1997 FEDERAL CIVIL PRACTICE UPDATE FOR SEVENTH CIRCUIT PRACTITIONERS

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Federal practitioners in the Seventh Circuit faced another year of procedural developments in civil practice. This Article outlines key developments. For ease of future reference, topics are listed in the order in which they often arise in litigation.

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I. SUBJECT-MATTER JURISDICTION

A. Federal Jurisdiction

In *Blackburn v. Sundstrand Corp.*,[1] plaintiffs were injured in an auto accident and settled with the driver. The plaintiffs' employer, through its welfare benefit plan (covered by ERISA), had paid $25,000 toward the cost of plaintiffs' medical care, and thus had a subrogation right against the recovery. Plaintiffs then filed a state-court action asking that a portion of their fees and expenses be charged against the employer's subrogation right. The employer removed the action under 28 U.S.C. § 1441(b),[2] which allows removal of federal-question cases. The district court heard the case and entered judgment against the plaintiffs.[3]

On appeal, the Seventh Circuit determined that the district court lacked subject-matter jurisdiction.[4] Judge Easterbrook explained, "[n]ot even the most

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1. 115 F.3d 493 (7th Cir.), *cert. denied*, 118 S. Ct. 562 (1997).
2. 28 U.S.C. § 1441(b) (1994).
3. Blackburn v. Becker, 933 F. Supp. 724 (N.D. Ill. 1996).
4. *Blackburn*, 115 F.3d at 494.

expansive reading of ERISA covers motor vehicle collisions, just because part of the recovery may inure to the benefit of a plan."[5] Federal preemption, the court explained, does not create federal jurisdiction.[6] (The only exception is so-called "complete preemption," which arises when plaintiff's claim does depend on federal law, but plaintiff attempts to craft a state claim through artful pleading.)[7]

B. Amount-In-Controversy

Judge Miller's decision in *TLS Industrial v. King Lift*,[8] shows the ongoing problems with determining the amount in controversy in removed diversity actions where there is no specific dollar prayer. In *King Lift*, plaintiff agreed to purchase twenty trucks from the seller-defendant. Plaintiff initially ordered four trucks, but claimed they were not timely delivered and were defective. Plaintiff then repudiated the contract and sued the seller for breach of contract in state court; no specific dollar prayer was stated in the complaint.

The seller removed the action asserting diversity jurisdiction and an amount-in-controversy exceeding $75,000. The buyer moved to remand, and submitted a post-removal affidavit asserting the amount-in-controversy was only $60,000 (the costs of the four trucks). The seller asserted that the amount in controversy could be more than $200,000 because up to twenty trucks were to be purchased.

Judge Miller followed Seventh Circuit precedent that post-removal affidavits by plaintiff do not reduce the amount in controversy, which is determined at the time of removal.[9] However, Judge Miller remanded the action to state court, reasoning that the seller had not established that the lost profits on the twenty trucks would exceed $15,000 (there being no dispute that at least $60,000 was otherwise at issue).

King Lift shows that defendants seeking removal face challenges in establishing the requisite amount-in-controversy. Federal courts appear to be taking a hard line on this subject, and because specific dollar amounts cannot be requested in Indiana personal-injury actions under Indiana Trial Rule 8(A)(2), defendants will face this issue with regularity.

C. Limited Jurisdiction

In *Whitney v. Riccordino Realty, Inc.*,[10] a *pro se* plaintiff tried (a third time) to bring a landlord-tenant action in federal court. In the course of affirming the district court's *sua sponte* dismissal, the Seventh Circuit reiterated the district courts' duty to police its limited jurisdiction and raise jurisdiction even when the

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5. *Id.*
6. *Id.* at 495.
7. *Id.*
8. No. 3:97-CV-294RM (S.D. Ind. July 17, 1997).
9. Chase v. Shop 'N Serve Warehouse Foods, Inc., 110 F.3d 424, 429 (7th Cir. 1997).
10. 106 F.3d 404 (7th Cir. 1997).

parties do not.[11] For those challenging subject-matter jurisdiction, the opinion has excellent language and a litany of useful Seventh Circuit cites.

II. RULES CHANGES

A. Federal Rules Changes

Several rules changes took effect December 1, 1997. Highlights include:

Federal Rules of Civil Procedure 74,[12] 75,[13] 76[14] will be deleted. Each of these rules addresses appeals from Magistrate Judges where, under pre-1996 practice, parties could consent to a Magistrate Judge with a right of appeal to the District Judge (rather than to the court of appeals). As part of the Federal Courts Improvement Act of 1996,[15] the former provisions of 28 U.S.C. § 636(c)(4) and (5)[16] that allowed this alternate appeal route were repealed. The current repeal of Rules 74, 75, and 76 simply puts the rules in compliance with the statute to avoid confusion.

