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In This Issue
Limitations

Revisions to Federal Rules Change Time-Computation Method

By Amelia Toy Rudolph & Stacey A. McGavin

Effective December 1, 2009, revisions to the Federal Rules of Civil Procedure adopted a "days are days" approach to the computation of time periods under the rules. Previously, when calculating time periods, intervening weekends and holidays were excluded if the applicable period was less than 11 days, but were included for longer periods. This method of calculating time often led to unexpected results. Prior to these revisions, for example, 10 "federal days" would almost always last as long, if not longer, than 14 calendar days. Under the revised Rule 6(a), however, every calendar day, including weekends and holidays, is now counted. In addition, as a part of these revisions, the specific periods set forth in several rules were changed, primarily to compensate for this new "days are days" method of computing time and to use a "multiples of seven" approach to time periods to minimize deadlines falling on weekends. While these amendments may be considered merely technical, it is important to note that there are more substantial revisions to some rules.

This article discusses the general time-computation revisions, using Rules 12 and 56 to illustrate some of these changes, and discusses the application of the new method to local rules, court orders, and statutes. Specific changes to the other Federal Rules

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Revised Deadlines in the Federal Rules of Civil Procedure

By Theresa A. Phelps

The Federal Rules of Civil Procedure were revised, effective December 1, 2009, such that the time deadlines set forth in the rules underwent a major overhaul. The primary changes relate to the manner in which deadlines are calculated under the rules. Gone are the complicated days of trying to determine whether to include or exclude weekend days and certain holidays in the calculation of specific deadlines. Undoubtedly prompted by the confusion, headaches, and collateral litigation surrounding the basic issue of how time is calculated, these changes are designed to simplify the calculation under the rules.

Under the newly revised rules, the drafters have taken a "days are days" approach. Stated differently, the calculation of deadlines under the rules now means employing a straightforward method of counting each day during the period. Practitioners must now beware: While under the prior version of the rules, a five-day deadline really meant something much longer than five days (once weekend days and holidays were excluded), under the newly revised rules, five days means five days, plain and simple. Clearly, this change may take some getting used to; however, it will undoubtedly make calculation of deadlines under the rules simpler for all.

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Message from the Chairs

This issue's theme of "Limitations" is a broad topic that lends itself to many potential subjects. *PP&D* brings you a great array of articles relating to various types of limitations. Statutes of limitation jump to mind for many litigators when they hear the theme. While seemingly simple to apply, one can find many ways around statutes of limitations. Statutes of limitation are especially susceptible to circumvention at the pleading stage. Don't jump to the conclusion that a claim is dead without considering how a party may try to avoid the statute of limitations. Many examples come to mind.

About eight years ago, I received a call from a client who had just been sued on a written contract alleging that my client had breached the contract two years earlier. While my client might have had some equitable defenses, such as laches, breach of written contract had a 10-year statute of limitations in the relevant jurisdiction, Illinois. My factual investigation of the underlying facts revealed that my client had a good counterclaim—the only problem was that the statute of limitations for this claim had already run. After beginning to despair (and admire my opponent for clever timing), I noticed Illinois's revival statute, which allows a defendant to set off or counterclaim against a plaintiff for an otherwise time-barred claim.

There are numerous other codified exceptions to the statute of limitations. For example, most states toll the statute of limitations for minors until they reach majority, a potentially lengthy period of time.

The common law also provides arguments to avoid a statute of limitations bar. Many jurisdictions apply the discovery rule in connection with various causes of action. While the discovery rule is fairly narrow in concept, its application is usually fact-based, making it difficult to decide as a matter of law. Also, application of the discovery rule varies widely between jurisdictions and causes of action. To different degrees, jurisdictions generally acknowledge that a plaintiff cannot be expected to sue until the plaintiff could reasonably figure out that he or she has a cause of action. But this may be of limited use to a plaintiff who knows that he or she has been injured but is unaware that he or she has a cause of action. For example, in *Rotella v. Wood*, the Supreme Court found that the tolling of a statute of limitations for civil RICO ended when the plaintiff should have known he was injured, even if he had no way of knowing his injury was due to a conspiracy for which several defendants were convicted.

Equitable estoppel, or fraudulent concealment, is an alternative argument to tolling limitations. It, however, requires allegations that the defendant misled the plaintiff concerning the injury or cause of action. Consider whether there are facts to support such an argument.

Yet another way of avoiding a statute of limitations is equitable tolling, which can arise in varied ways. A common example is when a class-action case has been pending in which the new plaintiff was a putative class member. In *American Pipe*, the Supreme Court resolved that a plaintiff's federal claims are equitably tolling while a class action is pending. However, application of this concept can be confusing, and numerous issues persist. For example, *American Pipe* is only binding with regard to federal claims. Some state courts follow *American Pipe*, and others reject it with regard to state claims. And questions exist on whether these courts will recognize cross-jurisdictional tolling (i.e., tolling a cause of action based on a class action in a different state) and whether tolling applies to all causes of action arising from the set of facts in the class-action complaint, or only to the actual causes of action asserted in that complaint.

Even where a complaint is timely filed and the statute of limitations then expires, Rule 15's relation-back provisions can salvage stale claims mistakenly brought against the wrong party, or state savings statutes can save claims that have failed other than on the merits.

In short, limitations are the fountain of invention. Whether claimant or respondent, consider that the apparently time-barred cause of action may just be playing dead.

* * * *

Turning to committee news, we are happy to report that PP&D's *Iqbal* task group is off to a fantastic start. It has created a chart summarizing around 200 federal opinions interpreting *Iqbal*, and the chart continues to grow. The group hopes to make its work product available to the Section on the website in the near future. The group also plans to offer short analyses of a few of the most interesting cases decided under *Iqbal* each quarter.

We have several programs for the Section Annual Conference, April 21–23, 2010, in New York City. Our committee will sponsor three programs: one about e-discovery in document/ESI-intensive cases; another on managing litigation within a budget; and a panel of magistrate judges speaking on discovery disputes. All of the programs are coming along well.

We are also pleased to announce that the committee has had a program accepted for the ABA Annual Meeting in San Francisco, August 5–7, 2010, entitled "A Tale of Two Cases: Managing Discovery Costs and Minimizing Risks With and Without Outsourcing." The program is slated for August 5, 2010, at 2 p.m. It is never too early to plan to attend.

If you want to get more involved with the committee by joining our *Iqbal* task group, writing an article, presenting a program, or serving on a subcommittee, please contact one of us.

We look forward to seeing you in New York in April!

—Erica L. Calderas
—Ian H. Fisher
—Kent A. Lambert

Message from the Editors

To develop a successful litigation strategy, a lawyer must have a clear understanding of the limitations on various aspects of pretrial practice. These limitations can arise from rules of procedure or evidence, the common law, or lawyers' ethical obligations. The limitations can be traps for the unwary advocate or valuable tools in the hands of careful practitioners. This Winter 2010 edition of *PP&D* focuses on certain limitations that exist on pretrial practice in litigation.

In a style that you have seen before in *PP&D*, we begin with two "timely" articles presenting views on a single issue—this time, the recent revisions to the Federal Rules of Civil Procedure that overhaul the computation of time periods. In "Revisions to Federal Rules Change Time-Computation Method," by Amelia Toy Rudolph and Stacey A. McGavin and "Revised Deadlines in the Federal Rules of Civil Procedure," by Theresa A. Phelps, we look at how different procedural rules are affected by the adoption of the "days are days" approach to the computation of time periods.

In "Federal Rule of Evidence 502—Lessons from the First Year," Amy Longo and William Dance review the first year of case law under new Federal Rule of Evidence 502, which took effect on September 19, 2008. This article shows that it is essential for all litigators to stay on top of this rapidly developing body of law that concerns issues of attorney-client privilege, work product, waiver, and electronic discovery.

Addressing complicated issues of abstention and res judicata in the context of duplicative cases is Brandon J. Harrison's thoughtful article "A Brief Review of a Federal Abstention Doctrine." In "Understanding Time Limits on Removing Multi-Party Cases to Federal Court," Peter M. Durney and Marie E. Chafe present a refresher on the seemingly straightforward but often tortuous rules governing the time limits on removing multiparty cases to federal court. We close out with Joel Ewusiak's perceptive piece "Discovery Strategies and Preparing a Case for Success," which gives pointers for critical thinking about how to achieve efficient litigation results.

We are always looking for insightful articles on contemporary issues to include in the newsletter. The themes for our upcoming issues of *PP&D* are Experience (Spring 2010); Trends (Summer 2010); and Advocacy (Fall 2010). We anticipate a wonderful set of articles on these subjects. If you are interested in writing an article, or if you have other information to share with *PP&D*, please contact Sam Thumma (602.372.2018 or thummas@superiorcourt.maricopa.gov) or Greg Boyle (312.840.2651 or gboyle@jenner.com). Be sure to visit the PP&D webpage at www.abanet.org/litigation/committees/pretrial for past newsletters, practice pointers, and periodic updates on cutting-edge legal developments as well as general information about the PP&D Committee.

—Samuel A. Thumma
—Gregory M. Boyle

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ABA Section of Litigation
AMERICAN BAR ASSOCIATION

Federal Rule of Evidence 502—Lessons from the First Year

By Amy Jane Longo & William Dance

Federal Rule of Evidence 502 took effect on September 19, 2008, creating a uniform law applicable to waiver of privilege through disclosure of documents in litigation. According to the advisory committee notes, the new rule has two purposes: to resolve "some longstanding disputes . . . about the effect of certain disclosures of communications or information protected by the attorney-client privilege or as work product—specifically those disputes involving inadvertent disclosure and subject matter waiver," and to address

> the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have become prohibitive due to the concern that any disclosure (however innocent or minimal) will operate as a subject matter waiver of all protected communications or information. This concern is especially troubling in cases involving electronic discovery.[1]

One year later, courts around the country have issued over 20 written opinions addressing aspects of Rule 502. Courts disagree most over their interpretations of the reasonableness of disclosing parties' efforts to prevent and rectify disclosure under Rule 502(b). They also differ in determining the extent to which parties and courts can use agreements and protective orders, as provided for by Rule 502(d) and (e), respectively, to contract around the Rule 502(b) reasonableness requirements.

Rule 502(b): What Are "Reasonable Steps"?

The most contested provision of Rule 502 is section (b), addressing inadvertent disclosure. Section (b) provides that:

> [w]hen made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if:
>
> (1) the disclosure is inadvertent;
>
> (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and
>
> (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).[2]

The central issue in most of the decisions addressing Rule 502 is the reasonableness of the steps the disclosing party took to prevent and rectify the disclosure under Rule 502(b)(2) and (3). Generally, the issue of "inadvertence" under 502(b)(1) is undisputed.

The text of the rule provides no explanation of "reasonableness." The advisory committee notes offer some guidance, explaining that Rule 502(b) opts for a middle ground between subjective and objective standards, building on the trend that "[m]ost courts find a waiver only if the disclosing party acted carelessly in disclosing the communication or information and failed to request its return in a timely manner."[3]

Of the courts that have addressed Rule 502(b), most evaluate reasonableness under balancing tests from existing circuit authority. The advisory committee notes for Rule 502(b) describe the test used most often, citing *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*[4] and *Hartford Fire Ins. Co. v. Garvey*.[5] The stated factors (none of which is dispositive) are the reasonableness of precautions taken, the time taken to rectify the error, the scope of discovery, the extent of disclosure and the overriding issue of fairness. . . . [6]

The advisory committee notes state that "[t]he rule does not explicitly codify that test, because it is really a set of non-determinative guidelines that vary from case to case."[7] Most courts, however, apply these five factors, citing the note as well as existing circuit precedent for analysis of inadvertent disclosure and waiver, tempered by attention to several other considerations mentioned in the note, including the number of documents to be reviewed, the time constraints for production, use of advanced analytical software and linguistics tools in privilege screening, and the disclosing party's implementation of an efficient records-management system before litigation.[8]

Two noteworthy areas of divergence among the cases to date are their assessments of parties' delays in efforts to rectify disclosure and the extent of the preventive and rectifying steps they find reasonable, and therefore sufficient to avoid waiver.

The Importance of Prompt Efforts to Rectify Disclosure

In *Clarke v. J.P. Morgan Chase & Co.*, Magistrate Judge Freeman focused on, among other aspects of the defendant's conduct as the disclosing party, the long delay between when the defendant learned, or should have learned, that it had disclosed a privileged email and when the defendant demanded the email's destruction or return.[9] The elapsed time was over two months. According to Judge Freeman,

> "[i]nadvertent disclosure has been held to be remedied when the privilege was asserted *immediately* upon discovery of the disclosure and a prompt request is made for the return of the privileged documents." In this case, Defendant's assertion of privilege was far from immediate, as Defendant made no reference to the document's purportedly privileged status for over two months. This is a sufficiently long period of time to warrant a finding of waiver.

