FEDERAL PROCEDURE UPDATE - 2012

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TABLE OF CONTENTS

Table of Contents

(continued)

Page

Table of Contents

(continued)

Page

Page

Table of Contents

(continued)

Page

Table of Contents

(continued)

Page

FEDERAL PROCEDURE UPDATE - 2012

I. FEDERAL PROCEDURE

A. Overview of Article.

The purpose of this article is to provide summaries and brief discussion of significant recent cases from the United States Supreme Court, the United States Circuit Courts, and United States District Courts in Texas which address issues relating to federal practice and procedure during 2012.

Since this article will also be distributed in electronic format on USB drives, we have added numerous hyperlinks where possible so that readers may "click through" to the actual authority or document being cited via the Internet. In this manner, the article becomes not only a "snapshot" update of recent developments over the past year; but also a practical research tool for the practitioner when addressing federal procedure issues in pleadings and briefing. For that reason, for the Rules which have not been addressed by the courts over the past year in a noteworthy manner, we have attempted to make that clear as well.

B. The Current Version of The Rules.

The current version of the FEDERAL RULES OF CIVIL PROCEDURE were last amended and printed by the U.S. Government Printing Office on December 1, 2010.[1] Many of the 2010 amendments dealt issues relating to e-discovery in litigation in federal courts. However, the e-discovery rules did not specifically address issues related to preservation of electronic data and allegations of spoliation for failure to preserve data. Accordingly, several district courts, including the U.S. District Court for the Eastern District of Texas, have developed and issued Local Rules and/or Model Orders governing these issues for practice in these district courts. As discussed below, however, such Local Rules and Model Orders have been both praised and criticized by attorneys practicing in those courts. While some attorneys see them as facilitating a more efficient litigation process; others see them as traps for the unwary attorney which can adversely affect not only the procedural rights, but also the substantive rights of parties. This concern is heightened for attorneys who have not previously litigated in the particular court.

In September 2009, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, chaired by Judge Lee H. Rosenthal, issued a Report and Recommended Guidelines on Standing Orders in District and Bankruptcy Courts. The Report was the result of in depth research and the use of surveys to each of the courts to determine how those courts were actually using standing orders in conjunction with local rules. The Report set for guidelines for the courts regarding drafting, issuance, publication, and implementation of local rules and standing orders. A link to that seventeen (17) page report is located at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/jc09-2009/2009-09-Appendix-F.pdf.

C. Pending Amendments to the FEDERAL RULES OF CIVIL PROCEDURE.

The Advisory Committee on Civil Rules met again in March 2012 to discuss proposed amendments to the Rules which may include more specificity on preservation requirements and sanctions for failure to meet those requirements. A Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure is located at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST03-2012.pdf.

The most recent conference was the September 2012 Judicial Conference where the only amendments to the FEDERAL RULES OF CIVIL PROCEDURE are proposed amendments to FED. R. CIV. P. 37 and 45. These amendments have been approved by the Rules Committee and

[1] A pdf version of the current FEDERAL RULES OF CIVIL PROCEDURE are available for download at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2010%20Rules/Civil%20Procedure.pdf

transmitted to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

In summary, the proposed amendments to FED. R. CIV. P. 45 and 37 are directed at the goal of simplifying what the Committee called the "three-ring circus" of challenges for the lawyer seeking to use a subpoena under the current Rules. The amendment package seeks to eliminate this three-ring circus by making the court where the action is pending the issuing court, permitting service throughout the United States (as is currently authorized under FED. R. CRIM. P. 17(c)), and combining all provisions on place of compliance in a new Rule 45(c). The conforming amendments to Rule 37 deal with the failure to cooperate in discovery.

These amendments are discussed more specifically herein below in this article at Section II. L. 12 (Rule 37) and Section II. M. 9. (Rule 45).

D. Overview of Federal Rulemaking Authority.

Although every attorney practicing in our federal court system is familiar with the FEDERAL RULES OF CIVIL PROCEDURE, many are not aware of the statutory authority which gives rise to those Rules and how those Rules interconnect with the Local Rules and Model Orders issued by the various federal courts. Knowledge regarding these authorities may become significant when a Rule, a Local Rule, or a Model Order is alleged to have materially and adversely effected the substantive rights of a party. As more courts issue Local Rules, Model Orders, and Standing Orders, the number of disputes regarding violations of these rules is increasing as well.

The "enabling" power given to the United States Supreme Court both gives rise to the Rules, and also provides room for lower federal courts to enact "Local Rules" which are specific to the issuing court so long as such Local Rules *are consistent with* and *do not duplicate* federal rules and statutes. *See* FED. R. CIV. P. 83(a)(1). In addition to Local Rules, many district courts also issue Standing Orders which can create even more traps for attorneys practicing in those courts.

The FEDERAL RULES OF CIVIL PROCEDURE are enacted by the United States Supreme Court pursuant to 28 U.S.C. § 2072 (the "RULES ENABLING ACT"). The RULES ENABLING ACT gives the Supreme Court the power to prescribe general rules of practice and procedure and evidence in the United States district courts and courts of appeals. 28 U.S.C. § 2072(a). By way of limitation, the RULES ENABLING ACT forbids federal procedural rules that "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). The current version of the FEDERAL RULES OF CIVIL PROCEDURE now in effect were last amended and printed by the U.S. Government Printing Office on December 1, 2010. In August 2011, amendments were proposed to FEDERAL RULES OF CIVIL PROCEDURE 37 and 45 in response to a line of cases that that found authority to compel parties or party officers to travel more than 100 miles from outside the state to testify at trial; and introduced limited authority for a court to transfer a subpoena-related motion to the court that issued the subpoena.[2]

In addition to the FEDERAL RULES OF CIVIL PROCEDURE, the current version of the FEDERAL RULES OF EVIDENCE were last printed on December 1, 2011.[3] Amendments have been proposed to FEDERAL RULE OF EVIDENCE 803(10) (the hearsay exception for absence of public record or entry) in order to address a

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[2] *See* Preliminary Draft of Proposed Amendments to the Federal Rules of Practice and Procedure dated August 2011 and located at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Publication%20Aug%202011/Brochure.pdf

[3] A pdf version of the current FEDERAL RULES OF EVIDENCE are available for download at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2011%20Rules/Evidence%20Procedure.pdf

constitutional infirmity in light of the Supreme Court's decision in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009).[4]

E. Overview of Local Rules, Model Orders, and Standing Orders.

Whereas the RULES ENABLING ACT gives the Supreme Court the power to prescribe the Rules; FED. R. CIV. P. 83, in turn, delegates limited authority down to the lower courts to create local rules, model orders, and standing orders which are generally more specific than the Rules. FEDERAL RULE OF CIVIL PROCEDURE 83 Rules By District Courts; Judge's Directives provides that the district courts, acting by a majority of its district judges, may adopt and amend rules governing its practice so long as such "local rules" are consistent with and do not duplicate federal rules and statutes.

Although case law addressing this subject area has been historically sparse, there are several fairly recent cases which analyze the interplay between the Rules, local rules, and standing orders. *See Webb v. Morella*, 457 F. Appx 448 (5th Cir. 2012); *Knod v. Director, TDCJ-CID*, Civil Action No. 6:11cv140 (E.D. Tex. 2011) and *Davis v. Thaler*, Civil Action No. 3:08-cv-1509-O (N.D. Tex. 2008) (upholding a Local Rule which imposes a page limit on court filings). *See also Chiasson v. Zapata Gulf Marine Corp.*, 988 F.2d 513 (5th Cir. 1993) (whether local rule addressing *ex parte* communications violated FED. R. CIV. P. 26(b)(1)); and *Elliott v. Foufas*, 867 F.2d 877 (5th Cir. 1989) (whether standing order imposing specific factual pleading requirements violated FED. R. CIV. P. 8(a) and 83).

