

# ASSOCIATION OF AMERICAN LAW SCHOOLS

## SECTION ON

## CIVIL PROCEDURE

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### FALL 2008 NEWSLETTER

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#### 2009 ANNUAL MEETING PROGRAM

**The Changing Shape of Federal  
Civil Pretrial Practice:  
Implications of  
*Bell Atlantic Corp. v. Twombly***

**(Co-sponsored by the Section on  
Litigation)**

**Friday, January 9, 10:30 – 12:15 a.m.**

In May, the Section issued a call for papers on the topic “The Changing Shape of Federal Pretrial Practice.” Out of a very strong set of submissions, we selected the following for presentation:

**Comparative Convergences in Pleading Standards.** Scott Dodson (Arkansas).

**Taming Twombly.** Edward Hartnett (Seton Hall).

**The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases.** Elizabeth M. Schneider (Brooklyn).

The Supreme Court’s decision (a year and a half ago) in *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007), has had a seismic effect. Although the Court purportedly granted certiorari “to address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct,” courts have cited *Twombly* when assessing the sufficiency of complaints in all sorts of cases – not merely (as in *Twombly*) proposed nationwide class actions involving claims of antitrust conspiracy. A Westlaw search shows that *Twombly* has already been cited in over 9,700 federal-court opinions.

This Term, the Court’s consideration of *Ashcroft v. Iqbal* may provide it with an opportunity to clarify *Twombly*’s implications for the standard of notice pleading. To the extent that *Twombly* alters the standards for pleading a claim in federal court, the decision is centrally important to all those concerned with access to justice or with the costs of civil litigation. The panelists at our section program will present three analyses of *Twombly* and related issues, providing an

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Newsletter Editor: Robert Schapiro  
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opportunity to critique the decision and consider its implications from several distinct and complementary angles. There will be time for discussion among the panelists and for discussion with the audience.

Other sessions that may be of interest to section members include the following (in chronological order):

Section on Litigation: E-Discovery: A Litigation Revolution? (Thurs., Jan. 8, 8:30 – 10:15 a.m.)

Joint Program of Sections on Law and the Social Sciences and Remedies: Civil Case Outcomes: Theory and Reality (Thurs., Jan. 8, 10:30 – 12:15)

Section on Alternative Dispute Resolution: Envisioning Dispute Resolution in 2050 (Or Even 2025) and Preparing Our Students For It (Fri., Jan. 9, 1:30 – 3:15)

Section on Civil Rights: Remedies for Exonerated Prisoners (Fri., Jan. 9, 1:30 – 3:15)

Section on Conflict of Laws: Choice of Law Reforms in the EU: A Model for the U.S. or a Cautionary Tale? (Fri., Jan. 9, 1:30 – 3:15)

Section on Evidence: Evidentiary Foul Play: Deception, Destruction, and Just Desserts (Fri., Jan. 9, 1:30 – 3:15)

Section on Federal Courts: Habeas Corpus and the War on Terror (Fri., Jan. 9, 3:30 – 5:15)

## SECTION ANNOUNCEMENTS

**Business Meeting.** There will be a business meeting at the conclusion of the Section's annual meeting program on January 9. The Executive Committee proposes to nominate the following individuals for the 2009 Executive Committee:

<i>Chair</i>	Patrick Woolley (Texas)
<i>Chair-Elect</i>	Vikram Amar (U.C. Davis)
<i>Past Chair</i>	Catherine Struve (Penn)
<i>Exec. Comm.</i>	Lonny Hoffman (Houston)
<i>Exec. Comm.</i>	Rebecca Hollander-Blumoff (Wash. U.-St. Louis)
<i>Exec. Comm.</i>	Thomas Main (Pacific)
<i>Exec. Comm.</i>	Jonathan Siegel (George Washington)

Special thanks are due Steve Gensler, who served as Past Chair this year and provided the Executive Committee with wise guidance and invaluable institutional memory.

**Section website.** The Section has a website at <http://home.att.net/~slomanson/AALSCivPro.html>, which contains a collection of original pleadings in notable cases, past issues of this newsletter, and links to archives for exams, syllabi and outlines. If you have any questions, submissions or suggestions, please contact Bill Slomanson at [bills@tjssl.edu](mailto:bills@tjssl.edu).

**Mentoring Listserv.** The Section has an associated mentoring listserv. Please see the section website for instructions on how to subscribe. The section website also contains a list of experienced faculty who have volunteered to field questions on various topics. Mentors are reminded to update their website information via e-mail to Bill at [bills@tjssl.edu](mailto:bills@tjssl.edu). Listserv members are also reminded to include a copy of relevant messages—for new faculty teaching civ pro—

to the CIVPROMENTOR listserv.

**Civil Procedure Listserv.** Jay Tidmarsh hosts a Civ Pro listserv. Please contact Jay at [jtidmars@nd.edu](mailto:jtidmars@nd.edu) to subscribe.

**Civil Procedure Exam Bank.** Radha Pathak continues to maintain the Civil Procedure Exam Bank. If you would like instructions on how to obtain a password in order to access the exam bank or if you would like to contribute exams to the exam bank, you can contact Radha at [rpathak@law.whittier.edu](mailto:rpathak@law.whittier.edu).

**Procedure-related blogs.** Blogs that may be of interest to proceduralists include the following:

W. Jeremy Counseller (Baylor) and Rory Ryan (Baylor) edit the **Civil Procedure Prof Blog**:  
<http://lawprofessors.typepad.com/civpro/>.

Ben Spencer (Washington & Lee) maintains the **Federal Civil Practice Bulletin**:  
<http://federalcivilpracticebulletin.blogspot.com/>.

Byron Stier (Southwestern), Howie Erichson (Fordham), Alexandra Lahav (Connecticut), and Beth Burch (FSU) edit the **Mass Tort Litigation Blog**:  
[http://lawprofessors.typepad.com/mass\\_tort\\_litigation/](http://lawprofessors.typepad.com/mass_tort_litigation/).

Howard Bashman (an appellate litigator) maintains the **How Appealing** blog:  
<http://howappealing.law.com/>.

## SUPREME COURT DECISIONS

*Vikram Amar*  
*U.C. Davis*

The Supreme Court's 2007-2008 Term generated relatively few core Civil Procedure rulings that will occupy significant space in casebooks and course syllabi. There are at least four decisions, however, that touch on topics many instructors do cover, and that therefore might be worth looking at more carefully.

