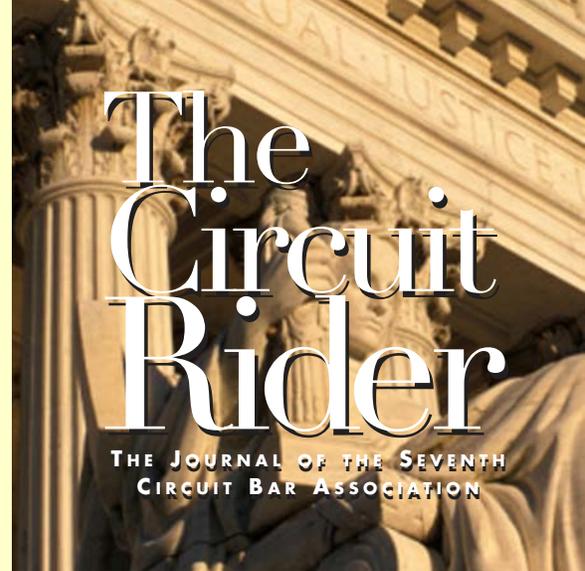


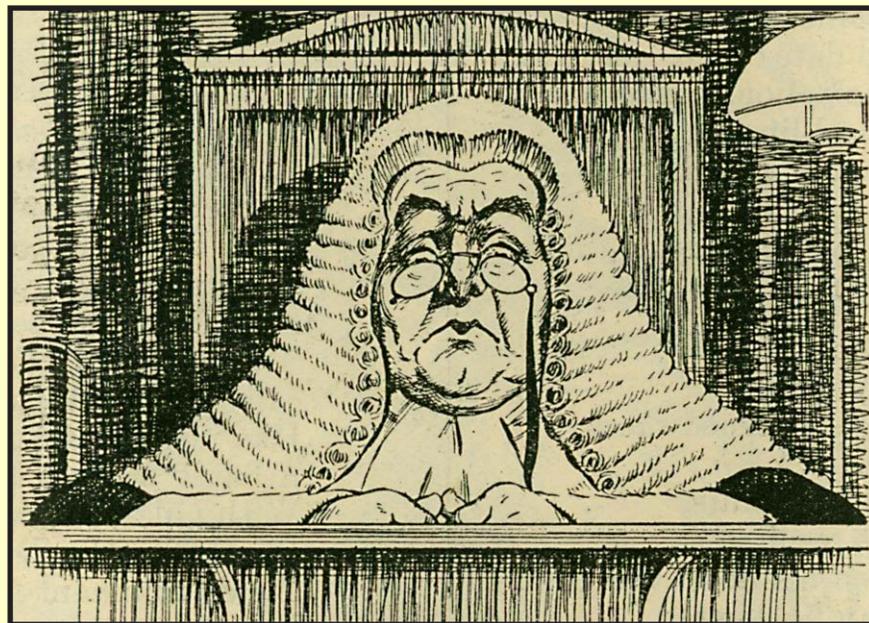
May 2014

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*Pleading Affirmative Defenses After Twombly and Iqbal*, By Derek Molter  
*Handling Jury Instructions With Care*, By Matthew D. Krueger and A.J. Peterman  
*Choosing ADR For Commercial Contract Disputes: the Good, the Bad, and the Common Law*, By Freya K. Bowen  
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*Petitions for Review of Second and Successive Class Certification Orders Under Rule 23(f): A Practitioner's Guide*, By Frank M. Dickerson III  
*Quit Using Times New Roman! (and Other Thoughts on Legal Typography)*, By William Katt  
*A Trial Lawyer's Guide to Patent Jury Litigation*, By Edward L. Foote and Peter McCabe  
*The Alien Tort Statute After Kiobel v. Royal Dutch Petroleum*, By Hon. Ian L. Levin (Retired) and John J. Pavich  
*Judge Sara Ellis*, By Ron Safer  
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*A Tribute to Arlander Keys on His Retirement from the Bench*, By Jeffrey Cole  
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From  
*Beginning to End*





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## Letter from the President

President Julie A. Bauer  
Winston & Strawn, LLP

**G**reetings to the Members of the Seventh Circuit Bar Association. I hope that you are planning to join us at the Radisson Blu Aqua on May 11-13, 2014 for the 63rd Annual Meeting of the Association and the Judicial Conference of the Seventh Circuit. The members of the planning committee, Circuit Judge Ann Williams, District Judge Robert Dow, Magistrate Judge Geraldine Soat Brown, Bankruptcy Judge Janet Baer, and Circuit Executive Collins Fitzpatrick, along with Association members Joel Bertocchi, Andrew Erskine, Tom Kirsch, Margot Klein, Brian Murray, Robine Morrison and Kari Rollins, have arranged timely and thought-provoking programs, lined-up excellent speakers, and planned some fun events.