Delay in efforts to rectify also resulted in a finding of waiver

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in *Eden Isle Marina, Inc. v. United States*.[10] With respect to one of the documents at issue, the court found that the delay in rectification of the disclosure error, among other conduct, caused waiver. One of the key documents at issue was a memorandum produced by the defendant in the fall of 2006. The plaintiff introduced the memorandum, which bore the legend "Confidential/Protected Information; Attorney Work Product . . .," as an exhibit in a deposition in March, 2008. Defense counsel objected to use of the memorandum but did not instruct the defense witness not to answer questions about it. Following the deposition, the defendant made no effort to rectify the disclosure, either by seeking its return, placing it on a privilege log, or filing a motion for a protective order. With respect to other documents the defendant claimed it produced inadvertently, the documents were used in depositions in January–March 2008, with defense counsel again objecting but failing to instruct the witness. The defendants waited until October 2008, a delay of about seven to ten months, depending on the dates of the depositions where the documents were introduced, to provide the plaintiff with a privilege log listing these documents.

In *Preferred Care Partners Holding Corp. v. Humana, Inc.*, Magistrate Judge Simonton cited the disclosing party's delay in attempting to claw back an allegedly privileged document as one of the reasons she determined that the privilege had been waived.[11] With respect to the document for which the court found the privilege waived, the delay was over two months. In contrast, the court found that the disclosing party had taken reasonable steps to rectify the inadvertent disclosure of several other documents by informing the other side of its privilege claims and requesting return of the documents within two weeks of discovering the inadvertent disclosure.

In *Heriot v. Byrne*, Magistrate Judge Ashman analyzed two opinions examining the timing of corrective efforts under Rule 502(b)(3), *Laethem Equip. Co. v. Deere and Co.* (*Laethem II*) and *B-Y Water Dist. v. City of Yankton*, and concluded that "*how* the disclosing party *discovers and rectifies* the disclosure is more important than *when* after the inadvertent disclosure the discovery occurs."[12]

In *Laethem II* and *B-Y Water District*, where the respective courts found no waiver, the disclosing parties' curative actions, while not instantaneous, followed very closely on the heels of discovery of disclosure, suggesting that both the timing and the nature of the disclosing party's rectification efforts figure prominently in the waiver analysis. In *Laethem II*, the disclosing party objected "almost immediately" upon its discovery of the disclosure, sent a letter requesting return of the protected documents the same day, then repeated the requests over the course of three weeks before obtaining a court order compelling the documents' return.

In *B-Y Water District*, counsel for the disclosing party objected immediately to use in a deposition of two documents it had placed on its privilege log, but which its vendor had produced in unredacted form. The fact that the disclosing party had instructed its vendor to redact the documents, but the vendor had produced the unredacted versions in error, was also viewed by the *B-Y Water District* court as mitigating the nature of the disclosure. While there is no bright-line rule to determine when a claw-back effort is prompt and when it is so late that it causes a finding of waiver, a disclosing party should take great pains to avoid unnecessary delay in its efforts to claw back the disclosed documents at issue.

Do "Reasonable Steps" Require "All Reasonable Means"?

Courts also take sharply differing approaches to Rule 502(b)(2) and (3) in analyzing the nature and scope of the disclosing party's efforts to prevent and rectify inadvertent disclosure. At least one court has interpreted 502(b)(2) and (3) to require parties to use "all reasonable means" to prevent and rectify disclosure, while other courts have applied a more forgiving standard of reasonableness.

In *Relion, Inc. v. Hydra Fuel Cell Corp.*, Magistrate Judge Hubel construed Rule 502(b) strictly. In this patent dispute, plaintiff had disclosed—inadvertently, it contended—two emails it claimed were privileged.[13] The plaintiff moved the court to compel the defendant to return all copies of these emails. Paraphrasing Rule 502(b), the *Relion* court stated that "inadvertent disclosure does not constitute a waiver if the holder of the privilege took reasonable steps to prevent disclosure and promptly took reasonable steps to rectify the error." The court then concluded that privilege is waived "if the privilege holder fails to pursue *all reasonable means* of preserving the confidentiality of the privileged matter" (emphasis added). The court examined the facts and concluded that "Relion [the disclosing party] did not pursue all reasonable means of preserving the confidentiality of the documents produced . . ., and that therefore the privilege was waived." The conduct at issue included a four-month delay between the disclosing party's discovery of the disclosure and its claw-back effort.

Relion stands alone among Rule 502 opinions in its reading of "reasonable steps" as requiring "all reasonable means." Several opinions take issue with this view. Most explicitly, in *Coburn Group, LLC v. Whitecap Advisors LLC*, Magistrate Judge Brown stated that "[t]his court respectfully disagrees with the *Relion* decision."[14] "The standard of Rule 502(b)(2) is not 'all reasonable means,' it is 'reasonable steps to prevent disclosure.'" In *In re TFT-LCD (Flat Panel) Antitrust Litigation*, Judge Illston also held that "reasonable steps" required less than all possible means:[15]

> [T]here were certainly additional measures that could have been taken in the review . . . that would have prevented the inadvertent disclosure. . . . However, the Court . . . finds that [the disclosing party's former counsel] took reasonable steps at the time to prevent disclosure of privileged documents. . . .

In another holding contrary to *Relion*, *Alcon Manufacturing, Ltd. v. Apotex, Inc.*, Magistrate Judge Baker rejected the argument that the disclosing party's conduct amounted to waiver where it waited several days from discovery of the disclosure to determine and claw back all related privileged communications. Judge Baker noted that "[i]t is true that Plaintiffs' [disclosing party] counsel did not *immediately* assert privilege for every reason available," but held that its efforts nevertheless amounted

to reasonable steps to rectify the disclosure, and therefore there was no waiver.[16] Judge Baker observed that "[c]oncluding otherwise would undermine one of the main purposes of new Evidence *Rule 502*," avoiding waiver where the disclosure clearly was inadvertent and steps were taken to rectify the disclosure.

Overall, most opinions evaluating reasonableness and timeliness under Rule 502(b)(2) and (3) stake out an intermediate position with respect to the timing and extent of the disclosing party's efforts to prevent and rectify inadvertent disclosure of attorney-client privileged or work-product-doctrine-protected documents.

Can Party Agreements and Court Orders Contract Around the Reasonableness Standards?

Several opinions address, in different ways, tension between Rule 502(b), on the one hand, and Rule 502(d) and (e), on the other. Rule 502(d) provides that "[a] Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other Federal or State proceeding."[17] Rule 502(e) permits nonwaiver agreements between the parties, but limits the scope of their binding effect to the parties themselves.[18]

The central tension addressed in these opinions is the extent to which parties can contract around the reasonableness requirements in 502(b)(2) and (3) by agreeing, either between themselves or by means of a court order, that documents can be disclosed without *any* privilege review—let alone a privilege review meeting some sort of reasonableness test—and then be clawed back without waiver when their disclosure is discovered by the disclosing party. While such agreements appear to have been explicitly contemplated by the advisory committee in its design of 502(d) and (e),[19] taken to their extreme—no privilege review at all—the transparent lack of reasonable efforts to limit disclosure may render them vulnerable to challenge under 502(b).

An illustration of this tension is the evaluation of a proposed agreement under 502(e) in *Spieker v. Quest Cherokee, LLC*, a suit over royalties on oil and gas leases in southeast Kansas.[20] Magistrate Judge Humphreys attempted to resolve a dispute over an estimated $250,000 price tag for defendants to conduct a privilege review by ordering the parties to consider ways to economize through the application of Rule 502.

To reduce the asserted costs, the plaintiffs proposed that if the defendants would turn over all of the requested emails with no privilege review whatsoever, the plaintiffs would agree to return any privileged documents without asserting waiver—also known as a "quick peek" agreement. The plaintiffs argued that the defendants would thereby be relieved of the cost of their attorneys' time spent reviewing documents for privilege.

The advisory committee note to Rule 502(d) specifically identifies "quick peeks" as one form of agreement envisioned by the rule:

> For example, the court order may provide for return of documents without waiver *irrespective of the care taken by the disclosing party*; the rule contemplates enforcement of "claw-back" and "quick peek" arrangements as a way to avoid the excessive costs of pre-production review for privilege and work product.[21]

The *Spieker* court, however, did not evaluate the plaintiffs' proposed agreement under Rule 502(d) or (e). Instead, the court reviewed the proposal under Rule 502(b), concluding that producing documents with no prior privilege review would be *per se* unreasonable:

> The difficulty with [plaintiffs' proposal] is that Rule 502(b) preserves the privilege if "the holder of the privilege or protection took reasonable steps to prevent disclosure" of the privileged material. Simply turning over ***all*** ESI materials does not show that a party has taken "the reasonable steps" to prevent disclosure of the privileged materials and plaintiffs' proposal is flawed.[22]

Although the court indicated that the reasonableness of steps taken to protect privilege is best determined on a "case-by-case basis," it found that "some effort to protect privileged materials" is required to satisfy Rule 502(b).

Courts take sharply differing approaches to Rule 502(b)(2) and (3).

Ultimately, the court granted the plaintiffs' motion to compel, finding that the defendants' cost estimates were inflated, so the viability of the plaintiffs' proposal was rendered moot. But the *Spieker* approach to Rule 502, requiring a reasonableness analysis under the inadvertent disclosure provisions of 502(b) even when the disclosure would be by agreement, and therefore arguably not inadvertent, could restrict the types of nonwaiver agreements available to the parties under Rule 502(d) and (e). If followed by other courts, *Spieker* may mean that even true nonwaiver agreements must contain at least some privilege-protecting measures to satisfy the reasonableness standard of Rule 502(b) while promoting the cost-saving aims of Rule 502(d) and (e).

Though no cases yet have followed *Spieker*, several Rule 502 opinions found other ways to reconcile Rule 502(b) with Rule 502(d) or (e). In *Alcon Mfg., Ltd. v. Apotex Inc.*, discussed above, the plaintiffs produced and then attempted to claw back a privileged document.[23] A protective order governing discovery in the case contained a claw-back waiver provision. Both sides argued the issue of waiver under Rule 502(b)'s inadvertent disclosure provisions. Magistrate Judge Baker held that

> [b]oth parties rely on Rule 502(b). . . . However, this standard provides limited guidance given the language of Rule 502(d), which provides: [a] federal court order that the attorney-client privilege or work product protection is not waived as a result of disclosure in connection with the litigation pending before the court governs all persons or entities in all state or federal proceedings. . . .

The *Alcon* protective order provided for claw-back without waiver in the event of inadvertent or mistaken production of

documents that should have been withheld under attorney-client privilege or work-product immunity, conditioned on the producing party making a good-faith representation that disclosure was inadvertent and taking prompt remedial action to withdraw the document upon discovery of the disclosure. Judge Baker evaluated the defendants' waiver claims under the terms of the protective order, not under the reasonableness standards of Rule 502(b), finding that the plaintiffs' good-faith declaration of inadvertence was adequate and that there was no waiver. Thus, in effect, he concluded that Rule 502(d) court orders enable parties to devise their own approaches to privilege and waiver without also being bound by the provisions of Rule 502(b).

Another opinion finding that court orders can permissibly contract around the Rule 502(b) reasonableness requirements is *Rodriguez-Monguio v. Ohio State University*.[24] There, the defendant sought the return of a document it contended was privileged and had been inadvertently disclosed. As in *Alcon*, the parties apparently argued over the reasonableness of the defendant's conduct under Rule 502(b)(2) and (3). Magistrate Judge Abel found that

> [t]his dispute may be resolved by examining the language of the October 7, 2008 Agreed Protective Order, which provides in pertinent part: "A party who produces any document not subject to discovery under federal law without intending to waive the claim of protection associated with such document may, **within ten (10) days after the producing party actually discovers that such inadvertent production occurred**, amend its discovery response and notify the other party that such document was inadvertently produced and should have been withheld as protected."

Judge Abel ignored the plaintiffs' arguments that the defendant taking 10 days after discovery of the documents to claw them back was unreasonable, instead finding that the defendant's conduct met the terms of the protective order, so no reasonableness analysis was needed. Evaluating the dispute under the protective order rather than under 502(b), the *Rodriguez-Monguio* court essentially echoed the position of the *Alcon* court, that protective orders may provide for claw-back without waiver in circumstances that might not meet the reasonableness standards of Rule 502(b).

The key lesson of the opinions addressing the interrelationship of Rule 502(b) with Rule 502(d) and (e) is that a court order can be a much surer way to memorialize a privilege quick peek/claw-back/nonwaiver agreement between the parties. The court will have already entered an order addressing the subject, and the agreement can provide for a broader scope of nonwaiver than 502(b) affords. Also, parties should consider explicit provisions in their protective orders to the effect that any dispute as to the application of the order shall be governed by Rule 502(e), and that disclosure under the protective order is not to be treated as inadvertent and not to be governed by Rule 502(b).

Most, though by no means all, of the opinions shaping Rule 502 in its first year have come from magistrate judges. It will be fascinating to see how further review by district court judges and the circuits will change or refine the trends that have emerged in the first year.