In *Republic of Philippines v. Pimentel*, 128 S. Ct. 2180 (2008), the Court gave some guidance on Rule 19 in the unusual context of a case involving a foreign sovereign. A group of human rights victims of Ferdinand Marcos (the Pimentel class) had a \$2 billion judgment in a United States District Court that they sought to execute by attaching the assets of Arlema, a company incorporated by Marcos and held by the New York brokerage of Merrill Lynch. Confronted with claims from many creditors, including the Republic of Philippines and a Commission it had created as well as the Pimentel class, Merrill Lynch filed an interpleader action naming, among others, the Republic and the Commission. These two entities then successfully sought dismissal of the action as to them under the Foreign Sovereign Immunities Act, leaving the question whether the action could proceed in their absence. The Supreme Court, in reversing the Ninth Circuit, noted that there was no dispute over whether the Republic and the Commission were required entities under rule 19(a), and held under Rule 19(b) that the prejudice to these absent parties prevented the case from proceeding from going forward. As the Court observed, the Ninth Circuit "gave insufficient weight to the[] sovereign status"

of the Republic and the Commission in deciding whether they would be prejudiced if the action went ahead without them. Two Justices disagreed with the rest of the Court about the remedy going forward.

The Court decided two noteworthy cases involving the Federal Arbitration Act (FAA or Act). In *Preston v. Ferrer*, 128 S. Ct. 978 (2008), the Court by an 8-1 vote held that when parties agree to arbitrate all questions arising under a contract subject to the FAA, the Act supersedes state laws lodging primary jurisdiction to resolve legal questions in another forum. In *Preston*, that meant that the arbitrator, rather than the California Labor Commissioner (empowered under the California Talent Agencies Act, or TAA) would determine whether the TAA applied to, and was violated by, the plaintiff, rendering his contract claim invalid. In reaching this conclusion, the *Preston* Court drew substantially on its recent ruling in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006), which held that challenges to the validity of a contract requiring arbitration of disputes “ordinarily should . . . be considered by an arbitrator, not a court.”

In *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008), the Court held by a vote of 6-3 that the FAA’s grounds laid out in sections 10 and 11 of the Act for prompt vacatur and modification of arbitral awards are the exclusive bases for parties to obtain expedited judicial review under the FAA. The parties cannot agree to arbitration and then agree to have the arbitrator’s award reviewed by a court under standards more searching than those provided for in sections 10 and 11, and still seek to avail themselves of the expedited review provided for in the Act. In the *Mattel* case, the parties agreed to arbitrate a landlord’s (Hall’s) claim against a tenant (Mattel), and also to require the court to

vacate, modify or correct any award if the arbitrator’s conclusions of law were erroneous. The District Court approved of the arbitration agreement, and proceeded to vacate the arbitrator’s subsequent award for legal error. The Ninth Circuit reversed, holding that arbitration agreement terms fixing the mode of judicial review are unenforceable, given the exclusive grounds for vacatur and modification set forth in sections 10 and 11. The Supreme Court agreed with the Ninth Circuit, although it did note the parties might have other ways of judicially enforcing the arbitrator’s award outside of the FAA’s expedited judicial review provisions, an issue on which it expressed no view.

Finally, in *Richlin Security Service v. Chertoff*, 128 S. Ct. 2007 (2008), the Court reversed an odd ruling by the Federal Circuit interpreting the “fee” recovery provisions of the Equal Access to Justice Act (EAJA or Act). After prevailing against the United States on a claim originating in the Department of Transportation’s Board of Contract Appeals, Richlin Security Service filed an application for reimbursement for attorney’s fees, expenses and costs under the EAJA. A dispute arose over the extent to which Richlin should be able to recover for the money its law firm charged it for paralegal services. The Federal Circuit, affirming the Board, concluded that the term “fees” in EAJA applied to attorney’s fees but not paralegal fees. As for whether the money spent on paralegals could be recouped as “other expenses” under the EAJA, the Federal Circuit ruled that the rate of reimbursement should be determined by how much paralegals cost Richlin’s law firm, not how much Richlin’s law firm charged its client. The Supreme Court reversed, holding that paralegal costs should be treated as “fees”

under the EAJA, noting that “[s]urely, paralegals are more analogous to attorneys, experts and other agents than to the studies, analyses, reports, tests, and projects” that ordinarily comprise “other expenses” under the Act. Moreover, the Court observed, even if paralegal monies were treated as “other expenses,” there is no ready justification for measuring the cost from the perspective of Richlin’s attorney, rather than Richlin itself; after all, Richlin is the “prevailing party” that incurred the cost for which the EAJA authorizes reimbursement. The result was unanimous, although Justices Scalia and Thomas declined to join parts of the majority opinion, especially those parts that relied on legislative history.

### STATE, TRIBAL AND LOWER FEDERAL COURT DECISIONS OF INTEREST

*Niki Kuckes*  
*Roger Williams University*

**Debates Continue in Federal and State Courts over Supreme Court’s *Twombly* Pleading Standard.** Debates continue over the meaning of *Bell Atlantic v. Twombly*, 127 S. Ct. 1955 (2007), the antitrust case in which the Supreme Court issued its opaque interpretation of the Rule 8(a) notice pleading requirements. There has been continued, intense interest in *Twombly* this year in both federal and state courts. Some highlights include:

**Highlights of Federal Court *Twombly* Interpretations:** The Third Circuit spent considerable time parsing *Twombly* in a civil rights and wrongful death suit, *Phillips v.*

*County of Allegheny*, 515 F.3d 224, 230-35 (3rd Cir. 2008). As the Court aptly noted, “[w]e are not alone in finding the opinion confusing.” The Third Circuit concluded that the *Twombly* standard is a general interpretation of Rule 8(a), rather than an antitrust ruling. While the notice pleading standard “remains intact,” what *Twombly* does, according to the Third Circuit, is focus attention on “context” to shape the factual allegations necessary to provide fair notice to the defendant.

As far as *Twombly*’s repeated references to the “plausibility” of the facts alleged, the Third Circuit read this as simply a restatement of the general proposition that “stating . . . a claim requires a complaint with enough factual matter (taken as true) to suggest” the required elements. This does not “impose a probability requirement at the pleading stage,” but simply “calls for enough facts to raise a reasonable expectation that discovery will reveal evidence” of the necessary elements. Otherwise stated, there must simply be “some showing sufficient to justify moving the case beyond the pleadings to the next stage” of the litigation. As far as *Twombly*’s disavowal of *Conley v. Gibson*’s statement that a complaint should not be dismissed unless “no set of facts” can be proven consistent with the allegations, the Third Circuit noted that it had already read *Conley* narrowly.

The D.C. Circuit gave its take on *Twombly* in a trademark suit, *Aktieselskabet AF 21. November 2001 v. Fame Jeans Inc.*, 525 F.3d 8, 15 (D.C. Cir. 2008). The Court concluded that *Twombly* “leaves the long-standing fundamentals of notice pleading intact.” While the Court read *Twombly* as a general interpretation of Rule 8(a), not an antitrust-specific precedent, it treated *Twombly* as a relatively narrow decision. The reference to “plausibility,” the D.C. Circuit concluded,

was not a general holding: “*Twombly* was concerned with the plausibility of an inference of conspiracy, not with the plausibility of a claim.”