Federal Rule of Evidence 407[17] will be amended as follows: When, after an *injury or harm allegedly caused by an* event, measures are taken ~~which~~ *that*, if taken previously, would have made the ~~event~~ *injury or harm* less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, ~~or~~ culpable conduct, *a defect in a product, a defect in a product's design, or a need for a warning or instruction* ~~in connection with the event~~.[18]

This amendment makes two changes. First, the addition of "an injury or harm allegedly caused by"[19] is meant to clarify that the rule applies only to changes made after the occurrence that produced the damages at issue. Pre-accident remedial measures are not excluded pursuant to Rule 407.

Second, the amendment to the end of the Rule confirms that subsequent remedial measures may not be used to prove a defect in a product or its design, or that a warning or instruction was necessary. Most circuits had so ruled even prior to the amendment.[20]

Federal Rule of Evidence 803(24),[21] the hearsay "catch-all" provision, is being relocated to new Rule 807.[22] No change will occur to the language of former Rule 803(24).

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11. *Id.*
12. FED. R. CIV. P. 74 (repealed 1997).
13. FED. R. CIV. P. 75 (repealed 1997).
14. FED. R. CIV. P. 76 (repealed 1997).
15. 18 U.S.C. § 3401(b) (Supp. I 1996); 28 U.S.C. § 636(a) (Supp. I 1996).
16. 28 U.S.C. § 636(c)(4)(5) (1994) (repealed 1996).
17. FED. R. EVID. 407.
18. FED. R. EVID. 407 (amended 1997).
19. *Id.*
20. *See, e.g.*, Flaminio v. Honda Motor Co., 733 F.2d 463, 469 (7th Cir. 1984).
21. FED. R. EVID. 803(24) (amended 1997).
22. FED. R. EVID. 807 (amended 1997).

B. Local Rule 6.1 of the Southern District of Indiana

For several years, Local Rule 6.1[23] has allowed parties to document an initial extension by a simple filing with the court rather than a motion and order. The Rule makes sense: there is no reason to burden parties and the court with an unnecessary motion when a simple letter of agreement to the court allows the clerk to monitor the case deadlines. However, the Rule has undergone several recent changes.

First, the Rule formerly required a "letter" to be filed with the clerk. This caused some problems in that the letter did not have a formal title—thus leaving the clerk to create one for docketing purposes (for example, Letter of Extension to Answer). More significantly, Rule 6.1 letters often did not include the parties or the cause number, thus forcing the clerk to determine in which case the letter should be filed.

By amendment, effective April 1, 1997, such agreement must now be memorialized by a "notice" to be filed with the court.[24] Such a notice, of course, will have a caption and cause number making processing easier for the clerk.

Second, the prior Rule stated that when opposing counsel does not consent to the extension, the clerk should not accept for filing any letter (now notice) that does not contain a recitation of the effort to obtain agreement. This "no-filing" provision of Local Rule 6.1 has been deleted to comply with Federal Rules of Civil Procedure 5(e), which prohibits the clerk from refusing to accept any filing because it is not in compliance with federal or local rules.[25] (The court can thereafter strike such a filing, but the clerk must accept defective filings).

C. Pilot Case Management Program Takes Effect In Southern District

Several judges of the Southern District of Indiana implemented a Pilot Case Management Program. Specifically, all new cases managed by Magistrate Judge Shields—which includes cases assigned to Chief Judge Barker and Judge McKinney—are subject to the new Pilot Program. The Pilot Program took effect September 1, 1997, and applies to all civil actions managed by Judge Shields that were filed through counsel on or after September 1. The highlights of the Pilot Program are as follows:

1. Logistics Of The New Plan.—Unlike existing procedures in which the sample case management plan and instructions are issued by the court after defendant appears, under the Pilot Program, the sample case management plan and instructions are given to the *plaintiff's counsel* at time of filing**,** and plaintiff's counsel then serves those documents on defendant with the summons and complaint. The case management plan is then due within 60 days of filing.

2. Differential Case Management Tracks.—A key component of the Pilot Program is the implementation of differential case management tracks with

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23. S.D. IND. L.R. 6.1.

24. S.D. IND. L.R. 6.1 (amended 1997).

25. *See* FED. R. CIV. P. 5(e).

different schedules. Specifically, the Pilot Program allows for three different schedules: Track One (twelve months from filing to trial); Track Two (eighteen months from filing to trial); and Track Three (twenty-four months from filing to trial). Under the Pilot Program, all cases are presumptively Track One cases. To vary from Track One, the parties must set forth in writing in the case management plan why another Track should be used.

3. Jury Instructions With Plan.—Another new component of the Pilot Program is the requirement that parties attach proposed jury instructions on all claims and defenses. The purpose of this requirement is to require parties to know the elements and bases for their pleaded claims and defenses at the outset of the litigation.

