R. CIV. P. 33(a).

102. FED. R. CIV. P. 30(a)(2).

103. FED. R. CIV. P. 30(b)(2).

104. FED. R. CIV. P. 30(d).

105. *Hawthorne Partners v. AT&T Technologies*, 831 F. Supp. 1398, 1406-07 (N.D. Ill. 1993).

106. *Hall v. Clifton Precision*, 150 F.R.D. 525 (E.D. Pa. 1993). The *Hall* case is worthy of a quick read for those who confront intrusive counsel in depositions. Although not binding in the Seventh Circuit, the opinion has been widely reported, and is a strong opinion to potentially share with opposing counsel at a deposition to persuade counsel to cease and desist from such tactics.

(3) A judgment creditor may seek discovery from the debtor concerning financial information of the debtor's spouse; such a request is proper under the "very broad" scope of post-judgment discovery.¹⁰⁷

(4) That a party may disbelieve or disagree with the opponent's discovery response is not grounds for an order compelling discovery.¹⁰⁸

(5) When interrogatories are served on a party and that party is dismissed prior to the time for responding to the discovery, no response to the interrogatories is required.¹⁰⁹

(6) In the context of securing medical records from the Indiana Department of Corrections, Judge Foster held that federal courts are not required to comply with Indiana's procedural requirement that a court order be obtained to disclose such documents.¹¹⁰

V. SUMMARY JUDGMENT

The summary judgment trend continued during 1993, with numerous cases disposed of through Rule 56. With the basic standards well settled, the following cases involve interesting sub-issues or contain favorable summary judgment language:

(1) Judge Barker held that although courts have the power to enter summary judgment *sua sponte*, litigants are entitled to notice and an opportunity to present their evidence should they desire.¹¹¹

(2) Where a party fails to respond to summary judgment, it merely admits that no material facts are in dispute, and does not consent to judgment as a matter of law.¹¹² Indeed, granting summary judgment is not available as a sanction for failing to respond to a summary judgment motion.¹¹³

107. *National Union Fire Ins. v. Waeyenberghe*, 148 F.R.D. 256 (N.D. Ind. 1993) (per Judge Pierce).

108. *Gray v. Faulkner*, 148 F.R.D. 220, 223 (N.D. Ind. 1992) (per Judge Pierce).

109. *Ellison v. Runyan*, 147 F.R.D. 186 (S.D. Ind. 1993) (per Judge Foster).

110. *Jackson v. Brinker*, 147 F.R.D. 189 (S.D. Ind. 1993). This is a welcome decision, for previously even counsel for prisoners were unable to obtain their clients' medical packet from the Indiana Department of Corrections without such an order.

111. *Daniels v. Cincinnati Ins.*, 148 F.R.D. 257 (S.D. Ind. 1993).

112. *Glass v. Dachel*, 2 F.3d 733, 739 (7th Cir. 1993).

113. *Tobey v. Extel/JWP, Inc.*, 985 F.2d 330, 332 (7th Cir. 1993).

(3) With only two exceptions, deposition testimony cannot be supplemented by a conflicting affidavit to avoid summary judgment. The first exception is where the subsequent affidavit clarifies ambiguous or confusing testimony. The second exception is for newly discovered evidence.¹¹⁴

(4) Unsworn statements in letters can be contradicted by subsequent sworn testimony to oppose summary judgment. A party cannot, however, create a "genuine issue of fact by submitting an affidavit containing conclusory allegations which contradict plain admissions in prior deposition or otherwise sworn testimony." Thus, where a witness swore under penalties of perjury in a union's annual report that certain facts were true, he could not later refute those facts in a contrary affidavit at summary judgment.¹¹⁵

(5) "Self-serving assertions without factual support in the record will not defeat a motion for summary judgment."¹¹⁶

(6) "Presenting a scintilla of evidence will not suffice to oppose a motion for summary judgment."¹¹⁷

(7) "Mere conclusory assertions, whether made in pleadings or affidavits, are not sufficient to defeat a proper motion for summary judgment."¹¹⁸

(8) "Only factual disputes that might affect the outcome of the suit in light of the substantive law will preclude summary judgment; irrelevant or unnecessary disputes will not."¹¹⁹

(9) "[I]t is clear that entry of summary judgment is mandatory where the requirements of Rule 56 are met."¹²⁰

114. *Slowiak v. Land O'Lakes, Inc.*, 987 F.2d 1293, 1297 (7th Cir. 1993).