By contrast, in *dicta* in a securities fraud case, the First Circuit appeared to read *Twombly* more broadly. In *ACA Financial Guaranty Corp. v. Advest, Inc.*, 512 F.3d 46, 58 (1st Cir. 2008), the Court noted that the Supreme Court has “recently altered” the standard for dismissal for failure to state a claim “in a manner which gives it more heft.”

In place of the *Conley v. Gibson* formulation, the First Circuit concluded, the Supreme Court has now held that “[i]n order to survive a motion to dismiss, a complaint must allege ‘a plausible entitlement to relief.’” This discussion was only *dicta*, however, since the ACA case was a fraud case subject to the heightened pleading standards in Rule 9(b), rather than the general notice pleading rules in Rule 8(a) (applied in *Twombly*).

**Highlights of State Court *Twombly* Interpretations:** On a similar front, some notable State court decisions responding to the *Twombly* decision were issued this year:

The Massachusetts Supreme Judicial Court chose to follow the United States Supreme Court’s pleading decision in *Twombly*. In *Iannacchino v. Ford Motor Co.*, 888 N.E.2d 879, 883 n.7, 889-90 (Mass. 2008), the Supreme Judicial Court agreed with the *Twombly* decision’s critical analysis of the earlier *Conley v. Gibson* standard, which had suggested that a “wholly conclusory claim” should survive dismissal so long as some set of facts could conceivably appear in the future to prove the claim. The Supreme Judicial Court disapproved its own decision that tracked the *Conley v. Gibson* language, taking the opportunity to follow the federal lead in prospectively “retiring” the “no

set of facts” approach.

The South Dakota Supreme Court, similarly, decided to follow the *Twombly* approach. In *Sisney v. Best, Inc.*, 754 N.W.2d 804, 808-09 (S.D. 2008), the Court decided to “adopt the Supreme Court’s new standards” and to abrogate its prior state case law based on the *Conley* standard. In so holding, the Court emphasized that the South Dakota rules, like the federal rules, require a party asserting a claim to file a pleading “showing” that it is entitled to relief (the language emphasized by the United States Supreme Court in *Twombly*).

However, in *Colby v. Umbrella, Inc.*, 955 A.2d 1082, 1086 n.1 (Vt. 2008), in a three-to-two decision, the Vermont Supreme Court declined to follow *Twombly*’s more restrictive approach to notice pleading. The Court acknowledged that the United States Supreme Court had criticized the *Conley v. Gibson* statement that a federal complaint should not be dismissed unless “it appears beyond doubt that there exist no facts or circumstances that would entitle the plaintiff to relief.” But a majority of the Vermont Supreme Court expressed continued adherence to that State’s “minimal notice pleading” standard, emphasizing that “we have relied on the *Conley* standard for over twenty years, and are in no way bound by federal jurisprudence in interpreting our state pleading rules.”

Similarly, the Arizona Supreme Court expressly declined to revisit its rules in light of *Twombly*. In *Cullen v. Auto-Owners Insurance Co.*, 218 Ariz. 417, 189 P.3d 344, 346-48 (2008), the Court emphasized that Arizona has always had its own interpretation of the State’s version of Rule 8(a)’s notice pleading standard, and never followed *Conley v. Gibson*. Instead, Arizona law applies a narrower approach under which a complaint that “states only legal conclusions, without any supporting factual allegations,” will be

dismissed. The Arizona Supreme Court declined to revisit this state standard in light of the United States Supreme Court's statement, in *Twombly*, that a complaint should include sufficient factual allegations to demonstrate that the plaintiff's claim is "plausible."

(The above highlights are, of course, simply a non-exhaustive list. Many, many more federal and state courts have weighed in on the *Twombly* debate, both in 2007 and in 2008.)

**Error to Dismiss Excessively Lengthy Complaint That Was Well-Organized and Clear.** Rule 8(a) also made an appearance in a case that presented the opposite problem from *Twombly* – a complaint that contained too many factual allegations. In *Hearns v. San Bernardino Police Dept.*, 530 F.3d 1124, 1127-30, 1138 (9th Cir. 2008), the district court dismissed an 81-page civil rights complaint under Rule 8(a) without prejudice, granting leave to amend. After plaintiff filed an amended complaint that ran to 68 pages and was substantially unaltered, the district court dismissed the case with prejudice. On appeal, the Ninth Circuit reversed for abuse of discretion. While the defendants argued that the complaints contained "too much factual detail," the appeals court found both complaints were "coherent, well-organized, and stated legally viable claims," and should not have been dismissed. Neither verbosity nor length is a proper ground standing alone for dismissing a complaint under Rule 8(a), a majority of the Ninth Circuit concluded. A dissenting judge would have affirmed, emphasizing that the complaints were drafted by counsel, and that "[p]roliferous, confusing complaints such as the ones plaintiffs filed in this case impose unfair burdens on litigants

and judges."

***Twombly* Has Broader Effects in Supporting Seventh Circuit's Restrictive Summary Judgment Ruling.** The *Twombly* decision played a different role in the Seventh Circuit's decision in *E.E.O.C. v. Lee's Log Cabin, Inc.*, 2008 WL 4459236 (7th Cir. 2008). In this case, the Seventh Circuit cited *Twombly* – and in particular, its emphasis on the notice function of the complaint – as support for a restrictive summary judgment ruling. The EEOC had filed suit against an employer alleging hiring discrimination based solely on the "HIV-positive status" of the job applicant. Given this allegation, the Seventh Circuit ruled, in opposing summary judgment the EEOC could not rely on evidence to show discrimination because the prospective employee had AIDS. The EEOC's summary judgment opposition, the court held, reflected a "major alteration" of the nature of its claim and the grounds upon which it rests, as revealed in the complaint. Noting that the EEOC had not properly moved to amend its complaint to shift from claiming discrimination based on HIV-positive status to discrimination based on AIDS, the Court affirmed the judgment for the employer.

**Ninth Circuit Diversity Case Holds that Tribal Corporations are not Citizens of the State where Incorporation Occurred.** In *Cook v. AVI Casino Enterprises, Inc.*, 2008 WL 4890167 (9th Cir. 2008), the Ninth Circuit decided an interesting issue of diversity jurisdiction as applied to tribal corporations, holding that a corporation formed under tribal law is not a citizen of a State merely because the incorporation process occurred in that State.