As presently implemented, there is no discussion in the Pilot Program guidelines as to what occurs, if anything, if the instructions tendered with the case management plan vary from the instructions ultimately tendered prior to trial. However, the case management plan does require proposed jury instructions two weeks prior to trial, and it is this author's opinion that there probably will not be any preclusion or waiver ordered by these judges if there is a good faith effort in the case management plan to include appropriate jury instructions. Opposing counsel, however, are likely to raise such arguments, so care should be taken to include full and complete instructions with the case management plan.

4. Summary Judgment Procedure.—Perhaps the greatest change under the Pilot Program is in summary judgment practice. For cases under the Pilot Program, summary judgment packages (including motion, brief, appendix, opposition brief and materials, and reply) will be filed as a single package with the reply brief. These materials are not filed before that time, but are served on opposing counsel. This new filing procedure will make it easier for the court and clerk's office by reducing the number of filings.

All the summary judgment work must be done such that the entire package can be filed 120 days prior to trial. Under the Pilot Program guidelines, the motion for summary judgment and accompanying materials must be served on opposing counsel thirty-six days prior to the summary judgment deadline (that is, 156 days prior to trial).

Also, fifteen days prior to serving the summary judgment motion the parties must meet and then file a "Pre-Summary Judgment Statement" (thus making the Pre-Summary Judgment Statement due fifty-one days prior to the summary judgment deadline and 171 days prior to trial). The Pre-Summary Judgment Statement shall contain a joint statement of undisputed material facts and a statement from each party setting forth the disputed material facts, all with specific citations to record evidence.

The Pilot Program guidelines state in bold print that "[i]n no event will counsel's lack of cooperation in preparing the pre-summary judgment statement constitute cause to delay the service of the motion for summary judgment upon the opposing party." The guidelines add: "In the event that counsel is unable to secure the cooperation of opposing counsel in preparing the pre-summary judgment statement, a notice to the court setting forth the unsuccessful efforts that were made to prepare the joint statement shall be filed with the court on the

same day that the summary judgment motion is served on opposing counsel."

The Pre-Summary Judgment Statement and its timing (189 days into the case) will require parties with possible summary judgment motions to complete their investigation and discovery rapidly. As a practical matter, the Pre-Summary Judgment Statement will need to be prepared by the moving party (typically the defendant) and sent to the non-movant well in advance of the deadline for filing the Statement. At a minimum, ten to fifteen days' advance-notice probably should be given to opposing counsel so that opposing counsel cannot claim lack of time to participate in preparation of the Statement.

5. Requests For Production Served With Complaint.—To expedite the progress of cases, the Pilot Program requires plaintiff to serve its request for production of documents with the complaint. Although some counsel may not like this mandate, it is a common-sense way to get the case moving. At the time of drafting the complaint, there is no reason counsel cannot also draft initial document requests.

6. Bifurcated Discovery.—Another aspect of the Pilot Program is bifurcated discovery whereby liability discovery is to be completed prior to the summary judgment process, and all other discovery (e.g., damages) remains open until thirty days prior to trial. The guidelines further provide, "We emphasize that the court will not condone inattention to discovery which has the effect of benefitting the opponent of a motion for summary judgment." The guidelines then state, "In other words, a party should not lay back and wait for the proponent's road map to be set out in a summary judgment motion and then expect to do discovery to affect a detour."

7. Trial Continuances.—Finally, the Pilot Program requires parties, in addition to counsel, sign any motion for continuance of trial. The purpose of this requirement (which has been adopted by several other districts) is to ensure that clients do not lose their prompt trial setting without their consent.

III. JURY DEMANDS

In *Keystone Aviation v. Raytheon Aircraft*,[26] plaintiff sued alleging improper servicing of an aircraft. Plaintiff did not initially make a jury demand within the ten day post-pleadings limitation of Federal Rule of Civil Procedure 38(b),[27] but made an untimely jury demand sixty-seven days after the answer. Defendant moved to strike the demand, acknowledging the court's discretion but arguing that no good reason had been shown for the delay and that a jury trial would be more expensive and, given the technical issues, possibly problematic for a jury.

Chief Judge Barker granted the motion to strike, reasoning primarily that no reason existed for the delay in demanding a jury. Those seeking jury trials are thus advised to include that request in their complaint or answer to avoid inadvertently missing the Rule 38 deadline.

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26. IP96-1330 (S.D. Ind. Jan. 22, 1997).

27. FED. R. CIV. P. 38(b).

IV. FICTITIOUS PARTIES: "JOHN DOE" PARTIES

In *Doe v. Blue Cross & Blue Shield United*,[28] plaintiff filed his action under a fictitious name fearing that litigation might result in disclosure of his psychiatric records. Plaintiff initiated the lawsuit with an unopposed motion to proceed under the fictitious name, which the district court granted without comment.