115. *Jean v. Dugan*, 814 F. Supp. 1401, 1404-05 (N.D. Ind. 1993) (per Judge Lozano).

116. *McDonnell v. Cournia*, 990 F.2d 963, 969 (7th Cir. 1993).

117. *MacDonald v. Commonwealth Edison Serv. Annuity Fund*, 810 F. Supp. 239, 241 (N.D. Ill. 1993).

118. *Allstate Ins. v. Barnett*, 816 F. Supp. 492, 495 (S.D. Ind. 1993) (per Judge McKinney).

119. *Id.*

120. *Id.*

VI. EXPERTS

Federal courts have struggled in recent years to determine whether an expert's opinion is truly "expert," or whether it is instead junk science that should not be considered at summary judgment or trial. Some courts, following the so-called *Frye*-rule (stemming from a 1923 D.C. Circuit case),¹²¹ have required the opinion to be generally accepted in the expert's field,¹²² while others have simply applied Rule 702 of the Federal Rules of Evidence without requiring general acceptance.¹²³

The Supreme Court resolved the issue on the last day of its 1992 term, and in so doing gave fairly detailed guidance for future disputes on this subject. In *Daubert v. Merrell Dow Pharmaceuticals*,¹²⁴ the Court held that the *Frye* rule of general acceptance is not a prerequisite to admissibility of expert opinion. The Court reasoned that *Frye* predated Rule 702 by half a century, and found no indication in the text of Rule 702 that general acceptance is required.¹²⁵

This is generally considered good news for plaintiffs, whose experts' opinions are sometimes necessarily pursuing the outer edges of existing science and methodology, and as such were subject to inadmissibility if their opinions were not generally accepted by others in the field. There is good news for defendants as well, who typically attempt to limit the outer bounds of expert opinion.

The *Daubert* Court did not stop by casting aside the *Frye* rule. Instead, it wrote that district judges have an affirmative duty to screen expert evidence pursuant to Rules 104(a) and 702. The Court explained, "That the *Frye* test was displaced by the Rules of Evidence does not mean, however, that the Rules themselves place no limits on the admissibility of screening such evidence. To the contrary, under the Rules the trial judge *must* ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable."¹²⁶ The Court referred to this as the district judges' "gatekeeping role."¹²⁷

In uncharacteristic fashion, the Court then offered fairly specific guidance for discharging this screening function. The Court focused on the language of Rule 702, which provides, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or

121. *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013 (1923).

122. *E.g.*, *United States v. Shorter*, 809 F.2d 54, 59-60 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 817 (1987).

123. *E.g.*, *DeLuca v. Merrell Dow Pharmaceuticals*, 911 F.2d 941, 955 (3rd Cir. 1990).

124. 113 S. Ct. 2786 (1993).

125. *Id.* at 2792-94.

126. *Id.* at 2794 (emphasis added).

127. *Id.*

otherwise.”¹²⁸ The Court stated that the adjective “scientific” implies a grounding in the “methods and procedures of science.” Additionally, the term “knowledge” connotes “more than subjective belief or unsupported speculation.” Combining these terms, the Court explained that to “qualify as ‘scientific knowledge,’ an inference or assertion must be derived by the scientific method” and must be supported by “appropriate validation.”¹²⁹

Thus, when faced with a proffer of expert testimony, the trial judge must determine at the outset whether the expert offers scientific knowledge.¹³⁰ This gatekeeping role entails a “preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.”¹³¹

“Many facts will affect this inquiry,” according to the Supreme Court, which did “not presume to set out a definitive checklist or test.”¹³² Nonetheless, the Court did list the following general observations as “appropriate considerations.”