In *Cook*, the plaintiff (a citizen of California) was catastrophically injured in a

motorcycle accident with a tribal casino employee who was driving drunk. He filed a dram shop suit in federal court against casino employees and the tribal corporation that operated the casino. Because the employees were Nevada citizens, the determinative jurisdictional question was the citizenship of the tribal corporation under Section 1332(c). The district court found diversity lacking, concluding that the tribal corporation was a citizen of both Nevada (the principal place of business of the casino) and California (the location of the tribal seat of government, where the Fort Mojave Indian Tribe had incorporated the casino).

In a split decision, the Ninth Circuit reversed. All judges agreed that, under established rules, a tribal corporation is a citizen of the State in which it has its principal place of business (here, Nevada). But as to the trickier, open issue of determining the tribal corporation's State of incorporation, the majority focused narrowly on the language of Section 1332(c), which treats a corporation as a citizen of the State "by which" it is incorporated. The majority concluded that while the tribal corporation may have been incorporated in California, it was not incorporated "by" California. Rather, it was incorporated by the Tribe, a separate sovereign entity. Thus, the majority concluded, the tribal corporation was a Nevada citizen but not a California citizen, and diversity existed. In so holding, the majority also rejected as *dicta* prior case law suggesting that a tribal corporation would be deemed a citizen of every State in which the Tribe's reservation extended (here, Nevada, California, and Arizona). (The majority affirmed the dismissal on the alternative ground that the tribal casino corporation and its employees were protected by sovereign immunity.)

**Personal Jurisdiction Lacking Based on One-Time Sale on eBay.** *In Boschetto v. Hansing*, 539 F.3d 1011, 1016-20 (9th Cir. 2008), the Ninth Circuit took up an issue that was, surprisingly, left open by federal appellate case law: Does the sale of an item via the eBay Internet auction site provide sufficient "minimum contacts" by itself to support personal jurisdiction to sue a non-resident seller in the buyer's forum state? In *Boschetto*, plaintiff was the winning bidder for a 1964 Ford Galaxie sold on eBay for \$34,106 by defendants, Wisconsin dealers. After the plaintiff arranged to have the car shipped from Wisconsin to California, however, on arrival it failed to meet the plaintiff's expectations or the advertised description. Plaintiff sued the sellers in federal court in California. The Ninth Circuit affirmed dismissal of the complaint for lack of personal jurisdiction. Applying the California long arm statute (co-extensive with due process), the Court held that "the lone transaction for the sale of one item" does not establish that the sellers purposefully availed themselves of the privilege of doing business in California. The Court emphasized that the money was sent to Wisconsin, that the plaintiff was responsible for picking up the car in Wisconsin, and that this was a "one-shot" deal. (It hinted that the outcome might be different if the plaintiff had alleged, for example, that the Wisconsin dealer was a "power seller" on eBay.) A concurring opinion underscored that "a defendant does not establish minimum contacts nationwide by listing an item for sale on eBay," rather, the seller must do "something more" such as "individually targeting residents of a particular state" to be haled into the courts of that state to answer suit.

**Seventh Circuit Opens Circuit Split by Ruling Validating Forum Selection Clause Mandating a Bench Trial.** The Seventh Circuit took on the issue of forum selection agreements that provide for a bench trial in its decision in *IFC Credit Corp. v. United Business & Industrial Federal Credit Union*, 512 F.3d 989, 993 (7th Cir. 2008). In the contract at issue, the parties had agreed to resolve any dispute by bench trial in the selected forum. The district court held this clause invalid, and allowed the case to be submitted to a jury, which ruled for the defendant. The Seventh Circuit reversed and remanded for further proceedings before a judge. In so holding, it consciously parted ways with other federal courts that have held that given the constitutional status of the Seventh Amendment jury trial right, agreements to a bench trial are enforceable “only if extra evidence of negotiation or consent supports that clause” The Seventh Circuit criticized this reasoning as fallacious. It observed: “Agreement to a bench trial cannot logically be treated less favorably than agreement to confess judgment, or arbitrate, or litigate in a forum that will not use a jury,” all of which are treated as valid contractual provisions. The Court also noted its general view that the market will cure such problems, since “if buyers prefer juries, then an agreement waiving a jury comes with a lower price to compensate buyers for the loss.” (Given the potential for creating an inter-Circuit conflict, the opinion was circulated to the full Seventh Circuit, but there were no votes for *en banc* hearing).

**District Courts May Vacate Other District Courts’ Judgments Under Rule 60(b) if “Extraordinary Circumstances” are Present, Third Circuit Rules.** In reliance on Rule 60(b)(6), one federal district

court vacated a default judgment entered by another federal district court. On appeal in *Budget Blinds, Inc. v. White*, 536 F.3d 244, 246, 251-53 (3rd Cir. 2008), the Third Circuit reversed but left open the possibility that such action might be permissible in another case. Finding no bar in the rules to allowing one federal district court to vacate another federal district court’s judgment, the Court declined to establish a “categorical rule” that such a power does not exist. Instead, it emphasized that this power is to be exercised sparingly, only when “extraordinary circumstances” are present (circumstances not present in the case before the court). In so holding, the Third Circuit acknowledged that its ruling is in tension with other federal appellate decisions.

**Federal District Court Consumer Debt Decision Finds Supplemental Jurisdiction Over Permissive Counterclaims.** The decision in *Witt v. Experian*, 2008 WL 2489132 (E.D. Ca. 2008), reflects an interesting twist on the relationship between the test for compulsory counterclaims and supplemental jurisdiction – and the persistent procedural problem of debt counterclaims in consumer protection actions. The court reached a common sense balance, reading the supplemental jurisdiction statute as broader than the compulsory counterclaim rule, but using its discretionary power not to hear the debt counterclaim.

In *Witt*, the plaintiff alleged that an aged debt he owed was wrongfully included in his credit report, in violation of the federal Fair Credit Reporting Act. The defendant counterclaimed under state law for breach of contract to collect the underlying debt. Because diversity was lacking, the debt counterclaim could continue in federal court only if supported by supplemental jurisdiction. Traditionally, courts have

collapsed the question whether a counterclaim is compulsory with the test for whether supplemental jurisdiction exists, treating the characterization of the counterclaim as compulsory or permissive as determinative of the jurisdictional question as well. In *Witt*, however, the court found that the debt claim did not “arise out of the transaction or occurrence” alleged in the unfair credit reporting claim under Rule 13(a) (and thus was not a compulsory counterclaim but a permissive counterclaim requiring its own jurisdictional basis). Yet the court went on to conclude that the debt counterclaim was nonetheless part of the same “case or controversy” as the unfair credit reporting claim for purposes of supplemental jurisdiction under Section 1367(a).

Having found supplemental jurisdiction over the debt counterclaim, the court neatly exercised its discretion under Section 1367(c) not to exercise that jurisdiction on policy grounds. The court concluded that allowing such debt counterclaims to proceed would have a “chilling” effect in deterring suits to correct credit reporting errors, a strong federal policy. (The case clearly undermines the traditional practice of asking whether the debt counterclaim is compulsory or permissive as a proxy for jurisdiction).