Our opening program on Sunday evening will take at the Museum of Broadcast Communications, 360 N. State Street. After entering through Oprah's Door, members and guests can view the museum's spectacular array of television and radio memorabilia. Baby Boomers will recognize the set of WGN's Family Classics and costumes from Bozo's Circus. Along with food and drink, we will enjoy musical entertainment provided by the Chicago Bar Association's Scales of Justice.

On Monday, we get down to more serious business. Our first plenary session will examine issues raised by the National Security Administration's gathering of telephone and internet communications at home and abroad and consider whether the resulting reduction in privacy corresponds with a worthwhile improvement in security. Our all-star panel includes Professor John Yoo of the University of California, Berkeley, Professor Nadine Strossen of New York Law School and formerly the

president of the American Civil Liberties Union, Professor Geoff Stone of the University of Chicago, Cindy Cohn, the legal director of the Electronic Frontier Foundation, and the Honorable Harold Baker, a former member of the Foreign Intelligence Surveillance Court. Later in the morning, *Wall Street Journal* reporter John Emshwiller and Kenneth Feinberg, formerly the chief of staff to Sen. Ted Kennedy, will discuss the impact of three decades of federalization of state crimes. At the same time, a panel of bankruptcy, district and appellate judges and practitioners will examine the complicated and uncertain relationship between bankruptcy and district courts and courts of appeal following recent appellate decisions on the jurisdiction of non-Article III courts.

Our new location for the Annual Meeting inspired the planning committee try a new approach with our Monday lunch speaker. In a break from our legal discussions, Chicago native, *Chicago Tribune* columnist, author, on-air reporter and critic Rick Kogan will treat us to "Blasts for the Past," a talk about the importance of history in this increasingly fast-paced world.

On Monday afternoon, breakout sessions will cover a variety of topics of interest to civil, criminal, bankruptcy and intellectual property practitioners, including attorney misconduct and other ethical issues in consumer bankruptcy matters, pending patent reform legislation, alternative fee arrangements for lawyers and how those alternatives might affect the courts, practical advice for selecting effective search methods for e-discovery, and the decision on whether and when to cooperate with the government in criminal cases.

We are delighted that our circuit justice, the Honorable Elena Kagan of the United States Supreme Court, will again join us for dinner on Monday evening. We look forward to her remarks. In addition, United States Solicitor General Donald B. Verrilli Jr. will address us at the dinner.

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## Letter from the President

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On Tuesday, our traditional newer lawyers breakfast will expand to include lawyers of all seniority levels and judges. Newer lawyers and judges will be seated together, though, to facilitate networking and discussion. Following breakfast, the newer lawyers will have their own CLE program on “Frank Advice from the Bench for Newer Attorneys.” Meanwhile, senior lawyers and judges will discuss best practices in cases with a pro se litigant, both in the lower courts and the court of appeals. Wrapping up our programming will be our traditional district court breakouts. At noon on Tuesday, members of the Association will conclude with lunch and their annual business meeting, while the judges and clerks have lunch and then continue with the executive session for the members of the federal judiciary on Tuesday afternoon.

For those of you who missed it, on February 20-21, 2014, our sister organization, the Seventh Circuit Bar Association Foundation presented a two-day symposium on “Rethinking the War on Drugs.” The symposium explored competing views of the War on Drugs and the ramifications of changing the way we fight that war. Public policy experts, physicians knowledgeable about addiction, economists, judges, journalists and state and local officials talked about the impact of drug use and of the war on drugs. Senator Dick Durbin spoke about the Smarter Sentencing bill, co-sponsored by, among others, Senators Mike Lee and Rand Paul, aimed at reducing mandatory minimum sentences for certain drug offenses. Kudos to Tom Campbell and Doug Carlson and the rest of their planning committee for organizing this first-rate event.

Several district court vacancies in our circuit are on their way to being filled, thanks to the work of senators in Illinois and Wisconsin. Manish Shah has been confirmed for a vacancy on the Northern District of Illinois and Pam Pepper has been

nominated for a vacancy in the Eastern District of Wisconsin. James Peterson has been nominated for a vacancy in the Western District of Wisconsin, and Nancy Rosenstengel and Staci Yandle for the Southern District Illinois. We look forward to their joining the bench. However, one seat on the Court of Appeals continues to be vacant, and Judge John Tinder has also announced plans to retire from the court next year.

See you in May. For now, enjoy your *Circuit Rider*.

## Send Us Your E-Mail

The Association is now equipped to provide many services to its members via e-mail. For example, we can send blast e-mails to the membership advertising up-coming events, or we can send an electronic version of articles published in *The Circuit Rider*.

We are unable to provide you with these services, however, if we don't have your e-mail address. Please send your e-mail address to [changes@7thcircuitbar.org](mailto:changes@7thcircuitbar.org).