Endnotes

1. Fed. R. Evid. 502 advisory committee notes.
2. Fed. R. Evid. 502.
3. Fed. R. Evid. 502 advisory committee notes.
4. 104 F.R.D. 103, 105 (S.D.N.Y. 1985).
5. 109 F.R.D. 323, 332 (N.D. Cal. 1985).
6. Fed. R. Evid. 502 advisory committee notes.
7. *Id.*
8. *Id.*
9. Clarke v. J.P. Morgan Chase & Co., No. 08 Civ. 02400 (CM) (DF), 2009 U.S. Dist. LEXIS 30719 (S.D.N.Y. Apr. 10, 2009).
10. Eden Isle Marina, Inc. v. United States, No. 07-127C, 2009 WL 2783031 (Ct. Fed. Cl. Aug. 8, 2009).
11. Preferred Care Partners Holding Corp. v. Humana, Inc., No. 08-20424-CIV, slip op., 2009 WL 982449 (S.D. Fla. Apr. 9, 2009).
12. Heriot v. Byrne, No. 08 C 2272, 2009 U.S. Dist. LEXIS 22552, at *45 (N.D. Ill. Mar. 20, 2009), emphasis in original; Laethem Equip. Co. v. Deere & Co., No. 05-10113, 2009 WL 2777334 (E.D. Mich. Nov. 21, 2008); B-Y Water Dist. v. City of Yankton, No. CIV. 07-4142, 2008 WL 5188837 (D.S.D. Dec. 10, 2008).
13. Relion, Inc. v. Hydra Fuel Cell Corp., No. CV06-607-HU, 2008 WL 5122828 (D.Or. Dec. 4, 2008).
14. Coburn Group, LLC v. Whitecap Advisors LLC, No. 07 C 2448, 2009 U.S. Dist. LEXIS 69188 at *17, (N.D. Ill. Aug. 7, 2009).
15. *In re* TFT-LCD (Flat Panel) Antitrust Litig., No. M 07-1827 SL, slip op., 2009 WL 2905898, at *2 (N.D. Cal. Sept. 10, 2009).
16. Alcon Mfg., Ltd. v. Apotex Inc., 1:06-cv-1642-RLY, 2008 U.S. Dist. LEXIS 96630, at *17 (S.D. Ind. Nov. 26, 2008) (emphasis in original).
17. Fed. R. Evid. 502(d).
18. Fed. R. Evid. 502(e).
19. Fed. R. Evid. 502 advisory committee notes.
20. Spieker v. Quest Cherokee, LLC, No. 07-1225-EFM, 2009 U.S. Dist. LEXIS 62073 (D. Kan. July 21, 2009).
21. Fed. R. Evid. 502 advisory committee notes (emphasis added).
22. *Spieker* at *10 (emphasis added).
23. Alcon Mfg., Ltd. v. Apotex Inc., 1:06-cv-1642-RLY, 2008 U.S. Dist. LEXIS 96630 at *3 (S.D. Ind. Nov. 26, 2008).
24. Rodriguez-Monguio v. Ohio State Univ., No. 2:08-cv-00139, 2009 WL 1575277 (S.D. Ohio June 3, 2009).

A Brief Review of a Federal Abstention Doctrine

By Brandon J. Harrison

Filing duplicative litigation in state and federal court can result in a Gordian knot involving complicated doctrines like abstention and res judicata. Lawyers therefore should approach the prospect of filing or defending duplicative cases with extreme caution. If faced with issues arising out of duplicative litigation, lawyers should keep in mind a doctrine that stems from two U.S. Supreme Court opinions: *Colorado River Water Conservation District v. United States*[1] and *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*[2]

My familiarity with the *Colorado River/Moses H. Cone* doctrine and the complexities of duplicative litigation came after I was retained to help a commercial plaintiff (and trial counsel) solve the quandary that had resulted from duplicative state/federal litigation.[3] The cases arose when a commercial business that bought component parts, which it in turn used to make an end product, sued component-part suppliers for alleged faulty parts that damaged the buyer's end product. The plaintiff filed suit in state court, and later in federal district court. The basic issue was whether the district court should abstain from proceeding with the commercial plaintiff's federal tort case, given that the same plaintiff had previously filed a related state-court case involving the same core facts as the federal case. Many months after I entered the cases and with three opinions issued by three different appellate courts in hand—two state and one federal—the procedural wrangling over abstention and res judicata was resolved. The plaintiff had won on appeal in three venues, and its federal case against the component-part vendors was reinstated. These cases provide a useful lens through which to examine the doctrine.

At its core, the *Colorado River/Moses H. Cone* doctrine addresses whether a district court may stop litigants from proceeding forward in federal court when a related state-court case is also pending. It is perhaps inevitable that many trial attorneys will encounter the *Colorado River/Moses H. Cone* doctrine in some way, someday. I will not attempt to catalog the various fact patterns that can sire duplicative litigation. The goal here is to briefly review this particular abstention doctrine—one that appears to be gaining momentum over the past decade or so. The takeaway is a friendly directive: Become more aware of a legal doctrine that touches parties when duplicative litigation is contemplated, or already afoot, in state and federal courts.

Duplicative Litigation's Fertile Seeds: Reactive and Repetitive Suits

In addressing the duplicative-litigation issue, Erwin Chemerinsky has identified two broad categories into which these cases will fall.[4] *Reactive* suits occur when a party sued in state court reacts and files a similar case in federal court, or vice versa. Why would a party file a reactive suit? Professor Chemerinsky has an answer. "Parties might bring a reactive suit because they perceive that the other forum would be more sympathetic to their claims; because of the strategic and tactical advantages available in the other forum; or because the second court system might offer a speedier resolution for the dispute."[5]

The second general category of duplicative litigation is *repetitive* suits. This basket contains cases where "[a] state court plaintiff may bring suit in federal court against the state court defendant on similar or identical causes of action."[6] It is no secret why repetitive suits are filed. "Repetitive suits might be filed to harass the defendant, because of impatience with the delay in getting a resolution in a court, or in reaction to an adverse ruling that foreshadows a decision on the merits but is not a final resolution that must be accorded res judicata effect."[7] This article will not discuss whether filing repetitive suits is desirable. However, this article will help you get your legal bearings when duplicative litigation arises.

The cases that exposed me to the *Colorado River/Moses H. Cone* doctrine are best termed repetitive because the plaintiff filed suit in federal court after a state court had announced its intention to grant summary judgment against the plaintiff. (I've simplified a convoluted case history for this article.) The plaintiff filed a federal diversity action, raising warranty and tort claims against state-court defendants. The state court eventually granted summary judgment against the plaintiff. The ultimate effect of that act and others is beyond this article's scope. Duplicative litigation is tricky partly because for every action in one court, there may be a reaction in the other court.

A Virtually Unflagging Obligation to Exercise Jurisdiction

Once the plaintiff had filed suit in federal court, a duplicative-litigation scenario arose. This fact required the district court to assess the legal landscape after a defendant raised the issue in a motion to dismiss the federal case. The district court granted the motion and dismissed the case. Although it did so primarily on res judicata grounds, the district court alternatively ruled that it would have abstained under *Colorado River/Moses H. Cone*. The plaintiff appealed, and the U.S. Court of Appeals for the Eighth Circuit was asked to review whether the district court properly applied res judicata law and the abstention doctrine.[8] These contextual facts lead us to the pivotal, general question to which the *Colorado River/Moses H. Cone* doctrine applies: When may a federal court abstain if a closely related, state-court case is pending? Generally, when jurisdiction is otherwise proper, duty binds a federal court to decide the case before it.

This idea is not new. Chief Justice John Marshall raised it more than 180 years ago: "With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be

brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given."[9] About 50 years after Chief Justice Marshall expressed his view on exercising jurisdiction, the Supreme Court held that a suit in state court does not bar a later suit—even on the identical cause of action.[10] Trial lawyers should know that these bedrock principles of jurisdiction as a duty-bound concept, which the Supreme Court pronounced nearly two centuries ago, endure today.

Many trial attorneys will encounter the doctrine in some way, someday.

The Eighth Circuit has offered a modern formulation of the Supreme Court's venerable pronouncement: "As a general rule, federal courts have a 'virtually unflagging obligation' to exercise their jurisdiction in proper cases."[11] And "[t]his obligation does not evaporate simply because there is a pending state court action involving the same subject matter."[12] As the Supreme Court stated in *Colorado River*, "as between state and federal courts, the rule is that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction[.]"[13]

The Supreme Court has recognized that other compelling principles—equity, comity, and federalism—sometimes justify a federal court in staying its hand.[14] But it has also warned that abstention "is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it."[15]

If you as counsel must oppose dual suits marching forward simultaneously, then the *Colorado River/Moses H. Cone* doctrine may give you some defensive firepower.

Two Essential Conditions

Strictly speaking, *Colorado River/Moses H. Cone* abstention arguably arises from considerations of wise judicial administration, not lofty constitutional principles. Here again is the Eighth Circuit: "Because the policy underlying *Colorado River* abstention is judicial efficiency, this doctrine is substantially narrower than are the doctrines of *Pullman*, *Younger* and *Burford* abstention, which are based on 'weightier' constitutional concerns."[16] Lest the efficiency-based exception dissolve the general rule, the Supreme Court has made plain just how uncommon a district court's decision to refuse to exercise jurisdiction should be under *Colorado River/Moses H. Cone*. To justify this kind of abstention, the duplicative litigation must satisfy two essential conditions. First, a parallel state-court proceeding must exist. In the Eighth Circuit, and elsewhere, "[a] parallel state court proceeding is a necessary prerequisite to use of the *Colorado River* factors."[17] The second essential condition is that "exceptional circumstances" must exist.[18] Determining whether exceptional circumstances exist so that a district court may surrender jurisdiction that has been otherwise properly invoked depends largely, but not necessarily solely, upon the *Colorado River/Moses H. Cone* factors.

Just how strong is the rule favoring the exercise of jurisdiction? The Eighth Circuit has

> emphasize[d] that [its] task in cases such as this is not to find some substantial reason for the exercise of federal jurisdiction by the district court; rather, the task is to ascertain whether there exist 'exceptional' circumstances, the 'clearest of justifications,' that can suffice under *Colorado River* to justify the *surrender* of that jurisdiction.[19]

Other courts have recognized that the crux of the analysis focuses on the surrendering of jurisdiction, not whether it should initially be exercised.

Simply put, district courts should begin their abstention analysis with a 10-ton presumption favoring the exercise of jurisdiction.[20]

The State and Federal Cases Must Be Parallel

Returning to the idea that federal and state cases must be parallel proceedings before the *Colorado River/Moses H. Cone* doctrine can apply, the Eighth Circuit's rule is similar to those in other federal courts of appeals that have addressed the threshold parallelism requirement. "A parallel state court proceeding is a necessary prerequisite to use of the *Colorado River* factors."[21] Indeed, the Eighth Circuit has reversed a district court's decision to abstain because this "essential prerequisite" of parallel proceedings was lacking.[22] Some cases will be easy, meaning that there will be no reasonable dispute that the two litigation tracks run parallel. But for many reasons, not every duplicative-litigation dispute will be easily, or quickly, resolved on parallelism.

What is certain is that where no parallelism exists, then the essential prerequisite for launching the *Colorado River/Moses H. Cone* balancing of factors is absent. Thus, cases that do "not possess the required identity of parties and issues" stumble at the threshold.[23] Parties seeking abstention will want to concentrate on showing parallelism.

What "Parallel Proceeding" Means Will Vary

Some jurisdictions have a more exacting parallel requirement than others. Moreover, do not be surprised if a particular circuit varies in its analysis from time to time. Here, I will mention only some core questions that arise when addressing the parallelism concept. An obvious question is: Are the parties in the two proceedings identical? If not, a parallel proceeding is a hard sell. A second question is: Are the legal issues identical in the two proceedings? A state case might be about a company's alleged contract debts to its vendors. The federal case, on the other hand, might be about product vendors' liability for their alleged torts. Lacking complete identity of claims, these two cases are not necessarily parallel proceedings.[24] Of course, not every case is clear.[25]

Though state-and-federal litigation tracks often spring from the same events, this sole fact is not the end-all to the parallelism analysis. As the Eighth Circuit has stated, a district court "must compare the issues in the federal action to the issues actually raised in the state court action, not those that might

have been raised."[26] Again, some jurisdictions will require "more precision" than others.[27] Further, the possibility of a parallel proceeding does not itself create one.[28]

Drawing on *Moses H. Cone*, and a Sixth Circuit case construing that case, the Eighth Circuit has recognized that the parallelism inquiry is, at bottom, about the current availability of complete relief in state court.[29] The Supreme Court has warned that:

> When a district court decides to dismiss or stay under *Colorado River*, it presumably concludes that the parallel state-court litigation will be an adequate vehicle for the complete and prompt resolution of the issues between the parties. If there is any substantial doubt as to this, it would be a serious abuse of discretion to grant the stay or dismissal at all.[30]

There is some play in the joints, but the Second, Fifth, and Sixth Circuits require that duplicative cases involve the same parties and issues before proceedings are parallel.[31] Other circuits hold that proceedings are parallel if they involve substantially the same parties and issues.[32] In 2005, the Seventh Circuit invoked the substantially similar rule and rejected a "formally symmetrical" rule.[33]

Lawyers must also consider defenses. For example, the Fourth Circuit has noted that just because one party's claims echo its defenses to an opposing party's claims, that does not make the claims substantially the same.[34] Recall that under the substantially similar rule, "the critical determination is whether the non-federal litigation will dispose of all claims raised in the federal court action."[35]

Lawyers handling duplicative litigation must learn how the federal jurisdiction in which their clients find themselves defines parallelism when applying the *Colorado River/Moses H. Cone* doctrine. Indeed, the parallelism inquiry is one that trial lawyers should undertake before duplicative cases are filed.