**Tribal Court Considers Whether to Strike Defense in Debt Collection Action.**

Also reflecting the persistent procedural tensions between debt collection claims and consumer protection claims, the Mashantucket Pequot Tribal Court was called on to decide

the correct procedural approach to a defense in a debt collection action. The tribal court in *Mashantucket Pequot Gaming Enterprise v. Menebhi*, 2008 WL 4425909 (Mash. Pequot Tribal Ct., 2008), was asked to strike a defense alleging that the plaintiff’s attorneys or agents had violated the Fair Debt Collection Practices Act. Adopting the approach of the federal courts that motions to strike should not be used to decide substantial and disputed questions of law, the court denied the motion, directing instead that the defendant file an amended answer recasting the defense as a counterclaim and providing greater detail.

**Tribal Court Retains Jurisdiction Despite Mediation Clause.**

*In Mashantucket Pequot Tribal Nation v. Paul Steelman, Ltd.*, 2008 WL 961024, 9 (Mash. Pequot Tribal Ct., 2008), the Mashantucket Pequot Tribal Court issued a thoughtful decision on the novel argument that the tribal court lacks subject matter jurisdiction where the parties have agreed to mediation as a condition of filing suit and mediation has not been completed. Analogizing to extensive federal case authority favoring jurisdiction over matters referable to arbitration, the Court concluded that it retained jurisdiction over the dispute despite the mediation clause.

*Thanks to Tom Rowe, Beth Thornburg, Barbara Atwood, Allen Kamp, Steve Steinglass, and Chief Judge Thomas Weissmuller for their helpful leads.*

## SELECTED STATUTES OF INTEREST TO PROCEDURALISTS

*Patrick Woolley*  
*University of Texas School of Law*

On September 19, 2008, the President signed a bill amending the Federal Rules of Evidence to add **Federal Rule of Evidence 502**. Rule 502 provides guidelines for determining whether and to what extent a disclosure of (1) a communication protected by the attorney-client privilege or (2) information protected by the work-product doctrine results in a waiver. The Rule provides that inadvertent disclosures shall not be deemed to waive the privilege or protection, provided that the holder of the privilege or protection took reasonable steps to prevent disclosure *and* the holder promptly took reasonable steps to rectify any inadvertent disclosure. The Rule further provides that the scope of an intentional waiver is limited to the subject matter of the disclosed communication or information and then only to the extent that the disclosed and undisclosed communications or information “ought in fairness be considered together.” These standards govern the effect of disclosures in federal proceedings in later federal *or* state proceedings. The Rule also governs the effect in federal proceedings of disclosures in state proceedings. Specifically, the Rule provides that in the absence of a state-court order regarding waiver, the standards discussed above or state law (if state law is more protective) determine the effect of a disclosure.

On May 1, 2008, **New York** Governor David Patterson signed the “**Libel Terrorism Protection Act**.” The Act grants New York

state courts territorial jurisdiction “over any person who obtains a judgment in a defamation proceeding outside the United States against any person who is a resident of New York or is a person or entity amenable to jurisdiction in New York who has assets in New York or may have to take actions in New York to comply with the judgment.” Jurisdiction is granted for the purpose of rendering a declaratory judgment with respect to liability for the libel judgment and/or for the purpose of determining whether the Libel Terrorism Protection Act permits the New York courts to refuse to recognize the judgment. The Act provides that the New York courts “need not” recognize a defamation judgment obtained outside the United States unless the court that rendered the judgment “provided at least as much protection for freedom of speech and press in that case as would be provided by both the United States and New York constitutions.”

The Act was spurred by events that followed a libel judgment obtained in Great Britain by Khalid bin Mahfouz against Rachel Ehrenfeld, a New York writer. Ms. Ehrenfeld had published a book alleging that Mr. bin Mahfouz was a financier of Al Qaeda. After losing the libel suit in Great Britain, Ms. Ehrenfeld filed suit in New York federal court seeking a declaration that the British judgment was unenforceable under New York law. (British law is much less protective of libel defendants than American law.) The Second Circuit certified the jurisdictional question to the New York Court of Appeals which held that the New York long-arm statute did not provide a basis for jurisdiction over Mr. Mahfouz. Similar legislation was introduced in the United States Senate in May (as the “Free Speech Protection Act of 2008”), but the bill has not been enacted into law.

## **DEVELOPMENTS IN THE FEDERAL RULES OF CIVIL PROCEDURE**

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The last several years have seen a flurry of rulemaking activity. In 2006 it was the E-Discovery amendments. In 2007 it was the arrival of the Style Project. Both of those projects, of course, began years earlier and commanded considerable attention not just from the members of the Advisory Committee but from all who participate in the rulemaking process, including the people who provide invaluable comments on the proposed amendments as they work their way through the rulemaking process.

And now, a break at last! No Civil Rules amendments are slated to take effect this year.

The break is deliberate. The rulemaking process ordinarily takes a minimum of three years. That means that any new rules for 2008 would have had to have been initiated in 2005. In 2005, the Advisory Committee was putting the finishing touches on the E-Discovery package and was neck-deep in the Style Project. It was not the time to begin any ambitious new projects in earnest. There was also a sense that the public would need a break. The Advisory Committee is well aware that rules amendments carry both costs and benefits, and one of those costs is the need for the practicing bar to keep up with the changes to the rules. After having feasted on the E-Discovery amendments in 2006, and then having been forced back to the table for “seconds” with the Style Project changes in 2007, the Advisory Committee figured that the practicing bar might not have the stomach for “thirds” in 2008.

But 2005 turns out to have been an important year for new projects nonetheless.

One of the agenda items for the Fall 2005 Advisory Committee meeting was to step back and reflect on what the Advisory Committee’s next projects should be. The list of ideas included a handful of relatively discrete projects including possible amendments to Rule 15 and the possibility of creating a new rule to address so-called “indicative rulings.” The list of ideas also included some more ambitious projects including an examination of Rule 56. Those of you who keep reading will find that those exploratory discussions later yielded concrete projects that currently are working their way through the rules amendment pipeline.

This update first looks at the amendments scheduled to take effect on December 1, 2009. It then turns to several proposals slated for the 2010 cycle that have been published for comment. I will conclude with a few words about what might be coming after that. Before turning to these items, though, I want to remind readers that detailed information regarding these rulemaking projects is available at the Federal Rulemaking website accessible via [www.uscourts.gov](http://www.uscourts.gov).

### **A. Amendments Scheduled to be Effective December 1, 2008**

None.