In the course of addressing plaintiff's appeal on the merits, Chief Judge Posner noted the fictitious name filing.[29] Judge Posner observed that the "judge's action was entirely understandable given the absence of objection and the sensitivity of psychiatric records, but we would be remiss if we failed to point out that the privilege of suing or defending under a fictitious name should not be granted automatically even if the opposing party does not object."[30] He added, "[t]he use of fictitious names is disfavored, and the judge has an independent duty to determine whether exceptional circumstances justify such a departure from the normal method of proceeding in federal courts."[31] Indeed, as Judge Posner noted, Rule 10(a) provides that the complaint shall give the name of all parties.[32] This stems from the people's "right to know who is using their courts."[33]

Although there are exceptions when public records are sealed for good reasons (such as state secrets, trade secrets, informers, rape victims, etc.), it is not enough that the case involves a medical issue.[34] And, Judge Posner added, "[s]hould 'John Doe's' psychiatric records contain material that would be highly embarrassing to the average person yet somehow pertinent to this suit and so an appropriate part of the judicial record, the judge could require that this material be placed under seal."[35]

This decision is the most recent in a line of cases in which the Seventh Circuit has taken a hostile view towards unnecessary confidentiality. To proceed under a fictitious name or place records under seal, there must be good cause—not merely agreement of the parties.

V. CLASS ACTIONS

Class actions are not always a panacea for class members. In *In re Brand Name Prescription Drugs Antitrust Litigation*,[36] several class members were dissatisfied with a district court ruling (made final and appealable under Rule 54(b)). These dissatisfied class members—who were not the named plaintiffs

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28. 112 F.3d 869 (7th Cir. 1997).
29. *Id.* at 872.
30. *Id.*
31. *Id.*
32. FED. R. CIV. P. 10(a).
33. *Doe*, 112 F.3d at 872.
34. *Id.*
35. *Id.*
36. 115 F.3d 456 (7th Cir. 1997).

serving as class representatives—sought to appeal. The Seventh Circuit held that class members who are not named parties have no rights to appeal.[37] Chief Judge Posner explained,

> [i]f the certified class representative does not adequately represent the interests of some of the class members, those class members can opt out of the class action, can seek the creation of a separately represented subclass, can ask for the replacement of the class representative, or can intervene of right and become named plaintiffs themselves, or even class representatives, represented by their own lawyer.[38]

VI. DISCOVERY

A. Discovery Disputes

In *Doe v. Howe Military School*,[39] Judge Miller addressed a dispute over the location, duration, and logistics of document production. After making numerous documents available for inspection at its place of business, defendant became dissatisfied with the length of time it was taking plaintiffs to inspect documents there, and suddenly insisted that documents be inspected at defense counsel's office.[40]

Judge Miller granted a protective order requiring production to continue as originally scheduled, finding that defendant did not show a valid basis for changing the original plan. Judge Miller also ordered defendant pay plaintiffs' fees in bringing the Rule 37 motion.[41]

B. Discovery In Products Cases

In *Piacenti v. General Motors Corp.*,[42] the court denied plaintiff's motion to compel General Motors to produce information regarding product models beyond the subject vehicle. The case is an important read for product-liability attorneys.

C. Ex Parte Communications With Former Employees: Rule of Professional Conduct 4.2

In *Wesleyan Pension Fund, Inc. v. First Albany Corp.*,[43] Chief Judge Barker affirmed Magistrate Judge Shields' order allowing ex parte interviews of former officers and board members of the opposing party. Judge Shields has so interpreted Rule 4.2 of the Indiana Rules of Professional Conduct on several

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37. *Id.* at 457.
38. *Id.* at 457-58.
39. No. 3:95-CV-206 RM, 1996 WL 663164 (N.D. Ind. July 23, 1996).
40. *Id.* at *2.
41. *Id.* at *5.
42. 173 F.R.D. 221 (N.D. Ill. 1997).
43. 964 F. Supp. 1255 (S.D. Ind. 1997).

occasions in unpublished orders. Judge Endsley issued a similar unpublished ruling before his retirement, and the Northern District of Indiana has issued several similar rulings as well.

Separately, *Wesleyan Pension Fund* is good reading for the deferential standards that apply to a district judge's review of a magistrate judge's order on a nondispositive matter. Pursuant to Federal Rule of Civil Procedure 72(a), reversal is appropriate only if the order is "clearly erroneous or contrary to law."[44] Counsel ordinarily should not have high hopes of reversing a magistrate judge's discovery ruling, particularly one involving fact-finding and/or discretion.

VII. EXPERTS

A. Daubert *Applies To Social Scientists*

For some time after the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[45] there was considerable debate regarding the application of the decision to non-technical experts such as social scientists. In recent years, case law has answered this affirmatively. For instance, in his decision addressing the Indiana "notice and waiting period" abortion statute, Judge Hamilton noted that in the last two years, the Seventh Circuit has applied the *Daubert* standards to social scientists in several cases.[46] Parties offering or resisting social scientists should focus on *Daubert* accordingly.