Exceptional Circumstances Must Be Crystal-Clear

The Supreme Court of the United States, in *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, established that "exceptional" means just that, and "the clearest of justifications" means crystal-clear, not mildly smudged. The idea here is that absent exceptional circumstances, federal courts must exercise jurisdiction despite duplicative litigation. In *Gulfstream*, the Supreme Court rejected Gulfstream's argument that Mayacamas's concurrent federal diversity and state-court suit required *Colorado River* abstention. "This Court never has intimated acceptance of [Gulfstream's] view that the decision of a party to spurn removal and bring a separate suit in federal court invariably warrants the stay or dismissal of the suit under the *Colorado River* doctrine."[36] In Professor Chemerinsky's opinion, the "mere duplication of a diversity suit in state court, regardless of whether it could have been removed, does not constitute sufficient exceptional circumstances to justify *Colorado River* abstention."[37] It's also evident that the *Colorado River/Moses H. Cone* duo does not necessarily restrict a party's right to seek relief in district courts under the diversity jurisdiction statute, 28 U.S.C. § 1332, though one factor in the abstention analysis is whether federal or state law controls the claims raised.[38]

Exceptional Circumstances Are the Jurisdictional Exception

Philosopher Mary Poppins once reasoned, "Well begun is half done." Parties who establish parallelism have begun well, but are still only half done, if that far. A party also must show exceptional circumstances. Most courts analyze six factors—the Seventh Circuit has identified ten[i]—that guide deciding whether to abstain in the duplicative-litigation context:

- whether there is a res over which one court has established jurisdiction
- the inconvenience of the federal forum
- whether maintaining separate actions may result in piecemeal litigation, unless the relevant law would require piecemeal litigation and the federal-court issue is easily severed
- which case has priority—not necessarily which case was filed first but a greater emphasis on the relative progress made in the cases
- whether state or federal law controls, especially favoring the exercise of jurisdiction where federal law controls
- the adequacy of the state forum to protect the federal plaintiff's rights

The fact-bound nature of these "exceptional circumstances" factors is self-evident; they will not be covered here in detail. A main point to remember is that courts must consider the factors "in a pragmatic, flexible manner with a view to the realities of the case at hand."[ii] If promoting efficiency was the most important consideration, then many *Colorado River/Moses H. Cone* abstention cases would be easy: Proceed directly to state court. But efficiency is not the keystone. Many cases will be difficult precisely because the balance is weighted heavily against abstention (and efficiency too). If the factors are in equipoise, then the strong pull toward the district court's exercise of jurisdiction necessarily decides the *Colorado River/Moses H. Cone* question: no abstention. Finally, lawyers should know whether an appellate court will review a district court's decision to abstain using a de novo or abuse-of-discretion standard. Which standard a reviewing court will apply often determines the outcome.

Endnotes

i. *Truserve Corp.*, 419 F.3d at 592 & n.2.
ii. *Moses H. Cone,* 460 U.S. at 21.

Should the Federal Court Stay or Dismiss?

We have considered the analytical skeleton supporting the *Colorado River/Moses H. Cone* doctrine. But another question bears mentioning: How should a district court implement a decision to abstain once it decides that doing so is proper? The short answer is that it likely depends on the jurisdiction and

what relief is sought. Lawyers should be prepared to suggest a course to the court—dismiss the federal case or stay the federal case until the state court decides merit issues. "In cases where damages are sought in the federal suit, the Supreme Court instructs that traditional abstention principles generally require a stay as the appropriate mode of abstention."[39] Indeed, in the Eighth Circuit, a dismissal with prejudice of a case seeking damages based on abstention is generally reversible error.[40] Consequently, in jurisdictions that agree with Eighth Circuit precedent, staying the federal-court case is likely the most appropriate course until the parallel state case's merits are resolved to a meaningful degree.[41] Because different jurisdictions may have nuanced rules or exceptions to the very general rule stated here, lawyers should research and inquire how federal district courts implement decisions to abstain when duplicative litigation is pending.

The Bottom Line

Exceptions exist, but it's generally accepted that parties may file duplicative litigation in state and federal courts. Setting aside the attendant complexities and resource-devouring aspects of such cases, federal courts have allowed duplicative litigation to proceed simultaneously. One way to challenge duplicative litigation is through the *Colorado River/Moses H. Cone* abstention doctrine. That way is narrow in theory and practical fact.[42] The party seeking to have a federal-court case stayed or dismissed must pragmatically establish exceptional circumstances and ultimately persuade the federal court that it's clearly justified in surrendering jurisdiction.

Endnotes

1. 424 U.S. 800 (1976).
2. 460 U.S. 1 (1983).
3. Mountain Pure, L.L.C. v. Affiliated Foods Sw., Inc., 241 S.W.3d 774, 776 (Ark. Ct. App. 2006).
4. Erwin Chemerinsky, Federal Jurisdiction § 14.1, at 838–39 (4th ed. 2003).
5. *Id.* at 838.
6. *Id.* at 839.
7. *Id.*
8. *Mountain Pure, LLC*, 439 F.3d at 923–27.
9. Cohens v. Va, 19 U.S. (6 Wheat.) 264, 404 (1821) (Marshall, C.J.).
10. Stanton v. Embrey, 93 U.S. 548, 554 (1876).
11. Beavers v. Ark. Bd. of Dental Exam'rs, 151 F.3d 838, 840 (8th Cir. 1998), (quoting Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976)).
12. Federated Rural Elec. Ins. Corp. v. Ark. Elec. Coops., Inc., 48 F.3d 294, 297 (8th Cir. 1995).
13. *Colorado River*, 424 U.S. at 817 (internal quotation and citations omitted).
14. 17A Moore's Federal Practice §§ 122.01–.06 (Daniel R. Coquillette, et al. eds., 3d ed. 2004) (discussing abstention and collecting cases).
15. *Colorado River,* 424 U.S. at 813.
16. *Federated,* 48 F.3d at 298 & n.4 (citing *Colorado River*, 424 U.S. at 817).
17. *In re* Burns & Wilcox, Ltd., 54 F.3d 475, 477 (8th Cir. 1995), *overruled in immaterial part by* Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 711 (1996).
18. *Colorado River*, 424 U.S. at 813; *see also Federated*, 48 F.3d at 297.
19. *Mountain Pure, LLC*, 439 F.3d at 926 (quoting *Moses H. Cone*, 460 U.S. at 25–26) (emphasis original).
20. New Beckley Mining Corp. v. Int'l Union, United Mine Workers of Am., 946 F.2d 1072, 1074 (4th Cir. 1991) (collecting cases).
21. *In re Burns & Wilcox*, 54 F.3d at 477.
22. *Id.* at 477–78.
23. Baskin v. Bath Twp. Bd. of Zoning, 15 F.3d 569, 572 (6th Cir. 1994).
24. Boushel v. Toro Co., 985 F.2d 406, 409 (8th Cir. 1993) (applying identity rule).
25. *See* Fru-Con Constr. Corp. v. Controlled Air, Inc., 574 F.3d 527, 541–46 (8th Cir. 2009) (Shepherd, J., dissenting).
26. *Baskin*, 15 F.3d at 572.
27. *Fru-Con Constr. Corp.*, 574 F.3d at 535.
28. *Mountain Pure, LLC*, 439 F.3d at 927.
29. *Baskin*, 15 F.3d at 571–72.
30. *Moses H. Cone*, 460 U.S. at 28.
31. *Baskin*, 15 F.3d at 572; Nat'l Union Fire Ins. Co. of Pittsburgh v. Karp, 108 F.3d 17, 22 (2d Cir. 1997); Diamond Offshore Co. v. A&B Builders, Inc., 302 F.3d 531, 540 (5th Cir. 2002).
32. *See, e.g., Fru-Con Constr. Corp.*, 574 F.3d at 535–37 (discussing parallelism across four circuits).
33. Truserv Corp. v. Flegles, Inc., 419 F.3d 584, 592 (7th Cir. 2005) (internal quotation and citation omitted).
34. *Al-Abood v. El-Shamari*, 217 F.3d 225, 232–33 (4th Cir. 2000).
35. 17A Moore's Federal Practice § 122.06[1]; *see also* AAR Int'l, Inc. v. Nimelias Enters. S.A., 250 F.3d 510, 518 (7th Cir. 2001).
36. *Gulfstream*, 485 U.S. at 290.
37. Chemerinsky, Federal Jurisdiction § 14.3, at 854.
38. *Mountain Pure, LLC*, 439 F.3d at 927.
39. Night Clubs, Inc. v. City of Fort Smith, 163 F.3d 475, 481 (8th Cir. 1998).
40. *See* Caldwell v. Camp, 594 F.2d 705, 708 (1979).
41. *Night Clubs*, 163 F.3d at 481; *see also* Int'l Ass'n of Entrepreneurs of Am. v. Angoff, 58 F.3d 1266, 1271 (8th Cir. 1995).
42. *See* Chase Brexton Health Servs., Inc. v. Md., 411 F.3d 457, 461-66 (4th Cir. 2005) (reversing district court's decision to abstain because no exceptional circumstances justified surrender of jurisdiction).

Understanding Time Limits on Removing Multiparty Cases to Federal Court

By Peter M. Durney & Marie E. Chafe

You represent one of numerous defendants in a mass tort action filed in state court, and you're convinced that it is in your client's best interests to seek removal to federal court. The statutory provisions require removal of the case within 30 days "after receipt by *the* defendant."[1] To which defendant does the statute refer? In a multi-defendant action, how does one calculate the deadline for removal? How quickly will you be able to determine which defendants have been served and when? You certainly do not want to recommend removal if such an effort would be futile and the clock is ticking. Or assume you are counsel for the plaintiffs. Realizing that the defendants may seek removal, you want to be able to raise a successful challenge.

This article analyzes the different approaches taken by federal courts in applying the removal statute, 28 U.S.C. § 1446, to multiparty litigation. Removal is a thorny issue, and judicial guidance is scant and remarkably inconsistent. This article will either give you confidence in the choice to remove, or it will save you and your clients the time, effort, and expense of a futile removal attempt. It may even provide a framework for seeking a change in the law of your jurisdiction.

Removal of cases from state to federal court is permitted by 28 U.S.C. §§ 1441–1453. Section 1446(a) requires that a "defendant or defendants" seeking to remove a civil action from state court file a notice of removal "in the district court of the United States for the district and division within which such action is pending." Section 1446(b) specifies that a petition for removal must be filed "within [30] days after receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action is based." Although not mandated by statute, a judicially created "rule of unanimity" requires that every properly joined and served defendant must join in the removal petition.[2] Accordingly, in multiple defendant cases, all defendants must either join in the petition for removal or consent to it in a timely manner.[3] Last, § 1446(b) prohibits removal on the basis of diversity jurisdiction "more than [one] year after commencement of the action."

This all sounds reasonably straightforward, but it is not. There is a split of opinion in the federal district courts on whether the 30-day time limit of § 1446(b) runs from service on the first-served defendant or whether each defendant has 30 days from the date it is served. The main area of disagreement is whether a defendant whose time to seek removal has elapsed may nonetheless consent to and thereby benefit from a later-served defendant's efforts to remove.

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The timing of service on any particular defendant is the starting point for the analysis. That timing may not always be readily apparent. Naturally, when it comes to determining who was served and when, plaintiffs have the edge, because effecting proper service is their burden. There are two likely scenarios for service. The first is the "open-window" or "staggered service" scenario, in which the defendant seeking removal has been served within 30 days of the first-served defendant. At least in theory, the later-served party would have the opportunity to persuade the first-served defendant to consent or join in a petition for removal within 30 days of service upon each defendant.[4] The second is the "closed-window" scenario, in which the 30-day removal period for a first-served defendant has elapsed before a later defendant is served. The later-served defendant could have been named on the original complaint and served later or, alternatively, added by means of an amended pleading.

Armed with the Facts Concerning Service: Where to Look for Guidance

The Removal Statute

The removal statute is of little help in ending the controversy among the courts. The plain statutory text of § 1446(b) "does not appear to address multi-defendant litigation."[5] The statute "'does not answer the question of how to calculate the timing for removal in the event that multiple defendants are served at different times, one or more of them outside the original [30]-day period.'"[6] Nor does "the legislative history of section 1446(b) . . . address the situation where multiple defendants are served on different days."[7]

In reaching their decisions, courts have struggled with both what the statute says and what it does not. For example, courts have rejected the first-served rule because it would require reading into § 1446(b) that a first-served defendant must file a notice of removal within 30 days.[8] Conversely, the last-served rule has been said to require the court to interpret "defendant" as the "defendant who has filed the notice of removal." That interpretation has been found reasonable by some courts.[9] Not surprisingly, other courts have come to the opposite conclusion.[10]

Yet, there is hope. In *Piacente v. State University of New York at Buffalo*, a 2004 decision that may portend a permanent shift, the court in the Western District of New York explicitly disagreed with the premise that the removal statute does not contemplate multi-defendant litigation. Instead, it found that the requirement of § 1446(a) for a "defendant or defendants" to seek removal, taken together with the mandate of § 1446(b) for "the defendant" to file a notice of removal, "implicitly supports adoption of the [last-served defendant] rule."[11] The court in *Piacente* reasoned that, when read together,

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these subsections of the statute demonstrate that Congress anticipated multiple defendant cases, and that the "singular use of 'the defendant' contemplates only one defendant because it is referring to the [removing defendant], the defendant who filed a notice of removal."[12] Such semantical debates persist, but at least they appear to be moving in the right direction.