### **B. Amendments Scheduled to be Effective December 1, 2009**

The following amendments have been approved by the United States Judicial Conference and have been forwarded to the United States Supreme Court. The Supreme Court has until May 1, 2009 to transmit them to Congress. Assuming that occurs, these amendments will take effect on December 1, 2009 absent contrary action by Congress.

## **1. Time-Computation Amendments**

The Standing Committee (which oversees all of the five Advisory Committees) has orchestrated a comprehensive project to simplify the time computation methods in each set of rules and make them consistent across the rules. The principal innovation is the adoption of a “days are days” approach to computing all time periods. Thus, regardless of the length of the time period in question, all days – including Saturdays, Sundays, and legal holidays – will count under Rule 6(a). (Time periods will still be extended when they would end on a Saturday, Sunday, or legal holiday.) The new Rule 6(a) will have other changes as well. For example, new Rule 6(a) will define when the “last day” of a period expires, providing a default answer to a question that has become increasingly important in this era of 24-hour electronic filing.

Recognizing that the “days are days” approach would affect the sufficiency of some existing time periods – especially those 10 days or less – each Advisory Committee was charged with reviewing all of the time periods in their respective sets of rules. As part of that review, a number of time periods in the Civil Rules are proposed to be lengthened. In addition, the Civil Rules Advisory Committee elected to extend the deadline for post-judgment motions under Rules 50, 52, and 59 from 10 days to 28 days to allow a more reasonable period for parties to properly prepare such motions. Finally, the Civil Rules Advisory Committee elected to further simplify time-counting by opting to use 7, 14, and 21-day deadlines so that applicable deadlines would usually fall on a weekday.

## **2. Rule 13(f)**

Rule 13(f) will be deleted, leaving to Rule 15 the subject of amendments to add counterclaims. Courts already view these provisions as coextensive.

## **3. Rule 15**

Rule 15 will be amended to redefine the circumstances in which a pleading may be amended without leave of court. Under the proposal, a pleading to which a responsive pleading is required may be amended once as a matter of course within 21 days after the earlier of (1) service of a responsive pleading, or (2) service of a motion under Rule 12(b), (e), or (f).

This proposal will make two principal changes to current practice. First, under current Rule 15, the filing of a Rule 12(b) motion does not cut off the right to amend once as a matter of course. Under the proposal, three of the Rule 12(b) motions would trigger a 21-day period for making amendments as a matter of course. Afterwards, leave would be required. The new rule will avoid the situation in which the defendant and the court expend significant resources on a Rule 12(b)(6) motion only to have the plaintiff file an amended pleading as of right that would have obviated the need for that effort had it been filed earlier. Plaintiffs can still seek to amend in these circumstances, but leave will be required. As always, the court must grant leave freely where justice so requires.

Second, under current Rule 15, the filing of an answer completely cuts off the right to amend once as a matter of course. Under the proposal, the plaintiff would have a 21-day period to consider whether to amend as of right.

Taken together, the basic idea of these changes is to give the plaintiff one amendment as of right within 21 days after the defendant first responds to the merit or sufficiency of the complaint, whether that response is in the form of an answer or a Rule 12 pre-answer motion.

#### **4. Rule 48**

Rule 48 will be amended to expressly allow polling of the civil jury.

#### **5. Rule 62.1**

Proposed new Rule 62.1 would address the procedure for obtaining postjudgment relief from the trial court during the pendency of an appeal. It would adopt well-recognized practices for securing a limited remand for trial-court action, but would also explicitly authorize the trial court to defer or deny such relief despite the pendency of the appeal. Proposed new Rule 62.1 is integrated with a parallel proposed new Appellate Rule 12.1.

#### **6. Rule 81**

Rule 81 will be amended to clarify that, for purposes of rules that incorporate state law, the District of Columbia and any commonwealth of the United States qualify as states “where appropriate.”

### **C. Proposed Amendments Published for Comment**

The following proposed amendments have been published for comment. The Advisory Committee welcomes your thoughts – either in writing or in person at one of the scheduled hearings – on these proposals.

Persons who wish to submit comments on

these published proposals may do so by writing to the Rules Committee Support Office (see the website for address) or by sending comments electronically to [Rules\\_Comments@ao.uscourts.gov](mailto:Rules_Comments@ao.uscourts.gov).

Comments are due by February 17, 2009.

The Advisory Committee has already held one public hearing on these proposed amendments. Further public hearings are scheduled as follows: (1) San Antonio – Wednesday, January 14, 2009; and (2) San Francisco – Monday, February 2, 2009. Persons who wish to testify at either of these public hearings may do so by submitting a request to appear to the Secretary to the Standing Committee no later than 30 days before the hearing date.

#### **1. Expert Disclosures and Discovery**

The Advisory Committee has proposed amendments to Rule 26(a)(2) and Rule 26(b)(4) governing expert disclosures and discovery.

The first proposal would add to Rule 26(a)(2) a requirement that lawyers provide a summary of the facts and opinions of any trial witness who qualifies as an expert but who is not required to supply a formal report. The classic example is a treating physician. There appears to be little controversy over this proposal.

The second set of interrelated proposals would – through changes to Rule 26(a)(2) and Rule 26(b)(4) – place limits on testifying-expert discovery by extending work-product protection to draft expert reports and to many attorney-expert communications. These proposals would still allow inquiry into attorney-expert communications in three areas: (1) compensation; (2) identifying facts or data provided by the attorney and

considered by the expert; and (3) identifying assumptions provided by the attorney and relied on by the expert in forming the opinions.

These amendments are proposed not as a matter of high theory but in response to the lessons of experience. The current provisions relating to expert discovery were added in 1993. The goal then was to create a more efficient and less costly process for parties to learn about the opinions of adverse expert witnesses. That goal has not been fulfilled. Sophisticated parties opt out of the expert discovery scheme, citing its cost and intrusiveness. When they stay in, lawyers and experts play games to avoid disclosure, such as by not preparing drafts. Qualified experts refuse to participate, unwilling to operate under such conditions. The cost of expert discovery has increased as lawyers attempt to mine these attorney-expert communications, usually with little success. And clients – at least the ones who can afford it – find themselves hiring multiple experts, one to testify and one to consult confidentially.

There has been some opposition to the proposal. The principal objection is that full discovery is the only way to ensure that experts actually form their own opinions. Critics worry that, absent full discovery of attorney-expert communications, many experts will simply become highly-paid mouthpieces parroting the views of the lawyers who employ them.

The proposed amendments reflect the Advisory Committee's view that the costs of the current system exceed the benefits. In reality, the proposed protection of attorney-expert communications will not result in a large deprivation of information because the lawyers are being careful under the current system not to create such discoverable information in the first place. Moreover, the

ultimate question is whether the expert's opinion is valid, not whether the employing lawyer aided in its formation. The areas where inquiry remains available should provide an ample basis for lawyers to determine the extent to which the expert's opinion might have been compromised by compensation or by facts, data, or assumptions supplied by the employing lawyer.