First, ordinarily a “key question” is whether the theory or technique has been tested. Second, another “pertinent consideration” is whether the theory or technique has been published or subjected to peer review. Third, in the case of a “particular scientific technique,” the judge “ordinarily” should consider the known or potential rate of error. Finally, that the theory is generally accepted “can yet have a bearing on the inquiry.”¹³³

The Court added that the inquiry under Rule 702 is a “flexible one” that focuses on “principles and methodology, not the conclusions that they generate.” The Court also observed that in making this flexible determination, the district judge may also exclude relevant evidence under Rule 403 if its probative value is outweighed by danger of unfair prejudice, confusion of the issues, or misleading of the jury.¹³⁴

The *Daubert* test is thus more defined than many analytical tools offered by the Supreme Court, but necessarily leaves much to the district courts for case-by-case refinement and application. *Daubert* is an essential read for federal practitioners, particularly those who present and oppose experts, both in deposition and at trial. At a minimum, counsel offering experts should ensure that as many of the four *Daubert* criteria are satisfied as possible (testing, publication or peer review, low rate of error, and general acceptance).

128. *Id.* at 2795.

129. *Id.*

130. Although the Court did not state this, presumably if the expert is testifying as to “technical” or “other specialized knowledge” per Rule 702, the judge must similarly ask whether the opinion involves “technical knowledge” or “other specialized knowledge” as must occur with scientific knowledge.

131. *Daubert*, 113 S. Ct. at 2795.

132. *Id.* at 2796.

133. *Id.*

134. *Id.*

Conversely, those confronting experts should carefully inquire into each factor at deposition to determine whether an argument can be made to exclude the entire opinion.

Finally, in the search for the presence or absence of *Daubert* factors, counsel should not overlook utilizing *other* experts. For instance, if the expert purports to offer a tested, published, errorless, and accepted theory or methodology, a cast of other experts might be able to persuade the trial judge otherwise for purposes of admissibility. This has always been a possibility for persuading the trier of fact, but should now be just as significant at summary judgment or motions in limine.

There will no doubt be much litigation over the flexible *Daubert* standard in the coming years. Because much has been left to the district courts, the most important battle on this issue in any case should be at the trial court rather than on appeal. It seems likely that if there is a reasoned basis under *Daubert* for the trial judge's admission or exclusion of expert testimony, the trial judge's discretion will not be disturbed absent obvious abuse.

The impact of *Daubert* was quickly felt in the Seventh Circuit in two significant cases. First, in *Frymire-Brinati v. KPMG Peat Marwick*,¹³⁵ the Seventh Circuit *reversed* a judgment entered after a jury verdict that was based in part on an accountant's "expert" testimony. In testifying as to the value of certain investments, the accountant did not use standard methodologies but instead made, in his own words, "a fairly simple pass at what the magnitude of the problem was."¹³⁶

Writing for the panel, Judge Easterbrook chastized the accountant and rejected his testimony outright. Relying on *Daubert*, Judge Easterbrook confirmed the trial judge's obligation to assess the expert's methodology before allowing purported expert testimony. Although Judge Easterbrook acknowledged that trial judges "possess considerable discretion in dealing with expert testimony," he held that "on this record the court could not properly have admitted [the expert's] valuation."¹³⁷

Similarly, in *Porter v. Whitehall Laboratories*,¹³⁸ the Seventh Circuit affirmed Judge Tinder's exclusion of proffered expert testimony. Plaintiff's experts sought to link the drug ibuprofen to renal failure. Judge Tinder excluded their opinions—even prior to *Daubert*—because they were not supported by scientific methodology, but were instead based on "a mere possibility of an unsupported and therefore hypothetical explanation for the acute renal fail-

135. 2 F.3d 183 (7th Cir. 1993).

136. *Id.* at 186.

137. *Id.* at 187.

138. 9 F.3d 607 (7th Cir. 1993).

ure.”¹³⁹ The Seventh Circuit agreed with Judge Tinder, noting that the “district court almost verbatim prophesied the language of the [*Daubert*] Court.”¹⁴⁰

Porter and *Peat Marwick* thus serve as indications that the Seventh Circuit expects and encourages district judges to fulfill their *Daubert* responsibilities to serve as gatekeepers of expert testimony. With hard work and careful questioning of experts, defense counsel could well find that *Daubert* is a blessing in disguise.