B. Daubert *and Appellate Standard Of Review*

In *General Electric Co. v. Joiner*,[47] the Supreme Court held that the appellate standard of review on *Daubert* admissibility questions is abuse of discretion.[48] The district court had excluded expert testimony, but the Eleventh Circuit reversed, applying a stringent standard of review.[49] The Supreme Court again reversed, holding that the district court did not abuse its discretion.[50] *Joiner* confirms that the real *Daubert* battle is won or lost in the district court, not on appeal.

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44. FED. R. CIV. P. 72(a).

45. 509 U.S. 579 (1993).

46. *See* A Woman's Choice-East Side Women's Clinic v. Newman, 906 F. Supp. 962 n.6 (S.D. Ind. 1997) (citing People Who Care v. Rockford Bd. of Education, 111 F.3d 528, 527-28 (7th Cir. 1997) (statistical study inadmissible under *Daubert*)); Sheehan v. Daily Racing Form, 104 F.3d 940, 942 (7th Cir. 1997); Tyus v. Urban Search Management, 102 F.3d 256, 263-64 (7th Cir. 1996) (district court erred in excluding expert testimony on effectiveness of advertising); United States v. Hall, 93 F.3d 256, 263-64 (7th Cir. 1996) (district court erred in excluding psychologist's and psychiatrist's testimony concerning false confession).

47. 118 S. Ct. 512 (1997).

48. *Id.* at 515.

49. *Id.* at 516.

50. *Id.* at 515.

C. Expert Reports In Federal Court: Rule 26(a)(2) Revisited

As part of the sweeping amendments to the Federal Rules in December 1993, Rule 26(a)(2)[51] was added requiring preparation and disclosure of detailed expert reports for "a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony . . . ."[52] Attorneys and the courts have now had three years to interpret and apply this Rule. The results are clear: Rule 26(a)(2) is having a dramatic impact on expert practice in federal courts. This section of the Article outlines key developments and lessons from Rule 26(a)(2) jurisprudence.

1. What Is Required.—Rule 26(a)(2) requires a written report "prepared and signed by the witness."[53] There is no reason to conclude that counsel are precluded from assisting in preparation of the report, but the expert must be able to honestly say that they prepared the report and that it contains their findings and opinions. As the official comments note, "Rule 26(a)(2)(B) does not preclude counsel from providing assistance to experts in preparing the reports, and indeed, with experts such as automobile mechanics, this assistance may be needed."[54] The comments add, "Nevertheless, the report, which is intended to set forth the substance of the direct examination, should be written in a manner that reflects the testimony to be given by the witness and it must be signed by the witness."[55]

The report shall contain:

- # a complete statement of all opinions to be expressed and the basis and reasons therefor;
- # the data or other information considered by the witness in forming the opinions;
- # any exhibits to be used as a summary of or support for the opinions;
- # the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years;
- # the compensation to be paid for the study and testimony; and
- # a listing of any other cases in which the witness has testified as an expert at trial or deposition within the preceding four years.[56]

2. What About Treating Physicians?—Expert reports are required by experts "retained or specially employed to provide expert testimony in the case . . . ."[57] The comments provide, "[a] treating physician, for example, can be deposed or

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51. FED. R. CIV. P. 26(a)(2).
52. *Id.*
53. *Id.*
54. FED. R. CIV. P. 26(a)(2) cmt.
55. *Id.*
56. *Id.*
57. FED. R. CIV. P. 26(a)(2)(A).

called to testify at trial without any requirement for a written report."[58] There is authority supporting this position.[59]

Defense lawyers, however, are apt to argue that when the treating healthcare provider goes beyond treatment and begins to testify more like a retained expert (in other words, doing more than providing treatment), such a witness should be required to provide a report as to non-treatment issues. There is authority supporting this proposition as well.[60]

3. There Is No Opt-Out.—Unlike the initial mandatory disclosures of Rule 26(a)(1) which can be opted out of by local rules (as the Southern District of Indiana has done), there is no local rule opt-out for Rule 26(a)(2). The Rule itself states, "Except as otherwise stipulated or directed by the court . . . "[61] but does not reference a local rule opt-out.

Moreover, as a practical matter federal courts are not allowing parties to stipulate away the 26(a)(2) requirements. Indeed, in the Southern and Northern Districts of Indiana, case management plans are presumptively required (by the terms of the proposed case management plans) to include 26(a)(2) report deadlines.

4. Deadlines.—Rule 26(a)(2)(C) provides that in the "absence of other directions from the court or stipulation by the parties, the [expert] disclosures shall be made at least 90 days before the trial date . . . ."[62] As a practical matter, in most cases ninety days before trial is too late in the game, so most case management plans in local federal courts set expert disclosures much earlier in the case.