In extreme cases, an unreasonable application of local rules tantamount to an otherwise unwarranted imposition of sanctions or adjudication of the merits can constitute a reversible abuse of discretion. For example, in *Webb v. Morella*, 457 F. Appx 448 (5th Cir. 2012), the district court dismissed plaintiffs' action against their former attorney and awarded the defendant his attorney's fees and costs after deeming his motion to dismiss unopposed when plaintiffs' filed their opposition one (1) day late and without the tables of contents and authorities required by the local rules. The Fifth Circuit reversed and remanded, finding that plaintiffs' failure to satisfy the local rules did not obviate the findings of contumacious conduct or extreme delay necessary to justify dismissing a case with prejudice. *Webb v. Morella*, 457 F. Appx at 452-54. *See also Korhauser v. Commissioner of Social Security*, 685 F.3d 1254 (11th Cir. 2012) (reversing a district court's decision to uphold a sanction on counsel's attorneys' fees recommended by the magistrate judge for failing to abide by the local rules relating to margin and font size).

F. Local Rules in Texas District Courts.

Under the power delegated under FED. R. CIV. P. 83, each of the Northern, Eastern, Southern, and Western United States District Courts of Texas have issued their own Local Rules and Standing Orders which govern practice in those courts.

FED. R. CIV. P. 83(a)(1) requires that local rules "be made available to the public." The Notes of Advisory Committee on Rules – 1995 Amendment further specify that: *"There should be no adverse consequence to a party or attorney for violating special requirements relating to practice before a particular court unless the party or attorney has actual notice of those requirements. Furnishing litigants with a copy outlining the judge's practices—or attaching instructions to a notice setting a case for conference or trial—would suffice to give actual notice, as would an order in a case specifically adopting by reference a judge's standing order and indicating how copies can be obtained."*

Accordingly, the district courts in Texas have made their local rules publicly available for viewing and download on each of their respective

[4] *See* Memorandum dated April 8, 2011 located at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Publication%20Aug%202011/EV_Report.pdf

websites. In fact, the Eastern District of Texas even provides additional formats including e-book formats for iPhone, iPad, Android, Mobi, and Kindle. Upon filing a case, or filing an answer/appearance in a case, in federal court in Texas; every attorney should locate, read, and fully understand the Local Rules, Standing Orders, and/or Model Orders which will govern practice in that specific court. Links to the Local Rules and Standing Orders for the district courts in Texas are provided below:

1. **Northern District of Texas: Local Rules (effective 09/01/2011). http://www.txnd.uscourts.gov/rules/localrules.html**

2. **Eastern District of Texas: Local Rules (in several formats including pdf, html, and e-book formats for tablets (iOS, Android, Mobi, Kindle) http://www.txed.uscourts.gov/page1.shtml?location=rules**

3. **Southern District of Texas: Local Rules (reprinted December 2009). http://www.txs.uscourts.gov/district/rulesproc/dclclrl2009.pdf**

4. **Western District of Texas: Local Rules (effective 04/26/2012) http://www.txwd.uscourts.gov/rules/docs/txwd-rules.pdf**

II. CASE UPDATE: RECENT CASES IN 2012.

Below are summaries and discussion of significant recent cases from the United States Supreme Court, the United States Circuit Courts of Appeals, and the United States District Courts in Texas which address issues relating to federal practice and procedure.

Another recent topic of interest is THE FEDERAL COURTS JURISDICTION AND VENUE CLARIFICATION ACT OF 2011 which made amendments to 28 U.S.C. § 1441(c) Removal of civil actions and § 1446(b)(2)(c) Procedure for removal of civil actions and is effective for all suits commenced on or after January 6, 2012. Although few opinions addressing the ACT have made their way to the courts of appeals during the past eleven (11) months, several cases have generally addressed the ACT and are mentioned herein.

A. Removal, Venue, Jurisdiction.

THE FEDERAL COURTS JURISDICTION AND VENUE CLARIFICATION ACT OF 2011 made amendments to 28 U.S.C. § 1441(c) Removal of civil actions and § 1446(b)(2)(c) Procedure for removal of civil actions and is effective for all suits commenced on or after January 6, 2012. *See MB Financial, N.A. v. Stevens*, 678 F.3d 497, 498 (7th Cir. 2012) and *John M. Floyd & Assoc., Inc. v. Fiserv Solutions, Inc.*, Case No. 4-11-CV-306 (E.D. Tex. 2012).

It has long been the rule in the Fifth Circuit that all properly joined and served defendants must join in the notice of removal or otherwise consent to removal within the 30 day period set forth in 28 U.S.C. § 1446(b). *Jones v. Scogin*, 929 F.Supp. 987, 988 (W.D. La. 1996) citing *Getty Oil, Div. of Texaco v. Ins. Co. of North America*, 841 F.2d 1254, 1263 (5th Cir. 1988). Failure to do so renders the removal defective. *Getty Oil*, 841 F.2d at 1263. While each defendant need not sign the notice of removal, there must be "some timely filed written indication from each served defendant, or from some person or entity purporting to formally act on its behalf in this respect and to have the authority to do so, that it has actually consented to such action." *Gillis v. Louisiana*, 294 F.3d 755, 759 (5th Cir. 2002) (quoting, *Getty*, supra).

The FEDERAL COURTS JURISDICTION AND VENUE CLARIFICATION ACT OF 2011 (the "JVCA") codified the foregoing principles, as follows, "[w]hen a civil action is removed solely under section 1441(a), all defendants who have been properly joined and served must join in or consent to the removal of the action." 28 U.S.C. § 1446(b)(2)(A).

The Second Circuit Court of Appeals in *Landesbank v. Aladdin Capital Mgmt., LLC*, No.

11-4306-CV (2nd Cir. Aug. 2012) applied the new rules under THE FEDERAL COURTS JURISDICTION AND VENUE ACT OF 2011 and noted that now every corporation is treated as a citizen of its state of incorporation and its principal place of business regardless of whether such a place is foreign or domestic.

In *Elchehabi v. Chase Home Fin., LLC*, Civil Action No. H-12-1486 (S.D. Tex. 2012), the court discussed THE FEDERAL COURTS JURISDICTION AND VENUE CLARIFICATION ACT OF 2011 and noted that the act rejected the Fifth Circuit's previous "First-Served Defendant" rule in determining timeliness of multiple defendants' consent to a notice of removal. Instead, the JVCA requires that each defendant has thirty-days from the time the notice of removal is received or served on that defendant in order to consent to removal.

B. Forum Non Conveniens

One of the cases discussed in last year's case update was *In re BP Shareholder Derivative Litigation*, No. 4:10-CV-3447, 2011 WL 4345209 (S.D. Tex. Sept. 15, 2011) where the Court considered whether to dismiss a shareholder derivative action governed by the UNITED KINGDOM COMPANIES ACT OF 2006 on *forum non conveniens* grounds.

Only one case was located in 2012 from the Fifth Circuit Court of Appeals on the issue of *forum non conveniens. See Ibarra v. Orica United States of America, Inc.*, No. 11-51094 (5th Cir. Sept. 25, 2012) (affirming dismissal on *forum non conveniens* grounds arising out of an explosion in Mexico).

In *Hooper v. Lockheed Martin Corp.*, 688 F.3d 1037 (9th Cir. 2012), the Ninth Circuit recognized a circuit split on whether, in a case arising under federal question jurisdiction, when a case is transferred on *forum non conveniens* grounds, the transferee court applies the statute of limitations of the state of the transferee or the transferor. The Ninth Circuit joined the Fifth, Seventh, and Tenth Circuits, holding that "when a federal statute directs federal courts to borrow the most closely analogous state statute of limitations, a transferee district court must apply the state statute of limitations that the transferor district court would have applied had the case not been transferred on *forum non conveniens grounds*." *Id.* at 1046.

Additionally, several district court opinions were issued including *In re BOPCO, LP*, Civil Action No. H-12-1622 (S.D. Tex. 2012) (affirming transfer of venue to Louisiana based upon *forum non conveniens* where accident occurred in Louisiana and most witnesses resided there) and *Carrs v. AVCO Corp*., Civil Action No. 3:11-cv-3423-L (N.D. Tex. 2012) (affirming grant of plaintiff's motion for dismissal where the nonmovant defendant could potentially lose a *forum non conveniens* defense).