The following cases address other areas of interest regarding experts:

(1) Where a plaintiff visited a non-testifying consulting doctor at his attorney's request after filing the action, the consulting doctors' records were protected — not as work-product under Rule 26(b)(3) — but as protected non-testifying expert materials under Rule 26(b)(4)(B).¹⁴¹

(2) In the same case, where the consulting doctor's otherwise protected records were reviewed by plaintiff's *testifying* expert, Judge Endsley held that the records need not be produced because the testifying expert stated in his deposition that he reviewed the consultant's records but found them “unreliable” and “unimportant.”¹⁴² By contrast, where another testifying expert “considered” and “relied on or rejected, to some degree,” the consultant's documents, Judge Endsley held that the Rule 26(b)(4)(B) protection had been waived.¹⁴³

(3) In the same case, Judge Endsley rejected the defendant's arguments that the consulting doctor's report should be produced because plaintiff allegedly engaged in “expert shopping” by visiting three different experts and relying on only one.¹⁴⁴

(4) In the same case but in a subsequent opinion, Judge Endsley held that a Chicago doctor's hourly deposition charge of \$860 was *not* reasonable.¹⁴⁵ After carefully evaluating seven standard factors, Judge Endsley determined that the Chicago neurologist should be paid \$341.50 per hour for deposition time.¹⁴⁶

139. 791 F. Supp. 1335, 1342 (S.D. Ind. 1992).

140. 9 F.3d at 614.

141. *Dominguez v. Syntex Laboratories, Inc.*, 149 F.R.D. 158, 160 (S.D. Ind. 1993) (per Judge Endsley).

142. *Id.* at 162.

143. *Id.* at 164.

144. *Id.* at 162-63.

145. *Id.* at 166.

146. The factors considered were: (1) area of expertise; (2) education and training; (3) rates of comparable respected experts; (4) nature, quality, and complexity of responses provided; (5) fee actually charged to retaining party; (6) fees traditionally charged by the expert on related matters; and (7) any other factor likely to be of assistance. *Dominguez*, 149 F.R.D. at 167.

(5) Although time spent by an expert in deposition is compensable, time spent travelling to the deposition or in procuring copies of photographs is not.¹⁴⁷

(6) Where an accident reconstruction expert's report was initially said to exist but in fact was not created until later, where the report was later denied to exist, and where the expert's Rule 26(b)(4) summary of testimony was not timely provided, Judge Tinder did not abuse his discretion in barring the expert from testifying under Rule 37.¹⁴⁸

VII. TRIAL

As discussed at length in last year's article, peremptory challenges are now sharply limited by *Batson* and its progeny, which prohibit race-based challenges to prospective jurors.¹⁴⁹ During the survey period further developments occurred in this important area. In *Doe v. Burnham*,¹⁵⁰ for instance, the Seventh Circuit announced in *dicta* that district courts should not raise the issue of illegal *Batson* challenges, but instead should leave it to the parties to object to peremptory challenges believed to be race-based. The court wrote that trial judges "should at least wait for an objection before intervening in the process of jury selection to set aside a peremptory challenge." The court added:

Tradition engraves the process of peremptory challenges into our system; it is 'a procedure which has been part of our jury system for nearly 200 years.' Judges should invade a party's discretion to strike potential jurors only in narrow circumstances. We are aware of no case which authorizes a judge to invoke *Batson* when a party has never objected on that basis.¹⁵¹

Burnham is significant, for several federal judges in Indiana had adopted the practice in recent years of raising *Batson* objections *sua sponte*. After *Burnham*, such a practice is not condoned in the Seventh Circuit, and could even lead to reversible error.¹⁵²

147. *Rosenblum v. Warren & Sons, Inc.*, 148 F.R.D. 237 (N.D. Ind. 1993) (per Judge Sharp).

148. *Scaggs v. Consolidated Rail Corp.*, 6 F.3d 1290, 1295-96 (7th Cir. 1993).

149. See 1992 *Federal Practice*, *supra* note 21, at 845-49 (discussing *Batson v. Kentucky*, 476 U.S. 79 (1986) and related cases that restrict discretion in exercising peremptory challenges).

150. 6 F.3d 476, 481 (7th Cir. 1993).