If the evidence "is intended *solely* to contradict or rebut evidence on the same subject matter identified by another party [in its expert report, disclosure is due] within 30 days after the disclosure made by the other party."[63] Caution is appropriate here, for as with purported rebuttal witnesses—who often are deemed by the courts to be "case-in-chief" witnesses and thus excluded—"rebuttal" expert reports may be deemed non-rebuttal, untimely, and thus excluded.

5. Who Goes First.—Rule 26(a)(2) does not directly address whether the plaintiff and the defendant are to disclose their reports simultaneously or whether plaintiff will disclose first followed by the defendant (except to the extent "rebuttal" reports are addressed above). The practice in most courts is for plaintiffs (or the party with the burden of proof) to disclose their reports first, with the opposing party to follow within thirty-ninety days thereafter. This is

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58. *Id.*

59. *See, e.g.*, Salas v. United States, 165 F.R.D. 31, 33 (W.D.N.Y. 1995); Brown v. Best Foods, 169 F.R.D. 385, 387 (N.D. Ala. 1996).

60. *See* Widhelm v. Wal-Mart Stores, Inc., 162 D.R.D. 591 (D. Neb. 1995) (plaintiff failed to provide Rule 26(a)(2) report for treating physician, court precluded physician from providing expert testimony as to causation and disability rating (neither of which were part of the treating physician's treatment)).

61. FED. R. CIV. P. 26(a)(2)(B).

62. FED. R. CIV. P. 26(a)(2)(C).

63. FED. R. CIV. P. 26(a)(2)(C) (emphasis added).

sound practice, for if a plaintiff contends that a product is defective and supports the claim with expert testimony, the defendant cannot effectively counter the expert unless the plaintiff's report is disclosed first.

This practice is supported by the comments to the Rule, which provide, "Normally the court should prescribe a time for these disclosures in a scheduling order under Rule 16(b), and in most cases the party with the burden of proof on an issue should disclose its expert testimony on that issue before other parties are required to make their disclosures with respect to that issue."

6. Depositions.—Rule 26(b)(4) expressly allows depositions of testifying experts (using the term "may" depose), but not until "after the report is provided."[64] In practice, fewer experts are currently being deposed at all—particularly defense experts by plaintiffs—because Rule 26(a)(2) reports, if done correctly, provide substantial information to the opposing party. As the Eighth Circuit has noted, "[s]ince depositions of experts required to prepare a written report may be taken only after the report has been served, the length of the deposition of such experts should be reduced, and in many cases the report may eliminate the need for a deposition."[65]

7. Supplementation.—Pursuant to Rule 26(e), parties making disclosures under Rule 26(a) are "under a duty to supplement or correct the disclosure . . . to include information thereafter acquired"[66] if:

- "ordered by the court, or
- the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during [discovery] or in writing."[67]

With respect to expert reports, Rule 26(e) further adds that the duty to supplement "extends both to the information contained in the report and to information provided through a deposition, . . . and any additions or other changes to this information shall be disclosed by the time the party's [trial] disclosures under Rule 26(a)(3) are due."[68]

8. Penalties for Non-Compliance.—Rule 37(c)(1) provides: "A party that without substantial justification fails to disclose information required by Rule 26(a) . . . shall not, unless such failure is harmless, be permitted to use as evidence at trial, at a hearing, or on a motion any witness or information not so disclosed."[69] In addition, the court may impose "other appropriate sanctions" in addition or in lieu of the above.[70]

This rule is being taken seriously by federal judges—as it should be, given the mandatory "shall" language. For instance, in *1st Source Bank v. First*

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64. FED. R. CIV. P. 26(b)(4).

65. Sylla-Sawdon v. Uniroyal Goodrich Tire, 47 F.3d 277, 284 (8th Cir. 1995).

66. FED. R. CIV. P. 26(e).

67. *Id.*

68. *Id.*

69. FED. R. CIV. P. 37(c)(i).

70. *Id.*

Resource Fed. Credit Union,[71] the court precluded an economic expert from testifying as to pre-judgment interest issues where the report only generally stated that the expert would testify regarding pre-judgment interest.

Similarly, in *Walsh v. McCain Foods*,[72] the Seventh Circuit found no error in a district court's decision to limit a defense expert's testimony to subjects addressed in his report and deposition. The court explained, "[Defendant] cannot legitimately argue that [the expert] should have been allowed to testify about matters not previously disclosed to the plaintiffs."[73]

In *Carter v. Fenner*,[74] the district court precluded an expert from testifying where the expert's "report" consisted merely of one page of unsigned, untitled, handwritten notes lacking the date or other information considered by the "alleged author."