A Sampling of Jurisdictional Case Law

Because the removal of cases from state to federal court raises significant federalism concerns, removal statutes are strictly construed.[13] "Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree."[14] The burden of demonstrating the propriety of removal rests with the removing party, and any doubts about the propriety of removal should be resolved in favor of remanding the case to state court.[15] Before turning to the public policy and equitable arguments that practitioners may wish to present in their effort to persuade a court to favor one or another rule, we examine a few cases demonstrating the practical application of the three rules.

In a Colorado case applying the first-served rule, the court ruled on the plaintiff's motion to remand involving a foreign corporation and its American subsidiary.[16] Service through the Hague Convention procedures was not effected upon the foreign corporation until three months after service upon its U.S. subsidiary. The foreign corporation filed a notice of removal within 30 days of its receipt of service. Applying the first-served rule, the court remanded the case to state court because the U.S. corporation failed to remove the case within 30 days of being served. The foreign corporation's attempt to remove was ineffective, leaving it no opportunity to seek removal. The district court held firm to the first-served rule to achieve the policy goals of (1) an early resolution to the choice of forum, (2) avoiding waste of judicial resources, (3) preventing forum shopping by defendants, and (4) protecting the integrity and sovereignty of the state court system.

The middle-ground rule also can lead to harsh results for a late-served defendant. For example, in *Guyon v. Basso*, a purchaser filed suit in state court against a development company and a corporate officer, alleging breach of contract and fraud. The corporation and officer were separately served within 30 days of each other. Within 30 days of its own service but more than 30 days beyond initial service, the later-served officer filed a notice of removal in which the corporation joined. Plaintiff filed a timely motion to remand the case. The court allowed the motion, noting it was "not inequitable to impose the same time period for removal in the context of multiple defendants."[17]

In addition to district courts in the Fourth Circuit that follow the middle-ground rule set forth in *McKinney v. Baltimore City Department of Social Services*,[18] two recent New Jersey district court decisions adopted the same approach, lauding it as "the best reasoned interpretation and application of Section 1446(b), as it is fair to the later-served defendant and

The Importance of Service and Its Bearing on Timeliness of Removal

With the sequence and timing of service established, federal courts generally apply three approaches to determine whether removal is timely under § 1446(b): the first-served defendant rule, the middle-ground or "intermediate" rule, and the last-served defendant rule.[i]

The First-Served Defendant Rule

The traditional approach to removal is found in the first-served rule, which is followed by the Fifth Circuit and a number of federal district courts.[ii] This approach requires a proper notice of removal to be filed within 30 days of service upon the first-served defendant. That means that the 30-day removal period for all defendants starts as soon as the first defendant is served. This rule precludes any later-served defendants from filing a notice of removal outside of the initial 30-day removal window that commences with service on the first-served defendant. It is a harsh rule that is disfavored by many and considered by the authors to be antiquated and unfair. Nevertheless, the rule persists in some jurisdictions.[iii]

The Middle-Ground Rule

The middle-ground rule, first articulated by the Fourth Circuit, is essentially a modified first-served rule.[iv] Like the first-served rule, a valid petition for removal must be filed within 30 days of the first-served defendant. However, each later-served defendant is granted its own 30-day period from its date of service to join in a previously filed petition for removal. If the first-served (or another) defendant failed to file a notice of removal within the first 30 days, or filed a defective notice, a later-served defendant may not remove the case.[v] The middle-ground approach thus alleviates some of the prejudice to later-served defendants inherent in the first-served rule but prevents the first-served defendant from joining in a later-served defendant's petition of removal once the initial 30-day period has run.

The Last-Served Defendant Rule

The last-served rule is the most liberal approach and allows each later-served defendant its own 30-day period from the date that defendant was served to remove a case with the consent of the other defendants. This rule allows the earlier-served defendants, who may not have filed a timely notice of removal, to join in a later-served defendant's petition for removal. This last-served approach represents the modern trend, beginning in the late 1980s and early 1990s. It has been adopted by the Sixth, Eighth, and Eleventh Circuits.[vi]

less prejudicial to plaintiffs—without giving the earlier-served defendants an undeserved second bite at the apple."[19]

In one of those cases, *Epstein v. Sensory Management Services, LLC*, the matter had been litigated in state court for several months without any attempt to remove the case. The court found prejudice to the plaintiffs if a defendant who elected not to remove and had litigated in state court for a significant period of time, then acquiesced in a later-served defendant's (added by an amended complaint) removal notice. There could be no argument, therefore, that the plaintiff had deliberately delayed in adding defendants to lessen the chance of removal.

Breaking with a growing number of decisions in the First Circuit favoring the last-served rule, the court in *DiChiara v. RDM Technologies* recently opted for the intermediate or middle-ground rule. The court evaluated the interactions of three defendants in their attempt at removal and concluded that the removing party's representation that another party had consented to a timely filed notice of removal was insufficient. Without a timely independent filing by that defendant demonstrating consent to the removal, the court found that remand was necessary to serve "the policy goal of establishing a bright line rule and reducing uncertainty."[20]

Public Policy and Equity Considerations

With the text of the removal statute unclear at best, and with divergent case law, some courts have looked to public policy and equity considerations to determine which removal rule to follow.

A Glimpse at the U.S. Supreme Court's View

The waning appeal of the first-served approach is evident in the U.S. Supreme Court's decision in *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, in which the Court addressed the portion of § 1446(b) requiring "receipt, through service or otherwise" of the "initial pleading setting forth the claim for relief," as opposed to a "courtesy copy" sent to the defendant prior to formal service of the complaint.[21] The Court held that the 30-day removal period began to run when the defendant was formally served by certified mail, not upon receipt of the faxed courtesy copy of the complaint. The Court held, "[w]e read Congress' provisions for removal in light of a bedrock principle: An individual or entity named as a defendant is not obliged to engage in litigation unless notified of the action, and brought under a court's authority, by formal process."[22] Consequently, if a person or entity becomes a party to a lawsuit only upon service of process, it follows that the requirement to "engage in litigation" and file a notice of removal occurs once he or she has become a party to the litigation via proper service of process. An Eleventh Circuit decision noted the effect of the Court's *Murphy Bros.* decision:

> *Murphy Brothers* supports the last-served defendant rule because a defendant has no obligation to participate in any removal procedure prior to his receipt of formal service of judicial process. Contrary to *Murphy Brothers*, the first-served defendant rule would obligate a defendant to seek removal prior to his receipt of formal process bringing him under the court's jurisdiction.[23]

A number of lower courts have concluded that the rejection of the first-served in favor of a last-served rule is a logical extension of the *Murphy Bros.* decision.[24] Despite this trend, however, at least two district courts have held that because *Murphy Bros.* involved a single defendant, it never addressed the myriad issues raised in multi-defendant litigation. These courts declined to read the *Murphy Bros.* opinion to suggest that "a defendant may properly consent to removal after it has failed to timely remove in its own right."[25]

The Waiver Argument under Attack

The rule of unanimity constrains many courts to follow the traditional first-served rule, even as they acknowledge its prejudicial effect upon the later-served defendants.[26] A first-served defendant's failure to remove within its 30-day limit is deemed a universal waiver of the right of the removal, foreclosing any attempt by a later-served defendant to remove.[27] As explained by Professor Moore, "if the initially filed defendants failed to seek removal, it may be because they were satisfied with the state court forum, and that they therefore may not agree to remove when the later served defendants seek their approval to remove."[28]

But the view that a first-served defendant has waived removal on behalf of all defendants has been criticized as ignoring the strategic interplay between defendants who may be considering removal:

> Moore's premise would seem to assume that the previously served defendant's failure to remove the case originally indicates that it would not have consented to removal had the two defendants been served simultaneously. In making that assumption, Moore does not give adequate weight to the interplay that often occurs in multi-party litigation . . . removal is often as much a matter of trial strategy as it is one of forum selection.[29]

Certainly, the presence or absence of joined and served defendants can impact the desirability of removal. A defendant who elects to stay in state court as the only defendant may desire a different strategy when additional defendants are later joined and served.[30]

At least one court explicitly has rejected the argument that the first-served rule logically follows from the rule of unanimity or that the last-served rule is inconsistent with it.[31] Instead, the court held that allowing each defendant to dictate whether the action were to remain in state court would not contravene the rule of unanimity, because "each defendant's absolute veto power exists regardless of when the removal period commences."[32]

Fairness to Defendants

The main criticism of the first-served rule is that it is unfair to defendants served more than 30 days after the first defendant or near the end of the first defendant's 30-day time period for removal. In closed-window cases, the later-served defendant, who may not have had notice of the case, is bound by the first-served defendant's decision regarding whether to seek removal. This harsh impact has been criticized by several courts of appeal, which reject application of the first-served rule.[33] Similarly, courts are particularly unwilling to adopt the first-served rule when the removing defendant has been joined in the action by way of a subsequent amendment to the complaint.[34]

Unfairness in open-window cases also may result if a defendant is served near the end of the first-served defendant's 30-day time period. That defendant would obviously have little time to assess the desirability of removing the case and to obtain the consent of other parties.[35] This problem was magnified by the 1988 amendment to § 1446(a), which made removal petitions subject to Federal Rule of Civil Procedure 11. This amendment created a Hobson's choice, whereby the defendant must "either . . . forego removal or join hurriedly in a petition for removal and face possible Rule 11 sanctions."[36]

Nevertheless, some courts dismiss the unfairness argument entirely. In *Brown v. Demco*, the Fifth Circuit explained that "[a] defendant who is added to a case in which a codefendant has failed to seek removal is in no worse position than it would have been in if the codefendant had opposed removal or were domiciled in the same state as plaintiff."[37] Other courts have rejected the unfairness argument in open-window cases, concluding that the later-served defendant(s) had a reasonable period of time to persuade the first-served defendant(s) to join in a notice of removal.[38]

Prejudice to Plaintiff

As a practical matter, the first-served rule establishes the forum early in the litigation. That has not been as significant a consideration as one might think. Rather, most courts evaluating the issue reject that concern: "If plaintiffs want to know which court they will be in 'at the earliest possible date,' they need only make sure that all defendants are served at about the same time."[39]

The 1988 amendment to § 1446(b) that precludes removal more than one year from commencement of the action, thus minimizing the possibility for extensive litigation in state court before removal, has had more overall significance. Indeed, courts have identified the amendment as evidence that Congress envisioned that later-served defendants should be allowed to remove a case.[40] To adopt the first-served rule "would, in effect, render this amendment superfluous."[41] "Congress seems to believe that the defendant's right to remove a case that could be heard in federal court is at least as important as the plaintiff's right to the forum of his choice."[42]

The first-served approach has also raised the specter of plaintiff's purposeful influence upon service to minimize or preclude the possibility of removal. As explained in *Hensley v. Irene Wortham Center, Inc.*:

> [A]n unscrupulous plaintiff wanting to remain in a state forum could pick and choose which defendant he wanted to serve first—perhaps a defendant not likely to obtain counsel or a defendant who is a nominal defendant. Such a plaintiff could then allow the [30] days to lapse after initial service before serving the remainder of the defendants, thus preventing all defendants from exercising their right to remove the action to federal court.[43]

Other courts have chosen the "first-served defendant" rule where the "evidence does not establish that [the plaintiff] was aware that [the new defendant] was a proper defendant within the [30] day time limit but delayed naming it as a defendant in a bad faith effort to prevent removal."[44]

Arguments asserting prejudice to plaintiffs are rarely compelling. Courts have reasoned that the removal statute was enacted to protect defendants from bias and that if Congress created the removal statute to protect defendants, it could not logically "extend such protection with one hand, and with the other give plaintiffs a bag of tricks to overcome it."[45] Therefore, a plaintiff wishing to minimize chances of removal should attempt to serve all defendants simultaneously.

Conclusion

Attention to detail and an appreciation that time is of the essence is all that is required to tackle the nuances of removal and to properly advise clients. Not mentioned in this article is the practical reality that a certain number of improperly removed cases remain in federal court due to the absence of a formal challenge. With that said, the prudent approach is to make a decision concerning removal only after having examined the facts and the law and with a sound litigation strategy in mind.

"Understanding Time Limits on Removing Multiparty Cases to Federal Court" by Peter M. Durney & Marie E. Chafe, 2009, Mass Torts *7:3, pp. 12–17. Copyright 2009 © by the American Bar Association. Reprinted with permission.*

Endnotes

1. 28 U.S.C. § 1446(b) (1996) (emphasis supplied).
2. Horton v. Conklin, 431 F.3d 602, 604 (8th Cir. 2005); Marano Enters. of Kansas v. Z-Teca Rests., L.P., 254 F.3d 753, 754 n.2 (8th Cir. 2001); Garside v. Osco Drug, Inc., 702 F. Supp. 19, 21 (D. Mass. 1988).