151. *Id.*

152. In *Burnham* the judge denied two defense peremptory challenges of black jurors on her own motion. The Seventh Circuit reversed the eventual judgment for the plaintiff due to instructional error, so did not need to squarely address the *Batson* issue. Nonetheless, "to guide the district court on remand," the panel specifically discussed the judge's *sua sponte* action in some detail, and made quite clear its desire that district judges not involve themselves in self-policing of peremptories.

Separately, in *J.E.B. v. T.B.*,¹⁵³ the Supreme Court took up the issue of whether *Batson* extends to gender-based peremptories. The lower courts had split on this issue, with some (including the Seventh Circuit) refusing to extend *Batson* to gender,¹⁵⁴ and others prohibiting gender-based challenges.¹⁵⁵ By a six to three vote, the Supreme Court held that *Batson* prohibits prospective jurors from being excluded on account of gender. Neither women nor men can be excluded because of their gender. Practitioners should ensure that they have legitimate non-discriminatory reasons for striking any juror, particularly where race-based or gender-based discrimination could be argued by the opponents.

VIII. COSTS

Several significant decisions addressing costs were decided, and are summarized below:

(1) In a case of first impression, the Seventh Circuit affirmed Judge Tinder's dismissal of an action after plaintiff failed to post bond to ensure that costs could be paid if defendants prevailed.¹⁵⁶ Although no statute or rule expressly allows such a cost bond, the Seventh Circuit held that the "power to tax costs implies the ancillary power to take reasonable measures to ensure that the costs will be paid."

(2) Where an offer of judgment is made under Rule 68, and where defendant prevails such that plaintiff recovers nothing, trial courts lack the authority to award costs under Rule 68.¹⁵⁷ Interestingly, Rule 68 only applies where plaintiff recovers *something*, but less than the amount of the offer of judgment. Costs can still be awarded to defendants who prevail completely, however, under Rule 54(d).

(3) The expense of travel to take a deposition is not recoverable as costs.¹⁵⁸

(4) Although costs of videotaping a deposition may be taxed as costs, a party may not recover both the costs of videotaping and the costs of producing a transcript.¹⁵⁹

153. No. 92-1239, 1994 WL 132232 (Apr. 19, 1994).

154. See *United States v. Nichols*, 937 F.2d 1257 (7th Cir. 1991); *United States v. Broussard*, 987 F.2d 215 (5th Cir. 1993); *United States v. Hamilton*, 850 F.2d 1038 (4th Cir. 1988); *State v. Culver*, 444 N.W.2d 662 (Neb. 1989).

155. *United States v. DeGross*, 960 F.2d 1433 (9th Cir. 1992); *Tyler v. Maryland*, 623 A.2d 648 (Md. 1993).

156. *Anderson v. Steers, Sullivan, McNamar & Rogers*, 998 F.2d 495 (7th Cir. 1993).

157. *Lentomyynti Oy v. Medivac, Inc.*, 997 F.2d 364, 374-75 (7th Cir. 1993).

158. *Estate of Borst v. O'Brien*, 979 F.2d 511, 517 (7th Cir. 1992).

159. *Barber v. Ruth*, 7 F.3d 636, 645 (7th Cir. 1993). The decision was rendered prior to the

(5) Costs do not include attorneys' fees or witness travel and lodging expenses.¹⁶⁰

IX. APPEAL

Several significant developments occurred in federal appellate practice, and are highlighted below:

(1) Rule 3 of the Federal Rules of Appellate Procedure was amended effective December 1, 1993, to allow notices of appeal for multiple appellants to avoid listing all appellants individually in the notice, so long as the notice describes the appellants in terms such as "all plaintiffs or all plaintiffs except A."¹⁶¹

(2) Rule 4 of the Federal Rules of Appellate Procedure was amended to provide that a notice of appeal filed before the disposition of specified post-trial motions will now become effective upon disposition of the motion.¹⁶²

(3) Appellate briefs must now contain for each issue a "concise statement of the standard of the applicable standard of review," which may appear in the discussion of each issue or under a separate "standard of review" section preceding the issues.¹⁶³

(4) With an amendment to FED. R. CIV. P. 58, a timely petition for attorneys' fees (now due within 14 days of judgment under FED. R. CIV. P. 54) tolls the time for appeal *if* the district court so orders. Prior law allowed no such tolling, thus necessitating two separate appeals—one from the judgment, and one from the later ruling on fees.