Finally, in *Indiana Insurance Co. v. Hussey Seating Co.*,[75] Chief Judge Barker addressed defendant's motion to exclude the plaintiff's damages expert for non-compliance with Rule 26(a)(2)(B). She explained that: (a) the report must be signed by the expert, (b) although the lawyer is entitled to assist, the report should be "written in a manner that reflected the testimony specifically to be given by [the expert] and embraced by him," and (c) the report must be complete.[76] She added, "Rule 26 requires an expert witness to disclose his or her opinions and the bases for those opinions in a single report."[77]

Although Judge Barker found that plaintiff had failed to comply with Federal Rule of Civil Procedure 26(a)(2)(B), she was "reluctant to . . . exclude the testimony of the witness who appears to be Plaintiff's primary damages expert."[78] This was largely because the "[d]efendant has not contended that it was significantly prejudiced or that its defense was hampered by Plaintiff's violations."[79] However, Chief Judge Barker ordered the plaintiff to pay the defendant's attorneys' fees relating to the motion.[80]

9. Conclusion.—Rule 26(a)(2) has changed expert practice in federal court. No longer can parties list several purported experts and force the opponent to either spend money deposing them or proceed with the risk that the expert will actually testify. Instead, reports are mandatory, and they must comply with the literal language of Rule 26(a)(2). Practitioners are well advised to take Rule 26(a)(2) seriously. Federal judges do, and now that Rule 26(a)(2) has been in place for three years, federal judges are less apt to be tolerant of non-compliance.

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71. 167 F.R.D. 61 (N.D. Ind. 1996).
72. 81 F.3d 722 (7th Cir. 1996).
73. *Id.* at 727.
74. Nos. CIV.A. 92-3496, CIV.A. 92-3497, 1996 WL 592924 (E.D. La. 1996).
75. 176 F.R.D. 291 (S.D. Ind. 1997).
76. *Id.* at 292-93.
77. *Id.* at 295.
78. *Id.*
79. *Id.*
80. *Id.*

VIII. SUMMARY JUDGMENT

A. Motions To Strike/Summary Judgment

In *Powers v. Runyon*,[81] Judge Tinder granted summary judgment for the employer in a *pro se* plaintiff's discrimination case. In so doing, Judge Tinder struck several of the plaintiff's exhibits opposing summary judgment due to lack of authentication. The court wrote:

> [T]o be considered in support or opposing a motion for summary judgment, documents must be authenticated. Other materials are of no value in either establishing the presence or the absence of a material question of fact.
> . . . .
> [F]or a document to be considered . . . [at] summary judgment, the document must be authenticated by and attached to an affidavit that meets the requirements of Rule 56(e) and the affiant must be a person through whom the exhibits could be admitted into evidence.[82]

Plaintiff had submitted unsworn, unauthenticated written statements from several witnesses. Applying this standard from Rule 56(e), Judge Tinder struck those materials.[83] The employer also moved to strike certain materials based on relevance. The court denied this aspect of the motion to strike, explaining,

> Although the issue of relevance is certainly one of the fundamental questions in sifting through expanded evidentiary material to determine whether the standard of Rule 56(c) has been met, the ordinary course this court follows is to determine whether and how those materials relate to the factual and legal issues which must be determined in ruling on the motion.[84]

B. Summary Judgments In Discrimination Cases

The opinion in *Hunt-Golliday v. Metropolitan Water District of Greater Chicago*,[85] is an excellent primer for employment litigators. Beyond the substance of the opinion, it is noteworthy for highlighting that in 1996, the Seventh Circuit heard twenty-six appeals from summary judgments for employers in discrimination cases. Of those twenty-six appeals, twenty-one summary judgments were affirmed (slightly over eighty percent).[86]

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81. 974 F. Supp. 693 (S.D. Ind. 1997).
82. *Id.* at 696-97.
83. *Id.*
84. *Id.* at 697.
85. 104 F.3d 1004 (7th Cir. 1997).
86. *Id.*

IX. OFFERS OF JUDGMENT

In *Fisher v. Kelly*,[87] a defendant utilizing Rule 68 made an offer of judgment of $7,500 plus costs accrued to date. Plaintiff accepted the offer in this § 1983[88] case and then awarded costs but denied plaintiff's attorneys fees under 42 U.S.C. § 1988. On appeal, the Seventh Circuit affirmed.[89]

Although costs include fees for purposes of Rule 68 under § 1988, the fact that the case settled did not automatically make the plaintiff a prevailing party. Further, where a party settles a case merely for the nuisance value of the claim, district courts may find in their discretion that the plaintiff is not a prevailing party. In this case, defendant's offer of judgment specifically recited that it was made for nuisance value and denied liability. Accordingly, any defense counsel making an offer of judgments should be familiar with *Fisher* and utilize its creative approach.

X. SANCTIONS

In *Tye v. Kilroy Co.*,[90] Chief Judge Barker approved Magistrate Judge Hussman's recommendation for sanctions. The plaintiffs were seriously injured in the workplace in an accident involving a conveyor. Plaintiffs' counsel sued the Kilroy Company asserting a products liability claim. However, Kilroy had nothing to with the design or manufacture of the conveyor. Prior to filing the claim, plaintiffs' counsel—who had fifteen months before the limitations period expired—did not investigate whether Kilroy had any role in the design or manufacture of the conveyor.