C. Personal Jurisdiction

1. General Jurisdiction

General jurisdiction applies when the plaintiff has pled sufficient contacts with the state to allow it to assert jurisdiction over any and all suits against a defendant. Last year's case update included a discussion of *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S.Ct. 2846 (2011), where the Supreme Court defined general jurisdiction in terms significantly narrower than had been applied in most lower courts.

This year, in *Holston Investments, Inc. B.V.I. v. LanLogistics Corp.*, 677 F.3d 1068 (11th Cir. 2012), the Eleventh Circuit held as matter of first impression in the circuit, that a dissolved corporation has no principal place of business for purposes of diversity jurisdiction.

2. Specific Jurisdiction

Specific jurisdiction applies when a suit arises from or relates to the defendant's particular contacts with the state. Last year's case update included a discussion of *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011), in which the Supreme Court attempted to clarify the standards for specific jurisdiction over foreign corporate defendants.

In a lengthy decision discussing *J. McIntyre Machinery* in some depth, the District Court for the Eastern District of Louisiana, overseeing multi-district litigation related to Chinese drywall, found that it had personal jurisdiction over the Chinese manufacturer because of the company's contacts with the United States; however the company has appealed this decision. *In re Chinese Manufactured Drywall Products Liability Litigation*, No. 2:09md02047 (E.D. La. Sept. 4, 2012).

D. Standing

In *Katz v. Pershing, LLC*, 672 F.3d 64 (1st Cir. 2012), the First Circuit affirmed the dismissal of a claim on constitutional standing grounds where a brokerage account holder asserted contract and consumer protection claims against a clearing broker after the broker notified her that her personal data was being used on an electronic platform. The account holder's claimed harm centered on the increased risk of identity theft from the alleged methods of data protection employed by the broker. The First Circuit, former Justice Souter sitting by appointment, provides a detailed analysis of the constitutional standing principles.

In another data security case, *Resnick v. AvMed, Inc.*, --- F.3d ----, 2012 WL 3833035 (11th Cir. Sept. 6, 2012), the Eleventh Circuit held that current and former members of health care plans had alleged an injury fairly traceable to actions of plan operator, as required for Article III standing, where they alleged identity theft incidents that occurred after unencrypted laptops containing members' sensitive information were stolen from plan operator's corporate office. The incidents of identity theft alleged, occurring roughly a year and fourteen months after the theft, were sufficient to support a reasonable inference that the defendant is liable for the misconduct alleged.

In *Coffey v. C.I.R.*, 663 F.3d 947 (8th Cir. 2011), the Eighth Circuit addressed the unique territorial standing of the United States Virgin Islands ("USVI"), to intervene in a suit by a tax payer challenging the IRS's denial of her tax exemption for economic development program (EDP) credit applicable to income derived from sources within the USVI. The Eighth Circuit found the USVI presented sufficient evidence of an injury in the tax court's interpretation of the statute of limitations, which affected a legally protected interest in the USVI's unique statutory authority to create, define the scope of, and effectuate the EDP.

E. Class Certification

In *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011), the U.S. Supreme Court raised the standard for "commonality" under FED. R. CIV. P. 23(a)(2) and determined that individualized monetary damages are not available as part of a Rule 23(b)(2) injunction or declaratory judgment class. While the full impact of *Wal-Mart* is yet to be fully determined, the ruling will almost undoubtedly reduce the availability of class adjudication in the federal courts.

In *Sullivan v. DB Investments, Inc.*, No. 08-2784 (3rd Cir. Dec. 21, 2011), the Third Circuit Court of Appeals, *en banc*, vacated a previous Third Circuit decision and affirmed the certification of a nationwide class of direct and indirect purchasers of diamonds even though some of the indirect purchasers would not have had a cause of action in their home states. Although the opinion appears to contradict Supreme Court precedent and to create a circuit split, it is noteworthy that the case involved a settlement class in an antitrust lawsuit.

F. Arbitration

In *Reed v. Florida Metro. Univ.*, 681 F.3d 630 (5th Cir. 2012), the Fifth Circuit Court of Appeals held that it is proper for the arbitrator(s) to determine whether the arbitration agreement allowed for class arbitration. *Id.* at 633. However, the court also held that arbitrators should not find implied agreements to submit to class arbitration absent explicit contractual consent to class arbitration in the written agreement.

In *In re American Exp. Financial Advisors Securities Litigation*, 672 F.3d 113 (2nd Cir. 2011), the Second Circuit recognized an open question "of whether federal courts have the power to stay arbitration under the FAA (or any other authority) in an appropriate case." *Id.* at 139. The court concluded, that at least where "parties have not entered into a valid and binding arbitration agreement, the court has the authority to enjoin the arbitration proceedings."

1. The Supreme Court's Ruling in *Concepcion*

In *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011), the federal district court and the Ninth Circuit court of appeals held that an arbitration provision in a cellular telephone agreement was unconscionable under California state law because it disallowed classwide proceedings. However, the Supreme Court reversed holding that the FEDERAL ARBITRATION ACT (FAA) preempted a California common law rule which invalidated class-action waivers in arbitration agreements as adhesion contracts. The *Concepcion* opinion, therefore, promotes the enforcement of private arbitration agreements between the parties even if the agreement waives class arbitration.

2. Enforcing Arbitration against Non-Signatories

Since 1997, the Fifth Circuit has followed *Zimmerman v. Int'l Co. & Consulting, Inc.*, 107 F.3d 344 (5th Cir. 1997), to determine when arbitration may be enforced against non-signatories. In *Zimmerman*, a worker was injured in an accident while aboard his employer's vessel and subsequently filed a direct action against the employer's insurer for damages. *Id. at* 345-46. The employer's insurance policy included an arbitration clause requiring any coverage disputes between the insured and insurer to be arbitrated in London under English law. *Id. at* 346. The district court denied the insurer's motion to stay the direct action suit, and the Fifth Circuit affirmed. *Id.* The Fifth Circuit held that under LOUISIANA'S DIRECT ACTION STATUTE, terms and conditions of a policy that would require a stay in favor of arbitration are annulled or superseded by the statute. *Id.* It then rejected the insurer's argument that a direct action plaintiff should be treated as a third party beneficiary under the insurance contract, and, therefore, bound by the insurance policy's arbitration provision. *Id.* The Fifth Circuit held that the FEDERAL ARBITRATION ACT (FAA) does not require "arbitration for parties who have not contractually bound themselves to arbitrate their disputes." *Id.*

This changed when the Supreme Court decided *Arthur Andersen, LLP v. Carlisle*, 129 S.Ct. 1896 (2009). In *Carlisle*, the Supreme Court considered whether appellate courts have jurisdiction under the FEDERAL ARBITRATION ACT to review a denial of stay requested by non-signatories to the relevant arbitration agreement. *Id.* at 1899. Section 3 of the FAA requires that a suit be stayed "upon any issue referable to arbitration under an agreement in writing for such arbitration." 9 U.S.C. § 3. The Court found that under the FAA "any litigant who asks for a stay under section 3 is entitled to an immediate appeal from denial of that motion." 129 S.Ct. at 1900. The Court then held that non-parties to a contract cannot be "categorically barred from section 3 relief because principles of state law "allow a contract to be enforced by or against nonparties to the contract through 'assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver, and estoppel.'" *Id.* at 1902.

The Fifth Circuit addressed the holding in *Carlisle* for the first time in early 2010, in *Todd v. Steamship Mutual Underwriting Assoc. (Bermuda), Ltd.*, 601 F.3d 329 (5th Cir. 2010). It found that its decision in *Zimmerman* had been effectively overruled by the Supreme Court's decision in *Carlisle*, and that non-signatories to arbitration agreements may be compelled to arbitrate under principles of state contract law. *Id.* at 330. The Fifth Circuit and the lower courts then began shaping the rule of when exactly a non-signatory may be forced to arbitrate under a valid arbitration agreement. We address several such cases here. *Todd v. Steamship Mut.*

Underwriting Ass'n, Ltd., No. 08-1195, 2011 WL 1226464 (E.D. La. Mar. 28, 2011), *Am. Family Life Assurance Co. v. Biles*, No. 3:10-CV¬667-TSL-FKB, 2011 WL 4014463 (S.D. Miss. Sept. 8, 2011), *DK Joint Venture v. Weyand*, 649 F.3d 310 (5th Cir. 2011), *Covington v. Aban Offshore Ltd.*, 650 F.3d 556 (5th Cir. 2011).