However, there are three well-recognized exceptions to the rule that all defendants must join in the removal petition: (1) where a defendant was not yet served with process at the time the removal petition was filed; (2) where a defendant is merely a nominal or formal party-defendant; and (3) where the removed claim is a separate and independent claim under 28 U.S.C. § 1441(c). Moody v. Commercial Ins. Co., 753 F. Supp. 198, 200 (N.D. Tex. 1990).

3. Some courts have held that 28 U.S.C. § 1446(b) does not prevent a defendant from removing a case if he or she learns of a filing before any party has been served even if some of the defendants are forum defendants. *See* Johnson v. Precision Airmotive, LLC, 2007 WL 4289656, at *6 n.2 (E.D. Mo. Dec. 4, 2007).
4. *See* Gorman v. Abbott Labs., 629 F. Supp. 1196, 1201 (D.R.I. 1986).
5. *See Bailey*, 536 F.3d at 1205 (citing *Brierly*, 184 F.3d at 532).
6. *Id.* (quoting *Brierly*, 184 F.3d at 532); *see also* Piacente v. State Univ. of N.Y. at Buffalo, 362 F. Supp. 2d 383, 387 (W.D.N.Y. 2004) (noting ambiguity of § 1446(b)).
7. *See McKinney*, 955 F.2d at 926; *see also* Smith v. Time Ins. Co., 2008 WL 4452147, at *3 (D. Colo. Sept. 30, 2008) (noting that legislative history does not provide any indication as to what Congress intended).
8. *See, e.g., Piacente*, 362 F. Supp. 2d at 386; *Brierly*, 184 F.3d at 533; *McKinney*, 955 F.2d at 926; *Bailey*, 536 F.3d at 1207.
9. *See Piacente*, 362 F. Supp. 2d at 386; *Bailey*, 536 F.3d at 1207; *See also* Russell v. LJA Trucking Inc., 2001 WL 527411, at *1 (E.D.N.Y. May 11, 2001) .
10. *See* Smith v. Health Ctr., Inc., 252 F. Supp. 2d 1336, 1346 (M.D. Fla. 2003) (finding that adoption of the last-served defendant rule would require inserting the words "last-served" into § 1446(b)); *see also* Auchinleck v. Town of LaGrange, 167 F. Supp. 2d 1066, 1069 (E.D. Wis. 2001) (finding that the first-served defendant rule was "more consistent with the plain language of the statute").
11. *Piacente*, 362 F. Supp. 2d at 387.
12. *Id.*
13. *See* Syngenta Crop Prot., Inc. v. Henson, 537 U.S. 28, 32 (2002) (citing Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108–9 (1941)).
14. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377

(1994) (citing Willy v. Coastal Corp., 503 U.S. 131, 136–37 (1992)).

15. Dixon v. Coburg Dairy, Inc., 369 F.3d 811, 816 (4th Cir. 2004).

16. *See* Cellport Systems, Inc. v. Peiker Acustic GmbH & Co., 335 F. Supp. 2d 1131, 1132 (D. Colo. 2004).

17. Guyon v. Basso, 403 F. Supp.2d 502, 509 (E.D. Va. 2005).

18. McKinney v. Bd. of Trs. of Md. Cmty. Coll., 955 F.2d 924, 928 (4th Cir. 1992). *See* Ford v. Baltimore City Dept. of Soc. Servs., 2006 WL 3324896, at *2 (D. Md. Nov. 13, 2006); *see also* Jackson v. John Akridge Mgmt. Co., 2006 WL 66669, at *3 (D. Md. Jan. 9, 2006); Superior Painting & Contracting Co. v. Walton Tech., Inc., 207 F. Supp. 2d 391, 392–93 (D. Md. 2002); Branch *ex rel.* Branch v. Coca-Cola Bottling Co., 83 F. Supp. 2d 631, 636–37 (D.S.C. 2000).

19. *See* Epstein v. Sensory Mgmt. Servs., L.L.C., 2007 WL 2702646, at *2 (D.N.J. Sept. 12, 2007) (quoting Princeton Running Co., Inc. v. Williams, 2006 WL 2557832, at *3 (D.D.C. Sept. 5, 2006)); Pegasus Blue Star Fund, LLC v. Canton Productions, Inc., 2009 WL 331413, at *2 (D.N.J. Feb. 10, 2009) (adopting last-served defendant rule in light of Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344 (1999)).

20. DiChiara v. RDM Technologies, No. 08-cv-11411, slip op. at 7 (D. Mass. Jan. 13, 2009).

21. *Murphy Bros.*, 526 U.S. at 348.

22. *Id.* at 347.

23. *See* Bailey v. Janssen Pharmaceutica, Inc., 536 F.3d 1202, 1208 (11th Cir. 2008).

24. *See, e.g.*, Lead I JV, LP v. North Fork Bank, 2009 WL 605423, at *3 (E.D.N.Y. Mar. 11, 2009) (noting post-*Murphy Bros.* rejection of first-served defendant rule and adopting last-served defendant rule); Ratliff v. Workman, 274 F. Supp. 2d 783, 790 (S.D. W.Va. 2003) (removal rights of later-served defendants cannot be forfeited before being brought into litigation.); Griffith v. American Home Prods. Corp., 85 F. Supp. 2d 995, 1000 (E.D. Wash 2000) (casting doubt on validity of first-served defendant rule in light of *Murphy Bros.*); Lewis v. City of Fresno, 2008 WL 5246095, at *3 (E.D. Cal. Dec. 15, 2008) (noting case law trend in favor of last-served rule since *Murphy Bros.*); Coleman v. Assurant, Inc., 463 F. Supp. 2d 1164, 1168 (D. Nev. 2006) (noting the trend toward later-served defendant rule).

25. Davidson v. Rand, 2005 WL 768593, at *4 (D.N.H. Apr. 6, 2005); *see also* Smola v. Trumbull Ins. Co., 317 F. Supp. 2d 1232, 1233 (D. Colo. 2004).

26. *See* Brown v. Demco, 792 F.2d 478, 482 (5th Cir. 1986); *see also* Getty Oil Corp. v. Ins. Co. of N. Am., 841 F.2d 1254, 1263 (5th Cir. 1988); D. Kirschner & Sons, Inc., v. Cont'l Cas. Co., 805 F. Supp. 479, 481 (E.D. Ky. 1992).

27. *See* Gorman v. Abbott Labs., 629 F. Supp. 1196, 1202 (D.R.I. 1986) ("[Defendant] by reason of having slept upon its opportunity to escape to a federal forum, has forever forfeited the right to hop on a later-served defendant's removal bandwagon.").

28. *See* Moore, 28 U.S.C. § 107.30[3][a]; *see also* Phoenix Container, L.P. *ex rel.* Samarah v. Sokolof, 83 F. Supp. 2d 928, 932 (N.D. Ill. 2000).

29. Garside v. Osco Drug, Inc., 702 F. Supp. 19, 21 (D. Mass. 1988).

30. *See* Ford v. New United Motors Mfg., Inc., 857 F. Supp. 707, 710 n.6 (N.D. Cal. 1994) (first-served and later-served defendants should be given the opportunity to explore the possibility of removal).

31. Bailey v. Janssen Pharmaceutica, Inc., 536 F.3d 1202, 1207 (11th Cir. 2008).

32. *Ford*, 857 F. Supp. at 709–10.

33. *See Bailey*, 536 F.3d at 1206 (inequitable to deprive later-served defendants of statutory right to removal); Brierly v. Alusuisse Flexible Packaging, Inc., 184 F.3d 527, 533 (6th Cir. 1999) (preferring last-served rule in fairness to later-served defendants); Marano Enters. of Kansas v. Z-Teca Rests., L.P., 254 F.3d 753, 755 (8th Cir. 2001); McKinney v. Bd. of Trs. of Md. Cmty. Coll., 955 F.2d 924, 926 (4th Cir. 1992) (rejecting "inequity" of first-served defendant rule); *see also* Wright, Miller & Cooper, *supra* note 5, § 3732 (noting that under first-served rule, "subsequently served defendants are deprived of the opportunity to persuade the first defendant to join in the notice of removal").

34. *See* Fitzgerald v. Bestway Services, Inc., 284 F. Supp. 2d 1311, 1316–17 (N.D. Ala. 2003) (citing Bussey v. Modern Welding Co., 245 F. Supp. 2d 1269, 1274 (S.D. Ga. 2003)).

35. *See* Davidson v. Rand, 2005 WL 768593, at *3 (D.N.H. April 6, 2005) (noting that more courts are finding that requiring defendants who are served near the end of the 30-day period to join in the notice is unfair).

36. *See McKinney*, 955 F.2d at 928; *see also Ford* 857 F. Supp. at 710 n.7 (noting that the possibility of Rule 11 sanctions requires that each defendant be given its own 30-day period to assess removal).

37. Brown v. Demco, 792 F.2d 478, 482 (5th Cir. 1986); *see also* Gorman v. Abbott Labs., 629 F. Supp. 1196, 1201 (D.R.I. 1986) (rejecting inequity argument in that even if all defendants were served at the same time, a defendant's quest to remove could still be thwarted by any other party declining its consent).

38. *See* Hill v. Phillips, Barratt, Kaiser Engineering, Ltd., 586 F. Supp. 944, 946 (D. Me. 1984) (removing defendant had more than 10 days to convince first-served defendant to join in or consent to removal petition before the first-served defendant's 30 days expired); *see also* Balestrieri v. Bell Asbestos Mines, Ltd., 544 F. Supp. 528, 530 (D.C. Pa. 1982) (second group of defendants had 17 days to persuade previously served defendants to join or consent to removal petition); Smith v. Health Ctr. of Lake City, Inc., 252 F. Supp. 2d 1336, 1346 (M.D. Fla. 2003) (later-served defendant had 18 days after it was served to file its notice of removal and obtain the consent of the other defendants to removal but failed to do so).

39. *McKinney*, 955 F.2d at 927.

40. *Ford*, 857 F. Supp. at 710 n.7.

41. *Id.*

42. *McKinney*, 955 F.2d at 928.

43. Hensley v. Irene Wortham Ctr., Inc., 2008 WL 2183946, at *4 (W.D.N.C. Apr. 4, 2008) (noting E. Area Joint Sewer Auth. v. Bushkill-Lower Lehigh Joint Sewer Auth., 517 F. Supp. 583, 585 n.3 (E.D. Pa. 1981)).

44. *See* Brown v. Demco, 792 F.2d 478, 481–82 (5th Cir. 1986); *see also* Schmidt v. Nat'l Org. of Women, 562 F. Supp. 210, 213 (N.D. Fla. 1983) (delay in service on removing defendant was due to defendant's failure to comply with Florida statute requiring foreign corporation to designate registered agent with secretary of state); Gorman v. Abbott Labs., 629 F. Supp. 1196, 1203 (D.R.I. 1986) (Plaintiff's later addition of defendants was the by-product of identification problems during discovery rather than a "preconceived Machiavellian scheme.").

45. *McKinney*, 955 F.2d at 928.

i. This split in the federal courts is mirrored in the divergent opinions of the two leading treatises on federal civil practice. *Compare* 14C Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure, § 3732, at 338–39 (2008) (preferring the last-served defendant rule), *with* 16 James Wm. Moore et al., Moore's Federal Practice § 107.30[3][a] (3d ed. 2006) (contending the first-served defendant rule is the better approach).

ii. *See* Getty Oil Corp. v. Ins. Co. of N. Am., 841 F.2d 1254, 1262–63 (5th Cir. 1988); Adams v. Charter Commc'ns VII, LLC, 356 F. Supp. 2d 1268, 1273 (M.D. Ala. 2005) (adopting first-served defendant rule); Kuhn v. Brunswick Corp., 871 F. Supp. 1444, 1447 (N.D. Ga. 1994) (same); Phoenix Container, L.P. *ex rel.* Samarah v. Sokolof, 83 F. Supp. 2d 928, 932–33 (N.D. Ill. 2000) (same).

iii. The Fifth Circuit applies a limited "revival exception" to the first-served defendant rule, whereby "if a complaint is amended 'so substantially as to alter the character of the action and constitute essentially a new lawsuit,' an otherwise-lapsed right to removal may be revived.'" Air Starter Components, Inc. v. Molina, 442 F. Supp. 2d 374, 378 (S.D. Tex. 2006) (quoting Johnson v. Heublein Inc., 227 F.3d 236, 241 (5th Cir. 2000)).

iv. *See* McKinney v. Bd. of Trs. of Md. Cmty. Coll., 955 F.2d 924, 928 (4th Cir. 1992).

v. *Id.* at 926 n.3.

vi. *See* Brierly v. Alusuisse Flexible Packaging, Inc., 184 F.3d 527, 533 (6th Cir. 1999); *see also* Marano Enters. v. Z-Teca Rests. L.P., 254 F.3d 753, 756–57 (8th Cir. 2001); Bailey v. Janssen Pharmaceutica, Inc., 536 F.3d 1202, 1209 (11th Cir. 2008); Save-A-Life Foundation, Inc. v. Heimlich, 2009 WL 330142, at *4 (N.D. Ill. Feb. 9, 2009) (adopting last-served defendant rule based on "persuasive reasoning of Sixth, Eighth, and Eleventh Circuits").