## **2. Summary Judgment Procedures**

The Advisory Committee has proposed amendments to Rule 56. These changes would: (1) implement a nationally-uniform point-counterpoint process for parties to state and respond to the facts asserted to be undisputed; (2) clarify the options available when a party fails to properly respond to a summary judgment motion; (3) clarify when a court may grant summary judgment sua sponte; and (4) clarify the court's power to grant partial summary judgment on specific claims or issues in the case. The amendments under consideration would not alter the existing standards or burdens for summary judgment as currently set forth in rule text and as explicated by the 1986 trio of *Celotex*, *Anderson*, and *Matsushita*.

These proposed amendments have generated both considerable support and considerable controversy. On the support side, many view them as adding valuable structure and clarity to what is, at least nationally, a rather scattershot system.

Opponents of the proposal express several concerns. Some assert that a nationally-uniform mechanism is not needed, and would prefer that summary judgment practices continue to be defined by local needs and culture. Others seem to accept that a

nationally-uniform mechanism would be beneficial, but disagree with one or more aspects of the proposal. For example, multiple witnesses at the November hearing expressed their concern that the point-counterpoint structure will skew outcomes against civil rights and employment plaintiffs who rely on narratives to set forth the inferential evidence that often underlies their claims.

#### **D. Subjects Under Consideration by the Advisory Committee**

One of the missions of the Civil Rules Advisory Committee, of course, is to assist the Judicial Conference in its statutory obligation to “carry on a continuous study of the operation and effect of the general rules of practice and procedure.” (28 U.S.C. § 331) In less lofty terms, the Advisory Committee keeps tabs on the rules to see how things are developing.

It should come as little surprise that the Advisory Committee continues to keep an eye on discovery. In some sense, the Advisory Committee has been studying discovery on an ongoing basis for thirty years. That’s likely to continue, as discovery continues to be one of the major pressure points in modern practice. The Advisory Committee continues to follow both “regular” discovery and E-Discovery, though no specific projects are planned at this time. The Advisory Committee has initiated a project to explore non-party discovery under Rule 45.

Aggregate litigation is another topic that falls into the “watch” category at this time. The Federal Judicial Center is well into its study of the effects of CAFA. The American Law Institute’s Principles of Aggregate Litigation Project seems to be nearing completion. These and other developments

will help the Advisory Committee to determine what, if any, further changes might be warranted to Rule 23.

Finally, there is this little case called *Twombly*. Even before *Twombly*, the Advisory Committee was considering various pleading related issues. (Readers may recall a flirtation with altering motions for a more definite statement under Rule 12(e).) In the wake of *Twombly*, the Advisory Committee has – like all of us – been carefully watching the developments in the lower courts to see just what that decision will mean for pleading standards in federal court. And now we turn our attention back to the Supreme Court, as we find ourselves *Waiting for Iqbal*.

#### **BOOKS OF INTEREST**

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A number of new books have been published that may be of interest to the proceduralist—including a few not directly addressing civil procedure per se.

For a broad look at the principles and law underlying class action, mass-tort, and complex litigation, the American Law Institute has published its first Tentative Draft on the PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (April 7, 2008). The Draft examines basic problems concomitant to aggregate litigation, with individual chapters focusing on issues particular to adjudication and to settlement.

On a related topic, in *MASS TORTS IN A WORLD OF SETTLEMENT* (Chicago University Press 2007), Richard A. Nagareda addresses both procedural and substantive problems surrounding the resolution of mass tort litigation. Nagareda includes an insightful

discussion of *Amchem* and *Ortiz*—casting the problem of mass tort class settlement as a type of administrative proceeding with the lawyer who drafts a settlement as a self-appointed government regulator. Nagareda also examines post-*Amchem* alternatives at resolving mass-tort cases, including resolution through legislation, contract, and manipulation of opt-out provisions. Ultimately, Nagareda challenges the basic premises of *Amchem*, and argues that the inherent conflict of interest between present and future claimants could be leveraged to deter self-dealing by lawyers and promote a fairer system of mass-tort administration.

In *STATE PROCEDURE AND UNION RIGHTS: A COMPARISON OF THE EUROPEAN UNION AND THE UNITED STATES* (Uppsala, Iustus Forlag, 2007), John Lindholm compares the *Erie* doctrine as established in the United States (in its relatively unguided way) with similar problems that have arisen in cases brought under substantive EU law in a court of a particular nation. Lindholm uses this comparison between American and European doctrines to formulate an explanation of current European law and to recommend improvements to the current theory.

For an interesting discussion of preemption, federalism, and allocation of power among the state and federal governments, Richard A. Epstein and Michael S. Greve have published a collection of essays in *FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS* (Richard A. Epstein and Michael S. Greve, eds., 2007). The editors provide a helpful introduction and an engaging conclusion that pulls together many of the best insights from the authors while elaborating the editors' own theory for approaching preemption problems.

Another interesting piece—certainly relevant in discussing FRCP 1—is found in

*TRIAL COURTS AS ORGANIZATIONS* (Temple University Press 2008), by Brian J. Ostrom, Charles W. Ostrom Jr., Roger A. Hanson, and Matthew Kleiman. The authors examine trial courts using established methods from organizational culture literature to explore the effect that local court culture has on adjudication, including timeliness and perceptions of court access, fairness, and managerial effectiveness. Examining data gleaned from twelve courts in three states, the authors identify four court culture types—each of which has pros and cons. The authors identify preferences for an ideal court culture, which would require an amalgamation of the four types. Although court culture may be harder to change than rules of procedure, the authors show that court culture can account for significant differences in timing, processing, and access in cases (their data suggests that one culture was five times slower than another in resolving the same number of similarly-complex cases). The research dealt with courts handling criminal cases, but, as noted in the conclusion, would seem to be equally applicable for civil dockets.

In *SCIENTIFIC JURY SELECTION* (American Psychological Association 2008), Joel D. Lieberman and Bruce D. Sales examine various techniques used by jury consultants and evaluate their effectiveness according to social science studies. They contend that personality and attitudinal characteristics are stronger indicators of verdict preference than are demographic characteristics. They also investigate the effectiveness of voir dire and recommend methods that could be employed by judges and attorneys to make voir dire more useful for revealing juror biases and attitudes. Lieberman and Sales stress the need for new approaches to jury selection and note the paucity of studies demonstrating the

effectiveness of current “scientific” techniques.