G. International Litigation

In *In re Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 685 F.3d 987 (11th Cir. 2012), the Eleventh Circuit held that a pending arbitration was a "proceeding in a foreign or international tribunal" sufficient to invoke the right to obtain the aid of U.S. District Courts to subpoena evidence pursuant to 28 U.S.C. § 1782.

In *In re Request from United Kingdom Pursuant to Treaty Between Government Of The United States Of America And The Government Of The United Kingdom On Mutual Assistance In Criminal Matters In The Matter Of Dolours Price*, 685 F.3d 1 (1st Cir. 2012), the First Circuit held that individuals had no private right of action under a Mutual Legal Assistance Treaty and therefore two individuals who challenged subpoenas to Boston College to turn over interviews with former Irish Republican Army members did not have enforceable rights under the MLAT and therefore lacked standing to intervene.

H. TITLE I. SCOPE OF RULES; FORM OF ACTION (FRCP 1 and 2).

In this section, each of the FEDERAL RULES OF CIVIL PROCEDURE is set forth in order with a hyperlink to the actual text of the Rule. Additionally, recent cases worthy of mention are cited and briefly discussed under the Rule or Rules which are discussed in the opinion. Where Rules do not have a case cited, the authors found no significant cases during the survey period.

This section also contains hyperlinks to court-approved forms. Although very basic in format, the forms provide a drafting guide in some respects and may be seen as the minimum complexity required when pleading in federal courts.

Fed. R. Civ. P. 84 states that "The forms in the Appendix suffice under the rules and illustrate the simplicity and brevity that these rules contemplate." The forms referenced in Rule 84 are then provided and identified as Civil Form 1 through 82. The Civil Forms are referenced throughout this article where they are, or may be, applicable to a specific Rule. Links to all of those forms are also provided below at TITLE XII. APPENDIX OF FORMS (U.S. COURT SITE).

1. Rule 1. Scope and Purpose.

In *Construct Corps LLC v Rails Plus, Inc.*, Case No. 11-cv-00438-CMA-MJW (D. Colo. 2012), the court cited and quoted FED. R. CIV. P. 1 in its entirety when it denied the parties' joint and unopposed motion to stay litigation and extend dispositive motions deadline: *"These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81.* ***They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."*** [Emphasis added].

2. Rule 2. One Form of Action.

Civil Forms 1 and 2 (combined). Caption; Date, Signature, Address, E-mail Address, and Telephone Number. (WP) (rtf).

FED. R. CIV. P. 2 states that *"There is one form of action – the civil action."*

In *ISC Holding AG v. Nobel Biocare Fin. A.G.*, Case No. 10-4867-cv(L) (2nd Cir. July 2012), the plaintiff ISC Holding filed a petition to compel arbitration, but then voluntary nonsuited the action under FED. R. CIV. P. 41(a)(1)(A)(i) two years into the litigation. The court vacated the voluntary dismissal and then dismissed with prejudice the action seeking to compel arbitration. ISC Holding appealed.

Discussing the interplay between Rule 41 and Rule 2, the court declined making a to make a distinction between an "action" versus a "motion." The defendant argued that petition to compel arbitration is a "motion" (as opposed to an "action") and therefore could not be voluntarily nonsuited under Rule 41. The court of appeals affirmed the trial court's vacatur and its dismissal with prejudice.

I. TITLE II. COMMENCING AN ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS (FRCP 3 through 6).

1. Rule 3. Commencing An Action.

Civil Form 3. Summons. (WP) (rtf).

FED. R. CIV. P. 3 states that *"A civil action is commenced by filing a complaint with the court."*

In *Robinson v. Tyson Foods, Inc*., Civil Action No. SA-10-CV-1043 OG (NN) (W.D. Tex. 2011), the Title VII plaintiff initiated a lawsuit by filing a motion to proceed *in forma pauperis* and a motion to extend time to file complaint. (Under Title VII, a claimant has 90 days to file a civil action after receipt of a right-to-sue letter from the EEOC). Citing FED. R. CIV. P. 3, the court dismissed the lawsuit as time-barred because the plaintiff did not file a complaint.

2. Rule 4. Summons.

Civil Form 4. Summons on a Third-Party Complaint. (WP) (rtf).

Civil Form 5. Notice of a Lawsuit and Request to Waive Service of a Summons. (WP) (rtf).

Civil Form 6. Waiver of the Service of Summons. (WP) (rtf).

In *Lozano v. Bosdet*, No. 11-60736 (5th Cir. Aug. 31, 2012), the Fifth Circuit Court of Appeals expressly adopted the "flexible due diligence standard" measured by "good faith and reasonable dispatch" of the First and Seventh Circuits in determining the length of time in which a plaintiff must serve a foreign defendant under Rule 4. The court noted that Rule 4(m)'s 120 day limitation does not apply but rejected the Ninth Circuit's unlimited time frame.

3. Rule 4.1. Serving Other Process.

In *Aviara Parkway Farms, Inc. v. Agropecuaria La Finca*, Case No. 8-cv-2301 (S.D. Cal. 2012), a defendant specially appeared to file a motion to quash service of a default judgment containing a permanent injunction. The judgment had been served on defendant's attorneys. Granting the motion to quash service, the court cited Rule 4.1 and held that defendant's attorneys did not have "implied authority to accept service of process" where the plaintiff failed to demonstrate that the defendants and their attorneys have "a relationship that extends beyond the typical attorney-client relationship."

4. Rule 5. Serving and Filing Pleadings and Other Papers.

In *Giles v. Campbell*, 2012 WL 4873673 (3rd Cir. Oct. 16, 2012), the Third Circuit held that where defendant correctional officer died during pendency of case, plaintiff's failure to serve motion to substitute on the officer's estate was not valid service. The estate was required to be served as a non-party despite the government's counsel's claim that he would continue to represent the estate. The Court noted that Rule 4, as opposed to Rule 5, was jurisdictional and therefore service under Rule 5 was inadequate to vest jurisdiction in the court. The Circuit therefore vacated the court's denial of motion to substitute.

5. Rule 5.1. Constitutional Challenge To A Statute – Notice, Certification, and Intervention.

6. Rule 5.2. Privacy Protection For Filings Made With The Court.

7. Rule 6. Computing And Extending Time; Time For Motion Papers.

In *United States v, Davenport*, Civil Action No. 3:09-CV-2455-L (N.D. Tex. 2012), the court addressed the timeliness of a claim seeking to recover an erroneously paid tax refund which must be brought "within 2 years after the making of such refund." 26 U.S.C. § 6532(b). Since Section 6532(b) does not specify a method of computing time, the court applied Rule 6 to calculate the statutory limitations period.

J. TITLE III. PLEADINGS AND MOTIONS (FRCP 7 through 16).

1. Rule 7. Pleadings Allowed; Form of Motions and Other Papers.

2. Rule 7.1. Disclosure Statement.

3. Rule 8. General Rules of Pleading.

4. Rule 9. Pleading Special Matters.

A district court in Colorado noted a circuit split in the application of Rule 9(b)'s particularity requirement to claims of negligent misrepresentation, cited the Fifth Circuit Court of Appeals decision stating that when the tenor of the complaint is fraud Rule 9(b) applies, and held that, in case before it, the claim was more one of negligence and thus Rule 9(b) did not apply. *Denver Health & Hosp. Authority v. Beverage Distributors Co., LLC*, --- F. Supp. 2d ---, 2012 WL 400320 (D. Colo. Feb. 8, 2012) (citing *Benchmark Electronics Capital Corp. v. J.M. Huber Corp.*, 343 F.3d 719, 723 (5th Cir. 2003)).

In *U.S. ex rel. Raynor v. National Rural Utilities Co-op. Finance, Corp.*, 690 F.3d 951 (8th Cir. 2012), the Eighth Circuit determined that the heightened pleading requirement of Rule 9 applied to claims under qui tam provisions of the False Claims Act, refusing to distinguish between the terms "false" or "fraudulent" in finding that such a claim must comply with Rule 9(b)—'a party must state with particularity the circumstances constituting fraud' – regardless of the language employed.