Discovery Strategies and Preparing a Case for Success

By Joel Ewusiak

As a young attorney finally given the reigns to a case, a general outline of how you are going to prove your client's case is a prerequisite to success. Your primary objective should be gathering evidence that supports your claims or defenses—evidence that is going to push buttons. Pushing buttons gets favorable results. At the end of the day, your client is not necessarily going to appreciate *how* or *what* you did to achieve those results, but you have to have a plan to get there. A good litigation plan will allow you to achieve the results quicker and more efficiently.

Any good litigation plan requires thinking ahead. And you should keep it as simple as possible. Each litigation plan will vary, depending on the particular facts of the case, the legal issues involved, and your client's objective; however, the brief outline provided below will assist you in developing your litigation plan to achieve the overriding objective of obtaining a favorable result.

Understanding the Legal Issues

Before you gather the facts needed to prove your claims or defenses, you should have a good understanding of the elements of the claims and defenses that you hope to establish at trial. Regardless of whether your ultimate decision maker is a judge, a jury, or an arbitrator, jury instructions are an excellent reference point. If you know what will be read to your decision maker at trial or final hearing, you will gain a good grasp of the evidence that the decision maker will want—and need—to hear to rule on your case. In short, the jury instructions outline the end goal of your proof, and you need a road map to get there. Once you've outlined the elements of your claims and defenses, you can begin planning your strategy to gather the evidence that you need to prove them.

Gathering the Facts

Before serving written discovery or taking depositions, you need to determine the facts that will be integral to your case. Some of those facts may be uncontroverted. Some may be disputed. It is essential that you determine what or who will provide proof of those facts and whether gathering them will be beneficial or detrimental to your case. Analyzing the strengths and weaknesses of your case will allow you to determine the important facts. From there, you can outline how to gather those facts.

How you go about gathering the facts is just as important as the decision you make to gather them. In this regard, your discovery efforts should be focused and poignant. Do not waste time or effort on minutiae. Focus on the big picture. When preparing written discovery, serve narrowly tailored requests aimed at gathering the key facts that you need. Overbroad requests will only serve to cloud the key legal issues.

For example, if you decide to utilize interrogatories as a discovery tool, ask very narrow questions on specific issues. Litigants tend to avoid answering tough questions. If the interrogatories are specific enough, the litigants have little to no room to wiggle, and you will posture an excellent motion to compel if the answers are incomplete or evasive.

Do not waste time or effort on minutiae.

Similarly, when preparing a request for production of documents, serve specific document requests. Do not assume that a litigant will comply with the scope of the definitions in your requests. Take the time to request a specific type or category of documents in each request. Importantly, serve specific requests for electronic data discovery, including emails, hard drives, and other computer data as opposed to generally defining documents to include these items. Often times, particularly with corporate defendants, electronic data may uncover a wealth of evidence. And again, you will posture an excellent motion to compel if the responses are inadequate.

Likewise, when serving requests for admissions, keep the requests as simple and narrow as possible. The longer the request, the more ambiguity the responding party can claim resulted in the denial of the request for admission. In contrast, brief requests for admissions are harder to cloud with unnecessary detail that can result in a denial.

When preparing for a deposition, your key reference point should be the complaint and any responses to it, which likely include affirmative defenses. Oftentimes, the complaint serves as an excellent outline for any deposition. When taking a deposition, ask specific questions that relate to the key proof that you will need to support your claims or defenses. Work through the relevant allegations in the complaint with the deponent. Keep in mind that overbroad questions have a tendency to fill the record with irrelevant facts, which will require an explanation that may have been avoided.

In sum, focused and well-tailored discovery can push buttons. Ideally, if you have focused your discovery efforts on the key issues, you will have gathered the facts necessary to present your case. Until you have gathered the key facts, there is often no

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Time Computation

(Continued from page 1)

of Civil Procedure are addressed in another article in this issue: "Revised Deadlines in the Federal Rules of Civil Procedure," by Theresa A. Phelps. In the interest of completeness, our article also summarizes revisions to other procedural rules that implicate civil litigation, also effective December 1, 2009, and also designed to reflect the "days are days" method of computing time.

Time-Computation Method

Federal Rule of Civil Procedure 6 now states that all time periods are calculated using the same method: The day of the triggering event is excluded; every subsequent day—*including* intermediate Saturdays, Sundays, and legal holidays—*is* counted; and the last day is included. Revised Rule 6 also clarifies what to do when the last day falls on a weekend or holiday, whether the period is measured by counting forward or backward from the triggering event. As before, when the last day of a period falls on a weekend or holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday. Revised Rule 6(a)(5), however, now clarifies that the "next day" is determined by counting forward when the period is measured after a certain event and by continuing to count backward when the period is measured by a period before an event. It is particularly important to note, however, that these revised rules leave unchanged the rule that parties may add three days to any applicable period after service when service is made by mail or other specified means as set forth in Rule 6(d).

In addition to calculating time using a "days are days" method, revised Rule 6 now specifies a similar method for the computation of hourly periods. Parties should begin counting hours immediately on the occurrence of the triggering event and should count every hour, including hours during weekends and holidays. If the period would end on a weekend or holiday, the period continues to run until the same time on the next day that is not a weekend or holiday.

Revised Rule 6 now expressly addresses other concerns associated with filing. The revisions clarify precisely when the last day of a time period ends, addressing concerns brought about by the increased use of electronic filing. The rules are now clear that, for electronic filing, the last day ends at midnight in the court's time zone. For filings made by other means, the revised rules state that the last day ends when the clerk of court's office is scheduled to close.

The revisions further address a situation where the clerk of court's office is inaccessible for filing on the last hour or last day. Following the approach for when the last day falls on a weekend or holiday, if the clerk of court's office is inaccessible on the last hour for filing, the time is extended to the same time on the next accessible day that is not a weekend or holiday. Similarly, if the clerk of court's office is inaccessible on the last day for filing, the time for filing is extended to the first accessible day that is not a weekend or holiday.

Beyond changing the method by which time is computed, specific time periods in many rules were changed. Short deadlines were extended to compensate for the inclusion of weekends and holidays. To prevent deadlines from falling on weekends, periods of fewer than 30 days have been changed to multiples of 7 days. Although reference to the express terms of each applicable rule is essential, generally, periods of 1, 3, and 5 days are now 7 days; 10- and 11-day periods are now 14 days, and 20-day periods are now 21 days. Although these changes seem merely to bring the rules in line with common sense, practitioners should note some counterintuitive results, as well as more substantial changes to a few rules.

Rules 12 and 56

The revisions to Rule 12 are representative of the types of changes made throughout the rules as part of the time-computation revisions. Under the old Rule 12, parties had 20 days in which to serve an answer or a motion in lieu of an answer. Consistent with the move to multiples of 7, this period is now 21 days. Similarly, parties now have 14 days rather than 10 days to serve a responsive pleading after denial of a Rule 12 motion. The revised rule also changes the 10-day period for complying with an order for a more definite statement to 14 days, and the 20-day period for filing a motion to strike is now 21 days. Although at first glance these revisions appear to extend deadlines, the new "longer" time periods generally won't be any longer than before. Under the old rules, weekends and holidays were not included in counting 10-day periods, but they are included in the new 14-day periods. Further, the old 20-day periods were more likely than the current 21-day periods to end on a Sunday, pushing the deadline until the following Monday.

For summary judgment motions, the rules governing time limits have changed considerably. The previous version of Rule 56 specified different timing provisions for plaintiffs and defendants in filing motions for summary judgment. These provisions have been replaced with new provisions specifically recognizing the court's authority to set deadlines for summary judgment motions either by local rule or by court order and providing for default time periods where not otherwise set. Absent a local rule or court order, any party may move for summary judgment at any time until 30 days after the close of discovery. The default period for filing a response to a motion for summary judgment is 21 days after service of the motion or when a responsive pleading is due, whichever is later. The default period for filing a reply to a motion for summary judgment is 14 days.

Application to Local Rules, Court Orders, and Statutes

Because these revisions change the method for calculating all time periods, they will apply to deadlines set under local rules, court orders, and statutes that do not otherwise specify a method for computing time. Many courts are changing their local rules, primarily by converting periods to multiples of seven days and by lengthening shorter periods to account for weekends

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and holidays. The U.S. District Courts for the Southern and Eastern Districts of New York, for example, have specifically incorporated the new "days are days" time-computation method into their local rules and have changed several time periods.

Under Rule 83(a), the Federal Rules of Civil Procedure take precedence over conflicting local rules, but courts are free to specify different time-computation methods applicable to specific local rules. If, for example, a local rule sets a deadline of three days and the court believes that the three-day time period is critical, the court may choose to specify the time period as "three days excluding intermediate weekends and holidays," rather than changing the period to seven days.

Practitioners should keep the revisions in mind when calculating deadlines under local rules, particularly if courts

Revisions to Other Rules

Other procedural rules applicable to civil litigation similarly have been amended to reflect the "days are days" and multiples-of-seven-days approach adopted in the Federal Rules of Civil Procedure. Highlights include:

Federal Rules of Appellate Procedure

Similar to Civil Rule 6(a), Appellate Rule 26(a) was revised to establish a "days are days" method of time computation. Specific time periods in the following rules have been changed to conform to the new time-computation rules: Appellate Rules 4, 5, 6, 10, 12, 15, 19, 25, 27, 28.1, 30, 31, 39, and 41. Generally, short time periods are extended, and time periods under 30 days are now in multiples of 7. Other Appellate Rules were amended in the following ways:

- Appellate Rule 4 (eliminates an ambiguity that could have been construed to require an appellant to amend a notice of appeal any time the district court amended a judgment)
- Appellate Rule 12.1 (coordinates with Civil Rule 62.1, which allows a party to request an "indicative ruling" from the district court, by providing that the court of appeals may remand to the district court in certain circumstances)
- Appellate Rule 22 (deletes certain requirements regarding a certificate of appealability in habeas corpus proceedings that are now found in Rule 11(a) of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 and 2255)

Federal Rules of Bankruptcy Procedure

Consistent with Civil Rule 6(a), Bankruptcy Rule 9006(a) was revised to reflect the new time computation method. The following rules were changed consistent with the time-computation amendments: Bankruptcy Rules 1001, 1007, 1019, 1020, 2002, 2003, 2006, 2007, 2007.2, 2008, 2015, 2015.1, 2015.2, 2015.3, 2016, 3001, 3015, 3017, 3019, 3020, 4001, 4002, 4004, 6003, 6004, 6006, 6007, 7004, 7012, 8001, 8002, 8003, 8006, 8009, 8015, 8017, 9006, 9015, 9023, 9027, and 9033. Note that Bankruptcy Rules 9015 and 9023 set a 14-day period for filing of postjudgment motions, as opposed to the new 28-day period in the Civil Rules. Other bankruptcy rules were amended in the following ways:

- Bankruptcy Rule 2016 (technical change to correct a recently changed cross-reference)
- Bankruptcy Rule 4008 (now requires an entity filing a reaffirmation agreement to file a cover sheet containing certain information)
- Bankruptcy Rules 7052, 9021, and new Bankruptcy Rule 7058 (now conform to the "separate judgment rule" of Civil Rule 58)
- Bankruptcy Rule 9006 (technical change to correct a recently renumbered cross-reference)
- Bankruptcy Official Forms 1, 8, 9F, 10, and 23 were amended, and a new Official Form 27 was added implementing the amendment to Bankruptcy Rule 4008.

Federal Rules of Criminal Procedure

Following the template used in Civil Rule 6(a), Criminal Rule 45(a) was amended to reflect the new time-computation method. Criminal Rules 5.1, 7, 12.1, 12.3, 29, 33, 34, 35, 41, 47, 58, and 59, as well as Rule 8 of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 and 2255, also were amended consistent with the general changes to the Civil Rules. Additional criminal rules applicable to civil or civil-type proceedings were amended as follows:

- Criminal Rules 7, 32, and 32.2 (amended as part of a comprehensive consolidation and clarification of the rules regarding forfeiture)
- Criminal Rule 41 (clarifies the application of the rule's warrant provisions to the search and seizure of electronically stored information)
- Rule 11 of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 and 2255 (consolidates and clarifies the requirements for certificates of appealability)
- Rule 12 of the Rules Governing Proceedings under 28 U.S.C. § 2254 (previously Rule 11, specifies that, unless conflicting with statutes or these rules, the Federal Rules of Civil Procedure may be applied to proceedings under § 2254)

have not changed their local rules to account for the revisions to the rules. Care should be taken to determine whether the deadline should be calculated under the new "days are days" method or whether the local rules specify a different method. Some local rules, for example, currently refer to "court days" or "business days." In cases where those local rules apply, the more specific rule should apply, and intervening weekends and holidays should be excluded when calculating deadlines.

Under Rule 86, the "days are days" amendments govern "proceedings after" December 1, 2009, in actions "then pending." Congress also has amended specific time periods found in several statutes to comply with these rule revisions. The Statutory Time-Periods Technical Amendments Act of 2009, H.R. 1626, generally extends time periods for certain statutory deadlines to use the "days are days" computation method and changes time periods to multiples of seven days.