After initial discovery, plaintiffs' counsel advised his clients that he no longer thought a cause of action existed against Kilroy, and he requested permission to dismiss the action. The plaintiffs refused, so counsel withdrew. The action was later dismissed for failure to prosecute, and Kilroy moved for sanctions.[91]

In recommending that the motion be granted, Magistrate Judge Hussman found that counsel failed to make a reasonable inquiry into the facts before filing the action. This was aggravated by counsel's failure to further investigate the facts before filing an amended complaint as well. Chief Judge Barker accepted the recommendation and report and granted the motion for sanctions.[92]

In *Cleveland Hair Clinic v. Puig*,[93] the Northern District of Illinois sanctioned the defendants and their counsel a total of $174,121. The appeal involved technical procedural issues unrelated to sanctions, but the case is another reminder that Rule 11 is taken seriously in the Seventh Circuit,

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87. 105 F.2d 350 (7th Cir. 1997).

88. 42 U.S.C. § 1983 (1994).

89. *Fisher*, 104 F.3d at 350.

90. No. NA 90-112-C B/F, 1996 WL 663708 (S.D. Ind. 1996).

91. *Id.*

92. *Id.*

93. 104 F.3d 123 (7th Cir. 1997).

particularly in the Northern District of Illinois.

In *Norwest Bank v. Kmart Corp.*,[94] Judge Miller wrote, "Ex parte conversations about the case with a law clerk are no more appropriate than direct ex parte conversations with the judge, and this court does not act on such communications."[95]

In the same opinion, Judge Miller outlined several ways for counsel to streamline a lengthy jury trial in his courtroom. For those with lengthy jury trials before Judge Miller, *Norwest* is probably worth reading so as to become familiar with the types of procedures that Judge Miller might employ to expedite a lengthy trial (such as allocating total time available to each party, using deposition summaries, summarizing expert qualifications, and preparing document summaries).

XI. APPEALS

A. Waiver of Arguments

In *Massachusetts Bay Insurance v. VIC Koenig Leasing, Inc.*,[96] the Seventh Circuit noted the general rule that "we have *no obligation* to consider an issue . . . that is merely raised, but not developed, in a party's brief."[97] Although the Seventh Circuit proceeded to address the choice-of-law issue that was raised but not developed by the parties, it warned, "we must make abundantly clear to future litigants that this case does not stand for the proposition that a choice-of-law issue will always be preserved for appellate review if or whenever the parties . . . cite authorities from different jurisdictions."[98]

B. Specification In Notice Of Appeal

In *Librizzi v. Children's Memorial Medical Center*,[99] the appellee sought to dismiss the appeal asserting that appellant's notice of appeal specified the judgment of January 1997 rather than the order of March 1997 denying reconsideration as the order under review. The Seventh Circuit denied the motion, writing:

> But this is entirely proper. It is never necessary—and may be hazardous—to specify in the notice of appeal the date of an order denying a motion under Fed.R.Civ.P. 50 or 59. Identifying the final decision entered under Rule 58 as "the judgment, order, or part thereof appealed from" (Fed. R.App. P. 3(c)) brings up all of the issues in the

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94. 1997 U.S. Dist. LEXIS 3282 (N.D. Ind. 1997).

95. *Id.*

96. 136 F.3d 1116 (7th Cir. 1998).

97. *Id.* at 1122 (quoting Freeman United Coal Mining Co. v. Office of Worker's Compensation Programs, Benefits Review Board, 957 F.2d 302, 304 (7th Cir. 1992)).

98. *Id.* (emphasis omitted).

99. 134 F.3d 1302 (7th Cir. 1998).

> case. Pointing to either an interlocutory order or a post-judgment decision such as an order denying a motion to alter or amend the judgment is never necessary, unless the appellant wants to confine the appellate issues to those covered in a specific order. An appeal from the Rule 58 final judgment always covers the waterfront. The whole case is properly before us for decision.[100]

XII. MISCELLANEOUS

A. Forum-Selection Clauses

In *Deans v. Tutor Time Child Care*,[101] Chief Judge Barker transferred an action to the Southern District of Florida based on a forum-selection clause between the parties. Judge Barker held that the clause did not violate Indiana public policy and should be enforced.[102]

B. Credit Card Payments At Clerk's Office

The Southern District of Indiana now accepts MasterCard and VISA for payment of filing fees, copies, and other fees paid to the clerk. For more information, call the clerk's office at (317) 229-3700.

C. Southern District Goes On-Line

The U.S. District Court for the Southern District recently introduced its own webpage, offering instant access to docket sheets, local rules, staff directory, and other useful information. The website is located at www.sdin.uscourts.gov.

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100. *Id.* at 1306 (citation omitted).

101. 982 F. Supp. 1330 (S.D. Ind. 1997).

102. *Id.*