(5) An order denying intervention is immediately appealable, and the right to appeal it lost is appeal is not taken within 30 days.¹⁶⁴

amendments to Rule 30 allowing depositions to be videotaped without leave of court or consent. It does not appear, however, that the amendments to Rule 30 would change the result.

160. *Thomas v. Caudill*, 150 F.R.D. 147 (N.D. Ind. 1993) (per Judge Rodovich).

161. FED. R. APP. P. 4(c) (1993). This amendment is intended to alleviate the problems caused by *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988), which held that jurisdiction over all appellants was lacking if the notice of appeal names the first-named appellant and then uses "et al." without listing every appellant.

162. FED. R. APP. P. 4(a)(4). Under prior law, such premature notices of appeal were without effect, thus requiring the filing of a second notice of appeal after disposition of the post-trial motion. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982); *Lentomynti Oy v. Medivac, Inc.*, 997 F.2d 364, 366 (7th Cir. 1993).

163. FED. R. APP. P. 28(a)(5).

164. *B.H. by Pierce v. Murphy*, 984 F.2d 196, 198-99 (7th Cir. 1993).

(6) Where a plaintiff appealed from an adverse ruling from Judge Steckler after a bench trial in a Title VII employment discrimination claim, and where the appeal only attacked factual findings involving disputed evidence, the Seventh Circuit assessed sanctions against appellant's counsel.¹⁶⁵ The decision serves as the latest reminder that the Seventh Circuit takes sanctions seriously, and will not tolerate appeals where the "result is obvious."¹⁶⁶

X. MISCELLANEOUS

Finally, a number of miscellaneous developments occurred that require mention. In the sanctions area, Rule 11 was amended with four major changes. First, no motion for sanctions under Rule 11 can be filed until twenty-one days *after* a copy of the motion was first served on the opponent.¹⁶⁷ If the offending paper is not withdrawn or corrected within those twenty-one days, the Rule 11 motion can then be filed. This procedural change effectively imposes a twenty-one-day safe harbor provision, and is intended to encourage withdrawal of frivolous filings.

The second change is that absent "exceptional circumstances," law firms are to be held jointly responsible for Rule 11 violations committed by their attorneys and employees.¹⁶⁸ This supersedes the Supreme Court's 1989 decision in *Pavelic & LeFlore*,¹⁶⁹ and is intended to encourage law firms to collectively consider withdrawal of frivolous filings.

The third change is that Rule 11 now applies not only to the initial filing of frivolous papers, but also to "later advocating" a paper that is frivolous.¹⁷⁰ Thus, unlike prior law, a plaintiff filing a frivolous complaint in state court can be subject to Rule 11 sanctions in federal court for pursuing the action after removal.

The fourth major change is Rule 11's treatment of sanctions. The prior version of Rule 11 required some sanction to be imposed upon a Rule 11 violation (by use of the term "shall"), while new Rule 11 allows the court discretion by using the term "may" impose an appropriate sanction.¹⁷¹ Further, new Rule 11 has an apparent preference for non-monetary sanctions in lieu of fees.

Separately, the Northern District of Indiana enacted new local rules effective January 1, 1994. The highlights include:

165. *Rennie v. Dalton*, 3 F.3d 1100, 1111 (7th Cir. 1993).

166. *Id.* at 1111.

167. FED. R. CIV. P. 11(c)(1)(A) (1993).

168. *Id.*

169. 493 U.S. 120 (1989).

170. FED. R. CIV. P. 11(b).

171. Fed. R.Civ. P. 11(c).

- (1) Initial enlargements for pleadings and discovery can be done by consent and notice as in the Southern District.¹⁷²
- (2) Briefs are limited to twenty-five pages absent “extraordinary and compelling reasons.”¹⁷³
- (3) Notices of serving discovery requests no longer need be prepared and filed, but requests for admissions and responses thereto are to be filed with the court.¹⁷⁴
- (4) Parties are encouraged to resort to judicial phone conferences to resolve deposition disputes.¹⁷⁵

172. N.D. IND. L.R. 6.1.

173. N.D. IND. L.R. 7.1.

174. N.D. IND. L.R. 26.2.

175. N.D. Ind. L.R. 37.3.