Gerald N. Rosenberg has published a second edition of *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (University of Chicago Press 2008). As in the first edition, Rosenberg argues that litigation is not itself a successful avenue for effecting liberal social reform. Rather, litigation has only been a successful method when it has coincided with major political movements. The new edition includes a new section examining same-sex marriage litigation and the political response to court-ordered change on that issue (written pre-Proposition 8). In an intriguing epilogue, Rosenberg concludes that “[p]olitical organizing, political mobilization, and voter registration may not be glamorous . . . but they are the best if not the only hope to produce change.”

In a different vein, Robert Benson, in *THE INTERPRETATION GAME: HOW JUDGES AND LAWYERS MAKE THE LAW* (Carolina Academic Press 2008), argues that law is not really a matter of objective interpretation but (for both liberal and conservative judges) is subjective creation. Thus there is not a rule of law, but only a rule by people, who use precedent, texts, originalism, activism, and other doctrines as various paints on their pallets to create law consistent with their own subjective values, but still acceptable to society.

On perhaps a more practical level, there are several new books that may be helpful resources to professors or students in a civil procedure course. In *FEDERAL RULES OF CIVIL PROCEDURE: RULES AND COMMENTARY* (Thompson/Wets 2008), Steven S. Gensler presents an easy-to-use commentary on each rule with helpful explanations and case citations. Suzanna Sherry and Jay Tidmarsh, in *CIVIL PROCEDURE: THE ESSENTIALS* (Aspen

2007), provide an overarching view of the major principles and themes underlying civil procedure. The *ESSENTIALS* book is divided into digestible chapters that can be a helpful aid in expounding overarching principles that should be brought to the attention of students throughout a civil procedure course. On the other end of the spectrum, in *MASTERING CIVIL PROCEDURE* (Carolina Academic Press 2008), David Charles Hricik provides a detailed examination of rules and concepts with numerous charts that get into the nitty-gritty of rule application. In *JUDICIAL JURISDICTION* (Praeger Publishers 2007), Patrick Baude provides a concise commentary on Article III, Section 2 of the Constitution, in which he reviews the history of its enactment and analyzes the major case law interpreting it. He also provides a useful summary of major theoretical debates regarding the scope of federal judicial power.

Additionally, Jeffrey W. Stempel, in *LITIGATION ROAD: THE STORY OF CAMPBELL V. STATE FARM* (Thompson/West 2008), leads the reader through the *Campbell* case to illustrate procedure in action in a controversy that required two settlements, three trials, three appeals to a state supreme court and an appeal to the U.S. Supreme Court. Additionally, although not keyed to procedure or the study of law, in *THE CHALLENGE: HAMDAN V. RUMSFELD AND THE FIGHT OVER PRESIDENTIAL POWER* (Farrar Straus and Giroux 2008), journalist Jonathan Mahler relates the factual story behind the *Hamdan* lawsuit based on hundreds of hours of interviews he conducted with Charles Swift and Neal K. Katyal between 2004 and 2007.

Finally, for teachers of comparative state or California procedure, a number of new items and editions were published this year. David I. Levine, William R. Slomanson & Rochelle J. Shapell published a new edition of

their casebook, CALIFORNIA CIVIL PROCEDURE (Thompson/West 3d ed. 2008), which is designed for an upper division state procedure course. Similarly, Mary Kay Kane and David I. Levine published CIVIL PROCEDURE IN CALIFORNIA (Thompson/West 2008 ed.), a supplement that can be used to teach California procedure in conjunction with any civil procedure casebook. Walter W. Heiser has published a new edition of his similar supplement, CALIFORNIA CIVIL PROCEDURE HANDBOOK: RULES, SELECTED STATUTES AND CASES, AND COMPARATIVE ANALYSIS (Lexis 2008 ed.). Finally, a couple of new student resources specific to California procedure are available, namely: William R. Slomanson, CALIFORNIA CIVIL PROCEDURE IN A NUTSHELL (Thompson/West 3d ed. 2008) and David I. Levine & Rochelle J. Shapell, CALIFORNIA CIVIL PROCEDURE, QUICK REVIEW (Thompson/West 2008).

#### **New Editions of Note:**

- Erwin Chemerinsky, FEDERAL JURISDICTION (5<sup>th</sup> ed. 2008).
- Kevin M. Clermont, PRINCIPLES OF CIVIL PROCEDURE (2d ed. 2009).
- John T. Cross, Leslie W. Abramson, and Ellen E. Deason, CIVIL PROCEDURE: CASES, PROBLEMS AND EXERCISES (2d ed. 2008).
- David Crump, William V. Dorsaneo III, Rex R. Perschbacher & Debra Lyn Bassett, CASES AND MATERIALS ON CIVIL PROCEDURE (5<sup>th</sup> ed. 2008).
- Richard D. Freer & Wendy Collins Perdue, CIVIL PROCEDURE: CASES, MATERIALS, AND QUESTIONS (5<sup>th</sup> ed. 2008).
- Lewis A. Grossman & Robert G. Vaughn, A CIVIL ACTION: A

DOCUMENTARY COMPANION (4<sup>th</sup> ed. 2008).

- Samuel Issacharoff, CIVIL PROCEDURE (2d ed. 2009).
- Gregory P. Joseph, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE (4<sup>th</sup> ed. 2008).
- Stephen N. Subrin, Martha L. Minow, Mark S. Brodin, & Thomas O. Main, CIVIL PROCEDURE: DOCTRINE, PRACTICE AND CONTEXT (3d ed. 2008).
- Stephen C. Yeazell, CIVIL PROCEDURE (7<sup>th</sup> ed. 2008).

### **UPCOMING CONFERENCES/SYMPOSIA**

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February 7-11, 2009, in New Orleans, the Winter Convention of the American Association for Justice has a number of litigation-related panels.

<http://www.justicewinterconvention.org/>

February 28, 2009, in Covington, KY (No. Kentucky Univ. Chase Law), a symposium entitled E-Discovery: Navigating the Changing Ethical and Practical Expectations.

<http://www.kentuckylawblog.com/2008/08/law-schools-cha.html>

April 16, 2009, in New York City (N.Y.U. Law), a day-long conference in tribute to the career of Professor Andreas Lowenfeld.

<http://www.ssrn.com/update/lsn/lsnann/ann230.html>

April 17-18, 2009, in New York City (N.Y.U. Law), the bi-annual conference of the Journal of Private International Law.

<http://www.ssrn.com/update/Isn/Isnann/ann230.html>

June 3-5, 2009, in Toronto (Osgoode Hall), a meeting of the International Association of Procedural Law. [www.iapl2009.org](http://www.iapl2009.org)

Additionally, in the upcoming year the Penn State Law Review will have a symposium issue dedicated to the topic of “Building the Civilization of Arbitration.” Contact Professor Thomas Carbonneau, [tec10@dsl.psu.edu](mailto:tec10@dsl.psu.edu)