5. Rule 10. Form of Pleadings.

6. Rule 11. Signing Pleadings, Motions, and Other Papers; Representations To the Court; Sanctions.

In *Star Mark Management, Inc. v. Koon Chun Hing Kee Soy & Sauce Factory, Ltd.*, 682 F.3d 170 (2nd Cir. 2012), the Second Circuit affirmed an award of sanctions under Rule 11's Safe Harbor Provision where opposing counsel notified plaintiff's counsel of sanctionable conduct by letter, even though the letter referred to an attached memorandum of law and affidavits that were not in fact attached, but did attach a proposed notice of motion for sanctions. The Second Circuit found that the letter satisfied the Safe Harbor Provision where it served the proposed motion stating the grounds on which it relied, even where it did not serve the supporting affidavits or memorandum of law referenced. The letter and motion satisfied both the letter and the spirit of Rule 11.

7. Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing.

Civil Form 30. Answer Presenting Defenses Under Rule 12(b). (WP) (rtf).

Civil Form 40. Motion to Dismiss Under Rule 12(b) for Lack of Jurisdiction, Improper Venue, Insufficient Service of Process, or Failure to State a Claim. (WP) (rtf).

In 2009, the Supreme Court issued the opinion in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) holding that in order to survive a motion to dismiss under FED. R. CIV. P. 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

In 2012, several Texas district courts cited to *Ashcroft v. Iqbal* including *Kew v. Bank of America, N.A.*, Civil Action No. H-11-2824 (S.D. Tex. 2012) (addressing the issue of when

amendment of the complaint by the plaintiff in response to a 12(b)(6) motion would be futile) and *Hunter v. CitiMortgage, Inc.*, Civil Action No. H-11-2966 (S.D. Tex. 2012) (granting a motion to dismiss on a "wrongful foreclosure" claim because no foreclosure had occurred, and an FDCPA claim on grounds that the defendant was not a "debt collector" under the FAIR DEBT COLLECTION PRACTICES ACT, 15 U.S.C. § 1692(a)).

8. Rule 13. Counterclaim and Crossclaim.

9. Rule 14. Third-Party Practice.

Civil Form 16. Third-Party Complaint. (WP) (rtf).

Civil Form 41. Motion to Bring in a Third-Party Defendant. (WP) (rtf).

10. Rule 15. Amended and Supplemental Pleadings.

In *Mayfield v. National Ass'n for Stock Car Auto Racing, Inc.*, 674 F.3d 369 (4th Cir. 2012), the Fourth Circuit affirmed the district court's denial of leave to amend under Rule 15 following judgment on the pleadings where additional defamation and tort claims came two and a half years after the last complaint and demonstrated no new evidence that could not have been discovered previously. The prejudice to defendant by having already engaged in lengthy discovery was sufficient where the claims to be added related to an entirely new event and nucleus of facts.

In *Lewis v. Russell*, Case No. 2:03-2646-WBS-CKD (E.D. CA. October 2, 2012), the court denied the cross-claimant's motion for leave to file a second amended cross complaint under Rule 15(a)(2) holding that once a court issues a pretrial order under Rule 16, the latter Rule controls. The court noted that generally, a motion to amend is subject to Rule 15(a)(2) which provides that *"[t]he court should freely give leave [to amend] when justice so requires."* However, "[o]nce the district court ha[s] filed a pretrial scheduling order pursuant to Federal Rule of Civil Procedure 16[,] which establishe[s] a timetable for amending pleadings[,] that rule's standards control[]." *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607-08 (9th Cir. 1992). Since the court had issued a pretrial scheduling) order stating that further amendments to the pleadings were prohibited "except with good cause shown," the language of Rule 16 prevailed over the language of Rule 15 and amendment was prohibited since good cause was not shown.

11. Rule 16. Pretrial Conferences; Scheduling; Management.

Civil Form 52. Report of the Parties' Planning Meeting. (WP) (rtf).

In *Lewis v. Russell*, Case No. 2:03-2646-WBS-CKD (E.D. CA. October 2, 2012), the court denied the cross-claimant's motion for leave to file a second amended cross complaint under Rule 15(a)(2) holding that once a court issues a pretrial order under Rule 16, the latter Rule controls. Although Rule 15(a)(2) states that *"[t]he court should freely give leave [to amend] when justice so requires,"* Rule 16(b)(4) states that [after a pretrial order is issued] *"A schedule may be modified only for good cause and within the judge's consent."*

K. TITLE IV. PARTIES (FRCP 17 through 25).

1. Rule 17. Plaintiff and Defendant; Capacity; Public Officers.

2. Rule 18. Joinder of Claims.

3. Rule 19. Required Joinder of Parties.

4. Rule 20. Permissive Joinder of Parties.

5. Rule 21. Misjoinder and Nonjoinder of Parties.

In *Broadstar Wind Sys. Grp Ltd v. Stephens*, Case No. 11-10025 (5th Cir. 2012), the Fifth

Circuit discussed how to determine with parties had been properly joined in a declaratory judgment action regarding ownership of a patent. Discussing the concepts of required joinder, permissive joinder, and misjoinder under FED. R. CIV. P. 19, 20, and 21, the court of appeals applied an abuse of discretion standard to a dismissal for failure to join an indispensable party stating that "Rule 19's emphasis on a careful examination of the facts means that a district court will ordinarily be in a better position to make a Rule 19 decision than a circuit court would be."

6. Rule 22. Interpleader.

Civil Form 42. Motion to Intervene as a Defendant Under Rule 24. (WP) (rtf).

7. Rule 23. Class Actions

In *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011), the U.S. Supreme Court raised the standard for "commonality" under FEDERAL RULE OF CIVIL PROCEDURE 23(a)(2) and determined that individualized monetary damages are not available as part of a Rule 23(b)(2) injunction or declaratory judgment class. While the full impact of *Wal-Mart* is yet to be fully determined, the ruling will almost undoubtedly reduce the availability of class adjudication in the federal courts.

In *Sullivan v. DB Investments, Inc.*, 667 F.3d 273 (3rd Dec. 20, 2011), the Third Circuit Court of Appeals, *en banc*, affirmed the certification of a class settlement in an anti-trust case focusing on the defendant's conduct and the injury caused to the class members in determining the predominance inquiry under Rule 23(b)(3). The Third Circuit described the Supreme Court's decision in *Dukes* as holding that "commonality and predominance are defeated when it cannot be said that there was a common course of conduct in which the defendant engaged . . . ." *Id.* It is noteworthy that the dissent read *Dukes* to support its conclusion that an inquiry into the existence or validity of each class member's claim is necessary under Rule 23.

In *Ross v. RBS Citizens, N.A.*, 667 F.3d 900 (7th Cir. 2012), the Seventh Circuit defined the contours of Rule 23(c)(1)(B), added to the Federal Rules in 2003. The Seventh Circuit held that the Rule required a precise definition of the class, claims, issues, and defenses in the class certification order, in order to permit adequate interlocutory review.

8. Rule 23.1. Derivative Actions

9. Rule 23.2. Actions Relating to Unincorporated Associations

10. Rule 24. Intervention.

In *Coffey v. C.I.R.*, 663 F.3d 947 (8th Cir. 2011), in addition to the constitutional standing issue addressed above, the Circuit addressed the requirements for permissive intervention in Rule 24(b)(2)–(3). The tax court denied intervention because the USVI failed to demonstrate that its participation as a party was necessary to advocate for an unaddressed issue and did not show that its intervention would not delay resolution of this matter. The Eighth Circuit rejected the "unaddressed issue" standard and remanded to the tax court to consider solely whether the intervention will cause "undue delay" or "prejudice the adjudication of the original parties' rights."

The Fifth Circuit Court of Appeals, in *City of Houston v. American Traffic Solutions, Inc.*, No. 11-20068 (5th Cir. Jan. 24, 2012), overturned the district court's decision and permitted the Kuboshes to intervene in a contract dispute between the City of Houston and ATS, the company which had installed red-light cameras, due to the fact that the Kuboshes were the impetus behind a city referendum which resulted in ordinances prohibiting red-light cameras. The court noted that the City of Houston had an incentive to put on a weak defense against ATS' claims that the ordinances were unconstitutional.