Conclusion

Although the new "days are days" and multiples-of-seven-days approaches have simplified and streamlined the task of deadline calculation, practitioners should be aware of both the larger changes brought in the revisions and of the small issues that may arise in transition. While some of the specific changes seem merely technical, some rules have been given more major overhauls. Wise practitioners must be aware both of the changes to the Civil Rules and of any corresponding or resulting revisions to the local rules where they practice (and carefully analyze any conflicts where revisions have not been made).

Helpful Websites

A complete copy of the revised rules, as well as commentary on the amendments, can be found on the U.S. Courts website at www.uscourts.gov/rules/newrules4.html. Practitioners may find particularly helpful the presentation titled "The Days of Our District Court Lives," which can be found at www.uscourts.gov/rules/The%20Days%20of%20Our%20District%20Court%20Lives%20Revised%20FINAL.pdf.

For a helpful summary of the revisions, see Making Every Day Count: Time Computation Amendments To The Federal Rules Of Civil Procedure Take Effect December 1, 2009: North Carolina Business Litigation Report, at www.ncbusinesslitigationreport.com/2009/10/articles/watching-the-court/making-every-day-count-time-computation-amendments-to-the-federal-rules-of-civil-procedure-take-effect-december-1-2009. This blog also has an interesting article regarding deadlines that straddle the December 1, 2009, effective date of the revision, which can be found at www.ncbusinesslitigationreport.com/2009/11/articles/watching-the-court/a-problem-with-the-soon-to-be-effective-time-computation-changes-to-the-federal-rules-of-civil-procedure.

A copy of the revised local rules for the U.S. District Courts for the Southern and Eastern Districts of New York can be found at www1.nysd.uscourts.gov/rules/rules.pdf.

Discovery Stategies

(Continued from page 17)

real incentive, particularly for defendants, to resolve a case.

Presenting the Facts

Once you have gathered the facts that you need to prove your case, you need to be able to present them. This is essential to great lawyering. The lawyer who, in a simple and straightforward manner, is able to present the key facts so that they fit into the elements of often-complicated legal claims or defenses will benefit his or her client tremendously. Often times, the simple, common-sense approach takes longer to craft than an extended presentation. Most likely, the original draft of your presentation will include complicated legal principles and detailed explanations of facts that may include superfluous detail. Be sure to go back through your draft presentation several times in order to make it as clean and simple as possible. By and large, a simple explanation is often the most persuasive one, regardless of whether you are presenting your case to a judge, a jury, or an arbitrator. It will also be appreciated by the decision maker in your case.

Getting Results

Very few civil cases actually reach a full-blown trial. Nearly all civil cases settle. Most likely, you will engage in informal settlement negotiations, depending upon your client's objective, and if you are not lucky enough to obtain summary judgment, then you will attend a court-ordered mediation. Generally, this means that if you have adequately outlined the key legal issues, understood the key facts, and then presented them in a clear and concise manner, you have reached a point to achieve a favorable result. Do not waste time getting there. Be a results-oriented lawyer. Your client will thank you for it.

"Discovery Strategies and Preparing a Case for Success" by Joel Ewusiak, 2009, The Woman Advocate *15:1, pp. 4,14.*

Revised Deadlines

(Continued from page 1)

This article highlights the specific revisions to the deadlines set forth in the Federal Rules of Civil Procedure from the initial filing of a lawsuit to post-trial. Although focusing on pretrial issues, for the sake of completeness and to avoid any implication that these changes only apply to pretrial issues, this article also addresses changes to the rules applicable at and beyond trial. This article does not, however, address the changes made to computation of time under the Federal Rules of Civil Procedure or the changes made with respect to Rule 12 motions or Rule 56 summary judgment motion, both of which are addressed in another article in this edition: "Revisions to Federal Rules Change Time-Computation Method," by Amelia Toy Rudolph and Stacey A. McGavin.

Rule Changes Relating to Pleadings

The revisions to the Federal Rules of Civil Procedure have slightly extended the deadlines regarding pleadings, as the following changes demonstrate:

Rule 13—Amendment of Counterclaims

One interesting revision to the rules deals with amendment of pleadings under Rule 13 to add inadvertently omitted counterclaims. Subsection (f) of Rule 13, which explicitly granted the court power to permit a party to amend a pleading to add an inadvertently omitted counterclaim, has been abrogated. Presumably, however, the court still possesses its inherent power to grant leave to amend pleadings when justice so requires and on such terms as are fair and reasonable under the circumstances.

Rule 14—Third-Party Practice

Leave of the court is now required for a defendant to serve a summons and complaint on a third party who was not a party to the suit if the third party complaint is filed more than 14 days after service of the defendant's original answer. The prior version of Rule 14(a)(1) required leave of the court to do so if the third party complaint was filed more than 10 days after service of the defendant's original answer.

Rule 15—Amended and Supplemental Pleadings

Under former Rule 15, a party had a right to amend its pleading once before being served with a responsive pleading, or within 20 days after service of the pleading if no responsive pleading was allowed. Under revised Rule 15, a party may now amend its pleading once as a matter of right within 21 days after serving the pleading, *or* if the pleading is one to which a responsive pleading is required, within 21 days after service of a responsive pleading *or* 21 days after service of a Rule 12(b), (e), or (f) motion, whichever is earlier. Unless the court orders otherwise, any required response to an amended pleading must be filed either within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later.

Rule Changes Relating to Pretrial Practice

Rule 38—Jury Trial Demands

Demands for a jury trial may now be served 14 days after service of the last pleading directed to the issue to be tried by a jury. Under the prior version of Rule 38, a jury-trial demand had to be served no later than 10 days after service of that pleading.

If a party has demanded a jury trial as to only some of the issues, any other party may now serve a jury-trial demand with respect to any other or all of the factual issues triable by a jury within 14 days (rather than 10 days, as set forth under the prior version of Rule 38) after being served with the partial jury-trial demand.

Rule 55—Default Judgment

A party moving for a default judgment under Rule 55 must now serve the opposing party with written notice of the application for default judgment at least 7 days before the hearing on the motion. Under the prior version of Rule 55, a party moving for a default judgment needed only provide 3 days' notice.

Rule 6—Notices of Hearing

Under the prior version of Rule 6(c), parties were required to serve a notice of hearing on opposing parties at least 5 days prior to the hearing, with supporting affidavits to be served at least 1 day prior to the hearing, unless a different period of time was established by the court. Under revised Rule 6(c), the notice of hearing must now be served on opposing parties at least 14 days before the date of the hearing (unless the matter is heard ex parte, another rule sets a different time, or a court order sets a different time). Supporting affidavits must also be served at least 7 days before the hearing, unless the court allows the affidavit to be served at another time.

Rule 27 and Rule 32—Depositions

Depositions to perpetuate testimony under Rule 27 are a relatively rare occurrence. Under revised Rule 27, where a petitioner seeks to take a deposition prior to the filing of an action in order to perpetuate testimony, the petitioner must now serve notice of the hearing date at least 21 days in advance. Under the revised rules, depositions cannot be used against a party who received less than 14 days' notice of the deposition (3 days more than the prior version of Rule 32(a)(5)) if the person to be deposed promptly moved for a protective order and the motion was still pending when the deposition was taken.

The time limit for objecting to written re-cross deposition questions has been extended from 5 days after being served with the question to 7 days after being served with the question. Because of the adoption of the "days are days" approach to calculating time under the revised rules, in most cases, this specific revision is essentially a non-issue as 5 days generally meant at least 7 days under the prior Rules.

Rule 65—Temporary Restraining Orders/Injunctions

Temporary restraining orders (TROs) used to expire, at the latest, 10 days after entry by the court. Under revised Rule 65, temporary restraining orders now expire, at the latest, 14 days after they are

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issued. This extension gives the party seeking injunctive relief and the court additional certainty and additional time to schedule and conduct a hearing with respect to a request for a preliminary injunction upon expiration of the TRO.

Rule 68—Offers of Judgment

A party defending against a claim may serve an "offer of judgment" on the opposing party pursuant to which the defending party agrees to allow judgment to be taken against the defending party in a certain amount and on certain specified terms. If the offer of judgment is rejected by the claimant pursing the claim, and that party does not ultimately recover more than the amount

These revisions to the rules have a significant impact on litigation, from start to finish.

set forth in the offer of judgment, the claimant may not recover costs from the date that the offer of judgment was served onward (and the claimant may actually have to pay the offering party's costs from the date the offer was served onward).

Under the prior version of Rule 68, defending parties could serve offers of judgment on opposing parties any time prior to 10 days before trial began. The opposing party then had 10 days after being served with an offer of judgment to accept the offer. Under revised Rule 68, however, offers of judgment must be served at least 14 days *before the date set for trial* (which may not be the date trial actually begins), and opposing parties now have 14 days after being served with an offer of judgment to accept the offer. If an offer of judgment is made after a defending party's liability to the opposing party has already been determined, but before the extent of liability has been determined, the party held liable may still make an offer of judgment if made at least 14 days (rather than 10 days) before the date set for the hearing to determine the extent of liability.

Rules Relating to Trial and Post-Trial Practice

Along with these significant revisions to rules that apply only to pretrial proceedings, perhaps the most significant revisions to the deadlines set forth in the rules relate to trial and post-trial practice. Many of these deadlines have been extended for a considerable period and are critically important at and after trial, but also in preparing for trial (i.e., pretrial practice and discovery). Of particular importance are the following revisions.

Rule 48—Polling of Jury

Revised Rule 48 sets forth new subsection (c) providing that, after a verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually. If the poll reveals a lack of unanimity or lack of assent by the number of jurors that the parties stipulated to, the court may direct the jury to deliberate further or may order a new trial.

Rule 54—Taxation of Costs

The deadlines with respect to taxing costs have also been extended. Following entry of judgment, the clerk of the court, under revised Rule 54, cannot tax costs unless 14 days' notice is given. Prior to the recent amendments, the clerk could tax costs on 1-day notice. Under the revised rule, the court may review the clerk's assessment of costs on a motion served within 7 days, as opposed to the 5-day period proscribed by the prior version of Rule 54(d)(1).

Rule 50—Judgment as a Matter of Law

Parties seeking judgment as a matter of law after entry of judgment will now be given additional time to file motions for such relief. Under the prior version of Rule 50, parties had to renew their motions for judgment as a matter of law within 10 days after the entry of judgment or, if the motion addressed a jury issue not decided by a verdict, within 10 days of discharge of the jury. Parties now have 28 days, a considerably longer time, to move for judgment as a matter of law under the revised rules.

Rule 52—Findings and Conclusions of Law in Court-Tried Cases

In court-tried cases or cases tried with an advisory jury, the court now has 28 days, rather than 10 days, after entry of judgment to amend its findings or make additional findings and amend its judgment accordingly.

Rule 59—Motion for New Trial or to Amend Judgment

As with motions for judgment as a matter of law under Rule 50, parties now have 28 days after the entry of judgment (as opposed to the 10-day period provided by the prior version of Rule 59) to file a motion for a new trial or a motion to alter or amend a judgment. When a motion for a new trial is based on affidavit(s), which must be filed with the motion, the opposing party now has 14 days after being served with the motion and affidavit(s) to file opposing affidavit(s). Revised Rule 59 no longer expressly permits the court to extend the deadline for filing opposing affidavits. The court has 28 days after entry of judgment to order a new trial on its own initiative. Prior to the recent revisions to Rule 59, the court had to order such a new trial within 10 days after entry of judgment.

Rule 62—Enforcement of Judgments

The time that a party must wait before executing or enforcing a judgment has also been lengthened under the revised rules. The revisions state that parties who have obtained a judgment in their favor now cannot execute on that judgment or initiate any proceedings to enforce the judgment until 14 days have passed after entry of the judgment.

Rule 62.1—Rulings by District Court after Appeal

The revisions add new Rule 62.1. This rule specifies the trial court's ability to rule on a motion for relief after an appeal has been docketed and is pending. Under new Rule 62.1, if a timely motion is filed in the district court and the district court lacks jurisdiction to grant the motion because an appeal has been docketed and is pending, the district court may either: (a) defer consideration of the motion; (b) deny the motion; or (c) state either (i) that the district court would grant the motion if the matter was remanded to allow the district court to consider

the motion or (ii) issue a ruling indicating that the motion raises a substantial issue. If the district court elects either of the alternatives under option (c), the movant must promptly notify the circuit court clerk under Federal Rule of Appellate Procedure 12.1. If the court remands the matter to allow the district court to rule on the motion, the district court may then decide the motion.

Conclusion

These recent revisions to the Federal Rules of Civil Procedure have a significant impact on litigation, from start to finish. While some of the deadlines set forth in the revised rules reach the same result given the "days are days" approach to calculating deadlines, other deadlines (some of which have existed for some time now) have been significantly altered. While the "days are days" approach should simplify the process of calculating deadlines under the rules, practitioners must carefully review the revised rules to ensure that they are in compliance with the newly established deadlines. Failure to do so could have disastrous results.

Relevant Websites

www.law.cornell.edu/rules/frcp
Cornell website listing the Federal Rules of Civil Procedure.

www.supremecourtus.gov/orders/courtorders/frcv09.pdf
Document from U.S. Supreme Court showing rule changes.

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