Civil Form 42. Motion to Intervene as a Defendant Under Rule 24. (WP) (rtf).

11. Rule 25. Substitution of Parties

L. TITLE V. DISCLOSURES AND DISCOVERY (FRCP 26 through 37).

1. Rule 26. Duty to Disclose; General Provisions Governing Discovery.

Civil Form 52. Report of the Parties' Planning Meeting. (WP) (rtf).

2. Rule 27. Depositions to Perpetuate Testimony.

3. Rule 28. Persons Before Whom Depositions May Be Taken.

4. Rule 29. Stipulations About Discovery Procedure.

5. Rule 30. Depositions by Oral Examination.

6. Rule 31. Depositions by Written Questions.

7. Rule 32. Using Depositions in Court Proceedings.

8. Rule 33. Interrogatories to Parties

9. Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes.

Civil Form 50. Request to Produce Documents and Tangible Things, or to Enter onto Land Under Rule 34. (WP) (rtf).

In February 2012, the United States District Court for the Eastern District of Texas introduced its Model Order Regarding E-Discovery In Patent Cases.

Hyperlink to PowerPoint Presentation: "The E-Discovery Amendments To The Federal Rules of Civil Procedure" by Carl C. Butzer (January 2007).

10. Rule 35. Physical and Mental Examinations.

11. Rule 36. Requests for Admission.

Civil Form 51. Request for Admissions Under Rule 36. (WP) (rtf).

12. Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions.

At the recent Judicial Rules Conference in September 2012, amendments were proposed to FED. R. CIV. P. 37 and 45 in hopes of simplifying the issuance and enforcement of subpoenas upon nonparties nationwide. These amendments have been approved by the Rules Committee and transmitted to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

The proposed amendment to FED. R. CIV. P. 37(b) includes changes to conform to the proposed amendments to FED. R. CIV. P. 45. The proposed language added to Rule 37 is set forth in underline below:

Rule 37. *Failure to Make Disclosures or to Cooperte in Discovery; Sanctions*.

* * *

(b) *Failure to Comply with a Court Order*.

(1) *Sanctions Sought in the District Where the Deposition Is Taken*. If the court where the discovery is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court. If a deposition-related motion is transferred to the court where the action is pending, and that court orders a deponent to be

sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of either the court where the discovery is taken or the court where the action is pending.

(2) *Sanctions Sought in the District Where the Action Is Pending*.

* * *

Additional discussion in relation to Rule 45 is set forth herein below at Section II. M. 9. (Rule 45).

In addition to the aforementioned proposed amendments, several courts addressed Rule 37 in 2012 including those set forth below.

In *Toys R Us-Delaware, Inc. v. Tots in Mind, Inc.*, 2012 WL 529595 (E.D. Va. Feb. 17, 2012), the Eastern District of Virginia sanctioned Tots in Mind, Inc. for failing to properly prevent documents from being destroyed based on the deposition testimony of Tots' 30(b)(6) witness who stated that no policy was implemented following the instigation of litigation to retain documents in spite of his subsequent affidavit to the contrary.

In *Mobile Shelter Systems USA, Inc. v. Grate Pallet Solutions, LLC*, Case No. 3:10-cv-978-J-37JBT (M.D. Fla. January 12, 2012), the court held that the plaintiff's expert witness was precluded from testifying under FED. R. CIV. P. 37 for failure to timely make disclosures under FED. R. CIV. P. 26. The plaintiff's expert's report was produced on the last day of discovery which was two months after the court-imposed deadline.

In *Green v. Blitz*, No. 2:07-CV-372 (TJW), 2011 WL 806011 (E.D. Tex. Mar. 3, 2011), the Eastern District of Texas showcased the unique sanctions that courts have available to them to enforce their rules when a party fails to preserve and produce documents. The motion for sanctions was brought even though the case had been closed on the court's docket for more than one (1) year. The court imposed civil contempt sanctions of $250,000, ordered Blitz to provide a copy of the sanctions Memorandum Opinion & Order to every plaintiff in every other lawsuit pending against Blitz, and ordered a conditional "purging sanction" of $500,000 which would be imposed if Blitz failed to certify compliance with the terms of the sanctions order within thirty (30) days of the date of the Order.

In *Smith & Fuller, P.A. v. Cooper Tire & Rubber Co.*, 685 F.3d 486 (5th Cir. 2012), the Fifth Circuit affirmed an award of sanctions against plaintiff's counsel for inadvertently violating the terms of a Protective Order when it disseminated defendant's trade secrets and confidential information to other personal injury lawyers at a conference about obtaining consent from the defendant. Finding no willful misconduct on the part of plaintiff's counsel, the district court nevertheless awarded defendant attorney's fees and expenses connected to the violation of the protective order, in the amount of $29,667.71. *Id.* at 488. The Fifth Circuit affirmed, distinguishing between the severest remedies under Rule 37(b)—striking pleadings or dismissal of a case—which require a finding of bad faith or willful misconduct, and found that sanctions of attorney's fees and costs was one of the least severe sanctions under its authority.

In *Sherman v. Rinchem Co., Inc.*, 687 F.3d 996 (8th Cir. 2012), the Eighth Circuit determined that where a district court imposes sanctions under its inherent power and there is a conflict between the applicable state and federal law, federal law applies to the imposition of sanctions for the spoliation of evidence.

M. TITLE VI. TRIALS (FRCP 38 through 53).

1. Rule 38. Right to a Jury Trial; Demand.

2. Rule 39. Trial by Jury or by the Court.

3. Rule 40. Scheduling Cases for Trial.

4. Rule 41. Voluntary Dismissal.

In *ISC Holding AG v. Nobel Biocare Finance AG*, Nos. 10-4867-cv(L), 11-239-cv (CON) (2d Cir. July 25, 2012), the Second Circuit affirmed

the district court's vacatur of a notice of voluntary dismissal under Rule 41(a)(1)(A)(i) on the grounds that Rule 41(a)(1)(A)(i) does not apply to petitions to compel arbitration.

5. Rule 42. Consolidation; Separate Trials.

6. Rule 43. Taking Testimony.

7. Rule 44. Proving an Official Record.

8. Rule 44.1. Determining Foreign Law.

9. Rule 45. Subpoena.

At the recent Judicial Rules Conference in September 2012, amendments were proposed to FED. R. CIV. P. 45 and 37 in hopes of simplifying the issuance and enforcement of subpoenas upon nonparties nationwide. These amendments have been approved by the Rules Committee and transmitted to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law. Four specific changes are being proposed including (1) simplification, (2) transfer of subpoena-related motions, (3) trial subpoenas for distant party and party officers, and (4) notice of service of a "documents only" subpoena.

Simplification: Under the current Rule 45, the lawyer seeking to use a subpoena has to choose the right "issuing court," then has to ensure that the subpoena is served within that district, or outside of the district but within 100 miles of where performance was required, or within the state if state law allowed, and then has to determine where compliance could be required. All of the foregoing is made challenging by the scattered provisions bearing on place of compliance found in different provisions of the rule.

The amendment would therefore make the court where the action is pending the issuing court, permitting service throughout the United States (as is currently authorized under FED. R. CRIM. P. 17(c)), and combining all provisions on place of compliance in a new Rule 45(c). New Rule 45(c) preserves the various place-of-compliance provisions of the current rule (except that the reference to state law is eliminated and the "*Vioxx*" issue[5] is addressed as discussed below).

The proposal permits the place of compliance for document subpoenas under Rule 45(c)(2)(A) to be any place "reasonably convenient for the person who is commanded to produce." The premise of this provision was that, particularly with electronically stored information, place of production should not be a problem and should be handled flexibly. But it was noted that Rule 45(d)(2)(B)(i) directs the party that served the subpoena to file a motion to compel compliance in "the district where compliance is required." That could lead to mischief, if the lawyer serving the subpoena designates her office as the place for production and a distant nonparty served with the subpoena objects on some ground. The objecting nonparty should not have to litigate in the lawyer's home jurisdiction just because production there would be "reasonably convenient," as it might well be. Accordingly, Rule 45(c)(2)(A) was changed to call for production "within 100 miles of where the person [subject to the subpoena] resides, is employed, or regularly transacts business in person." This change should ensure -- as Rule 45(c) is generally designed to ensure -- that if litigation about the subpoena is necessary it will occur at a location convenient for the nonparty.

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[5] *See In re Vioxx Products Liability Litigation*, 438 F.Supp.2d 664 (E.D. La. 2006) (requiring an officer of the defendant corporation, who lived and worked in New Jersey, to testify at trial in New Orleans even though he was not served within Louisiana under Rule 45(b)(2)). The alternative view is that the Rule sets forth the same geographical limits for all trial witnesses. *See Johnson v. Big Lots Stores, Inc*., 251 F. R.D. 213 (E.D. La. 2008) (holding that opt-in plaintiffs in Fair Labor Standards Act action could not be compelled to travel long distances from outside the state to attend trial because they were not served with subpoenas within the state as required by Rule 45(b)(2))

Transfer of subpoena-related motions: New Rule 45(c) essentially retains the existing rule requirement that motions to quash or enforce a subpoena should be made in the district where compliance with the subpoena is required, with the result that the "enforcement court" may often be different from the "issuing court."

This amendment adds Rule 45(f), which explicitly authorizes transfer of subpoena-related motions from the enforcement court to the issuing court, including not only motions for a protective order but also motions to enforce the subpoena.

The Committee Note has been revised to clarify that the prime concern should be avoiding undue burdens on the local nonparty, and also to identify considerations that might warrant transfer nonetheless, emphasizing that such concerns warrant transfer only if they outweigh the interests of the local nonparty in local resolution of the motion. It also suggests that the judge in the compliance court might consult with the judge in the issuing court, and encourages use of telecommunications methods to minimize the burden on the nonparty when transfer does occur.

Trial subpoenas for distant parties and party officers: There is a distinct split in existing authority about whether a subpoena may command a distant party or party officer to testify at trial. One view is that the geographical limits that apply to other witnesses do not apply to such witnesses. See *In re Vioxx Products Liability Litigation*, 438 F.Supp.2d 664 (E.D. La. 2006) (requiring an officer of the defendant corporation, who lived and worked in New Jersey, to testify at trial in New Orleans even though he was not served within Louisiana under Rule 45(b)(2)). The alternative view is that the Rule sets forth the same geographical limits for all trial witnesses. *See Johnson v. Big Lots Stores, Inc*., 251 F. R.D. 213 (E.D. La. 2008) (holding that opt-in plaintiffs in FAIR LABOR STANDARDS ACT action could not be compelled to travel long distances from outside the state to attend trial because they were not served with subpoenas within the state as required by Rule 45(b)(2)).

The division of authority resulted from differing interpretations of the 1991 amendments to Rule 45. The Advisory Committee concluded that those amendments were not intended to create the expanded subpoena power recognized in *Vioxx* and its progeny, and decided to restore the original meaning of the rule. The amendments therefore provide in Rule 45(c)(1) that a subpoena can command any person to testify only within the limits that apply to all witnesses.

Notice of service of "documents only" subpoena: The 1991 amendments introduced the "documents only" subpoena. The deposition notice requirements of Rule 30 did not apply to such subpoenas. Rule 45(b)(1) was therefore added to require that notice be given of service of such subpoenas. In the restyling of 2007, the rule provision was clarified to direct that notice be provided before service of the subpoena.

As it examined Rule 45 issues, the Committee was repeatedly informed that this notice provision is frequently not obeyed. Parties often obtain documents by subpoena without notifying other parties that the subpoena has been served. The result can be that there are serious problems at or before trial when "surprise" documents emerge and arguments may be made that they should not be admissible or that further discovery is warranted.

The amendment attempts to solve these problems by moving the existing provision to become a new Rule 45(a)(4) with a heading that calls attention to the requirement -'Notice to Other Parties Before Service." The relocated provision also slightly modifies the existing provision by directing that a copy of the subpoena be provided along with the notice. That should assist the other parties in knowing what is being sought and determining whether they have objections to production of any of the materials sought or wish to subpoena additional materials.

10. Rule 46. Objecting to a Ruling or Order.

11. Rule 47. Selecting Jurors.

12. Rule 48. Number of Jurors; Verdict; Polling.

13. Rule 49. Special Verdict; General Verdict and Questions.

Civil Form 70. Judgment on a Jury Verdict. (WP) (rtf).

Civil Form 71. Judgment by the Court without a Jury. (WP) (rtf).

14. Rule 50. Judgment as a Matter of Law in a Jury Trial; Related Motion for a New Trial; Conditional Ruling.

15. Rule 51. Instructions to the Jury; Objections; Preserving a Claim of Error.

16. Rule 52. Findings and Conclusions by the Court; Judgment on Partial Findings.

17. Rule 53. Masters.

N. TITLE VII. JUDGMENT (FRCP 54 through 71).

1. Rule 54. Judgment; Costs.

The Supreme Court, in *Taniguchi v. Kan Pacific Saipan, Ltd.*, --- U.S. ---, 132 S.Ct. 1997 (2012), held that costs permitted through Rule 54(d) under 28 U.S.C. § 1920(6) for 'compensation of interpreters' does not include costs for document translation.

2. Rule 55. Default; Default Judgment.

3. Rule 56. Summary Judgment.

In *Mobile Shelter Systems USA, Inc. v. Grate Pallet Solutions, LLC*, Case No. 3:10-cv-978-J-37JBT (M.D. Fla. January 12, 2012) the court addressed FED. R. CIV. P. 56(c)(2) which provides that *"A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence."* Specifically, the court excluded the plaintiff's expert witness report under FED. R. CIV. P. 37 for failure to timely make disclosures under FED. R. CIV. P. 26. The plaintiff's expert's report was produced on the last day of discovery which was two months after the court-imposed deadline.

4. Rule 57. Declaratory Judgment.

5. Rule 58. Entering Judgment.

6. Rule 59. New Trial; Altering or Amending a Judgment.

7. Rule 60. Relief from a Judgment or Order.

In *Turner v. Pleasant*, 663 F.3d 770 (5th Cir. 2011), as revised (Dec. 16, 2011), the Fifth Circuit took the unusual step of reversing a final judgment for defendants in a personal injury action, which it had previously affirmed, on the basis of equity. At the original trial, Plaintiffs filed a motion for recusal of District Judge G. Thomas Porteous, Jr. on the basis of his relation with Defendant's attorney. That motion was denied and Judge Porteous entered judgment for Defendant. Plaintiffs appealed and the judgment was affirmed, 127 Fed. Appx. 140. When Judge Porteous was subsequently impeached and removed from office for judicial misconduct, Plaintiffs filed a new complaint in equity seeking to set aside the prior judgment alleging that the judgment was procured by fraud involving the District Judge. The newly appointed District Judge dismissed the complaint on the basis of *res judicata*. The Fifth Circuit reversed, noting that "[r]es judicata must at times yield to a well-pled independent action in equity." *Id.* 775-776, *citing United States v. Beggerly*, 524 U.S. 38, 45–46, 118 S.Ct. 1862, 141 L.Ed.2d 32 (1998). The Fifth Circuit found further support for overturning the judgment in Rule 60 of the Federal Rules of Civil Procedure, but made clear that it also implicated the inherent power of the Federal Courts to manage their affairs and protect against judgments procured by fraud: "In order to prevent an independent action in equity from

making null the limitations of the related Rule 60(b)(3) right to relief for one year after judgment due to fraud, the injustice to be remedied must be so severe as to overcome the purposes for the doctrine of res judicata. The actions are "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs." *Citing Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991). The Federal Rules preserved a court's power to hear an independent action to grant relief from a judgment. *See* FED. R. CIV. P. 60(d)(1)."

The Fifth Circuit thereby appears to reserve the question of whether the Court's inherent equitable power to manage its affairs would permit it to reach beyond the one year limit from the date of the entry of the judgment in Rule 60(c)(1)

8. Rule 61. Harmless Error.

9. Rule 62. Stay of Proceedings to Enforce a Judgment.

10. Rule 62.1. Indicative Ruling on a Motion for Relief That is Barred by a Pending Appeal.

11. Rule 63. Judge's Inability to Proceed.

O. TITLE VIII. PROVISIONAL AND FINAL REMEDIES (FRCP 64 through 71).

1. Rule 64. Seizing a Person or Property.

2. Rule 65. Injunctions and Restraining Orders.

3. Rule 65.1. Proceedings Against a Surety.

4. Rule 66. Receivers.

5. Rule 67. Deposit into Court.

6. Rule 68. Offer of Judgment.

On June 25, 2012, the United States Supreme Court granted review in *Genesis Healthcare Corp. v. Symczk*, No. 11-1059, as the effect of a Rule 68 Offer of Judgment on a conditional class certification under Section 21(b) of the FAIR LABOR STANDARDS ACT. The issue presented for review is: Whether a case becomes moot and class certification is unavailable when the lone plaintiff receives an Offer of Judgment pursuant to Fed. R. Civ. P. 68 from the defendants to satisfy all of the plaintiff's claims.

7. Rule 69. Execution.

Hyperlink to "Post-Judgment Discovery (Ethics)" by Curt M. Langley (June 2005).

Hyperlink to "Professionalism In Post Judgment Practice" by Curt M. Langley (May 2002).

8. Rule 70. Enforcing a Judgment for a Specific Act.

9. Rule 71. Enforcing Relief For or Against a Nonparty.

P. TITLE IX. SPECIAL PROCEEDINGS (FRCP 71.1 through 76).

1. Rule 71.1. Condemning Real or Personal Property.

2. Rule 72. Magistrate Judges: Pretrial Order.

3. Rule 73. Magistrate Judges: Trial by Consent; Appeal.

4. Rule 74. [Abrogated (Apr. 11, 1997, eff. Dec. 1, 1997).].

5. Rule 75. [Abrogated (Apr. 11, 1997, eff. Dec. 1, 1997).].

6. Rule 76. [Abrogated (Apr. 11, 1997, eff. Dec. 1, 1997).].

7. [Rule 71A. Renumbered Rule 71.1].

Q. TITLE X. DISTRICT COURTS AND CLERKS: CONDUCTING BUSINESS; ISSUING ORDERS (FRCP 77 through 80).

1. Rule 77. Conducting Business; Clerk's Authority; Notice of an Order or Judgment.

2. Rule 78. Hearing Motions; Submission on Briefs.

3. Rule 79. Records Kept by the Clerk.

4. Rule 80. Stenographic Transcript as Evidence.

R. TITLE XI. GENERAL PROVISIONS (FRCP 81 through 86).

1. Rule 81. Applicability of the Rules in General; Removed Actions.

2. Rule 82. Jurisdiction and Venue Unaffected.

3. Rule 83. Rules by District Courts; Judge's Directives.

For discussion regarding Fed. R. Civ. P. 83, please see Section I. D. Overview of Local Rules, Model Orders, and Standing Orders of this article.

4. Rule 84. Forms.

Fed. R. Civ. P. 84 states that "The forms in the Appendix suffice under the rules and illustrate the simplicity and brevity that these rules contemplate." The forms referenced in Rule 84 are then provided and identified as Civil Form 1 through 82. The Civil Forms are referenced throughout this article where they are, or may be, applicable to a specific Rule. Links to all of those forms are also provided below at TITLE XII. APPENDIX OF FORMS (U.S. COURT SITE).

5. Rule 85. Title.

6. Rule 86. Effective Dates.

S. TITLE XII. APPENDIX OF FORMS (U.S. COURTS SITE).

As stated above, the Civil Forms referenced and contemplated in FED. R. CIV. P. 84 are listed as Civil Form 1 through 82 and may be accessed via the hyperlink immediately below:

U.S. District Court Illustrative Civil Rules Forms. http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/RulesAndForms/IllustrativeCivilRulesForms.aspx

III. FEDERAL EVIDENCE

A. The Rules of Evidence.

Discussion of recent cases relating to the FEDERAL RULE OF EVIDENCE are not included within the scope of this article. However, it may be useful to note that the current version of the FEDERAL RULES OF EVIDENCE were last printed on December 1, 2011 and are available for download online.[6] Additionally, amendments have been proposed to FEDERAL RULE OF EVIDENCE 803(10) (the hearsay exception for absence of public record or entry) in order to address a constitutional infirmity in light of the Supreme Court's decision in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009).[7]

For those attorneys using iPads and similar electronic devices in their practice, the FEDERAL RULE OF EVIDENCE are available in "mobile" formats at Free Download: FEDERAL RULES OF EVIDENCE – 2013 Edition for iPad, Kindle, and other tablets.

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[6] A pdf version of the current FEDERAL RULES OF EVIDENCE are available for download at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2011%20Rules/Evidence%20Procedure.pdf

[7] *See* Memorandum dated April 8, 2011 located at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Publication%20Aug%202011/EV_Report.pdf

IV. APPENDIX (LINKS TO AUTHORITIES, RULES, FORMS AND ARTICLES).

A. FEDERAL RULES OF CIVIL PROCEDURE (Online) http://www.law.cornell.edu/rules/frcp

B. Free Download of Federal Rules of Civil Procedure – 2013 Edition for iPad, Kindle, and other tablet devices.

C. Free Download of Federal Rules of Evidence – 2013 Edition for iPad, Kindle, and other tablet devices.

D. Illustrative Civil Rules Forms. (U.S. Courts Site). http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/RulesAndForms/IllustrativeCivilRulesForms.aspx

E. United States District Court, Northern District of Texas.

1. Home Page http://www.txnd.uscourts.gov/index.html

2. Local (Civil) Rules (effective 09/01/2011): http://www.txnd.uscourts.gov/rules/localrules.html

F. United States District Court, Eastern District of Texas

1. Home Page http://www.txed.uscourts.gov/index.shtml

2. Local Rules (in several formats including pdf, html, and e-book formats for tablets (iOS, Android, Mobi, Kindle) http://www.txed.uscourts.gov/page1.shtml?location=rules

3. General Order Amended Local Rules, signed 07/13/2012. http://www.txed.uscourts.gov/cgi-bin/view_document.cgi?document=23065

G. United States District Court, Southern District of Texas

1. Home Page http://www.txs.uscourts.gov

2. Local Rules of the United States District Court for the Southern District of Texas (Effective 05/01/2000) (Reprinted December 2009). http://www.txs.uscourts.gov/district/rulesproc/dclclrl2009.pdf

H. United States District Court, Western District of Texas

1. Home Page http://www.txwd.uscourts.gov/default1.asp

2. Local Rules of the United States District Court for the Western District of Texas (Effective 04/26/2012): http://www.txwd.uscourts.gov/rules/docs/txwd-rules.pdf

3. http://www.txwd.uscourts.gov/rules/online/default.asp

I. Hyperlinks to Additional Articles by Curt M. Langley.

UPDATE: Avoiding Fair Debt Collection Practices Act Claims

Latest Developments in the Federal and Texas Fair Debt Collection Practices Acts

Fair Debt Collection Practices Act Claims Based on Collection Letters

Post-Judgment Discovery (Ethics)

Litigation With Financial Institutions

Boilerplate Terms, Rules Of Interpretation, and Developments in Drafting Contracts

Legal Issues Relating to Special Events - And Contract Provisions to Address Those Issues

Legal Consequences of Technology Adoption and Changes In Practice

Professionalism in Post Judgment Practice

J. Hyperlinks to Additional Articles by Luke J. Gilman.

Richard Howell & Luke Gilman, Developments in Fifth Circuit Civil Procedure Law: 2011-2012, ---_ Tex. Tech L. Rev. --- (forthcoming 2012)

Chip Babcock & Luke Gilman, Use of Social Media in Voir Dire, 60 The Advocate 44 (Fall 2012)

Richard Howell & Luke Gilman, Developments in Fifth Circuit Evidence Law: 2010-2011, Tex. Tech L. Rev. 939 (2011)

Richard Howell & Luke Gilman, Developments in Fifth Circuit Evidence Law: 2009-2010, 43 Tex. Tech L. Rev. 989 (2010)