U.S. SENATOR DICK DURBIN

# Remarks *on the* War on Drugs After 40 Years

FEBRUARY 20, 2014

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I want to thank Judge Ruben Castillo for his kind words and for inviting me to join you at this important symposium on “Rethinking the War on Drugs.” Before he became Chief Judge of the Northern District of Illinois, Judge Castillo served for more than a decade as vice chairman of the bipartisan U.S. Sentencing Commission. He and other past and present members of the Sentencing Commission have been thinking critically and constructively about the War on Drugs for a long time. Judge, I’m happy to report that much of the nation is finally catching up with you. Even Congress.

I want to thank the Seventh Circuit Bar Association Foundation, Northwestern University School of Law and the Harvard Club of Chicago for hosting this symposium. I am impressed to see such a thorough and thoughtful examination of America’s drug laws and policies. And I am honored to be a part of it.

## **The War on Drugs after 40 Years**

The War on Drugs was declared by President Richard Nixon more than 40 years ago. Since then, this “war” has cost American taxpayers more than \$1 trillion and produced more than 45 million arrests. President Nixon said the purpose of the War on Drugs was to halt the flow of drugs into America’s communities and to “destroy the market for drugs” by preventing new addicts and rehabilitating those who are already addicted. Four decades, 45 million arrests, and a trillion dollars later, most street drugs are cheaper and easier to find than they were at the start of the “War on Drugs.”

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## Remarks on the War on Drugs

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Only about one in 10 Americans who needs substance abuse treatment can actually get it. While new guarantees under the Affordable Care Act will likely increase that figure, we still have a long way to go before we treat chemical dependence and addiction like the public health crisis that it is.

By at least one measure, however, the War on Drugs has had spectacular results. It has created an unprecedented growth in American prisons and the public budgets that support them. Think about this: In 1980, there were about 24,000 inmates in America’s federal prisons. That number had held steady for 30 years.

In the mid-1980s, the War on Drugs was dramatically expanded. Congress and state legislatures began passing a flood of what were considered “tough on crime” laws, including “three strikes and you’re out” laws and harsh mandatory minimums for certain drug offenses. Congress -- and many states -- also reduced or eliminated parole for many offenses, which meant that these tougher, longer new prison sentences would be served in full, or nearly so.

Now, fast-forward 30 years. Since 1980, America’s federal prison population has increased nearly 500 percent. Our federal prison system today is dangerously overcrowded, operating at nearly 40 percent over capacity. At high-security federal prisons, the situation is even worse -- nearly 50 percent over capacity. Over that same 30 years, the cost of operating federal prisons has soared by 1,100 percent.

Worried about runaway government spending? Think about this: It costs, on average, about \$30,000 a year to incarcerate one federal inmate; that’s three times the annual tuition at a public college or university.

The United States today has the highest incarceration rate in the world. Our closest competitors for that dubious distinction -- nations such as Rwanda and Russia, Cuba and China -- don’t even come close. America is home to about 5 percent of the world’s population and houses about 25 percent of the world’s prisoners. How’s that for “the land of the free?”

How did we get here? It’s important to note that many people who supported harsh drug sentences and mandatory minimums

did so with good intentions. Some of those good intentions were undermined, however, by a lack of knowledge -- especially in the beginning -- about what kinds of policies work, and which don’t.

Fear also played a part. For decades, too many politicians have been afraid of being labeled “soft on crime.” We have lived in fear of the ghost of Willie Horton -- afraid that our careers could be ended by one drug offender who was paroled early or went through a diversion program and treatment rather than prison, and later committed some terrible act. Many politicians took the safe way. We voted for longer and harsher sentences and more mandatory minimums.

But that is changing. A diverse and growing number of people -- from Tea Party conservatives and Heritage Action activists to the ACLU and the NAACP -- think it is possible to reduce the billions we spend on prisons ... make our communities safer ... and make our laws more just -- all at the same time.

### Smarter Sentencing Act

I agree. I have introduced a bill in the United States Senate called the Smarter Sentencing Act. The Smarter Sentencing Act would save money, make our communities safer and begin to restore balance and justice to federal drug sentencing policies.

My lead co-sponsor is a man some might consider an unlikely ally. Mike Lee is a Republican from Utah and one of the most conservative members of the United States Senate. The list of our other Republican co-sponsors reads like the headliners from a Tea Party convention. They include Senator Jeff Flake of Arizona, Senator Rand Paul from Kentucky and Senator Ted Cruz from Texas. It gets better. On the Democratic side, we’re joined by Senator Patrick Leahy of Vermont, chairman of the Senate Judiciary Committee; Sheldon Whitehouse, chairman of the Crime Subcommittee; and a number of others.

In a time of sometimes fever-pitch partisanship, we’re making progress. Last month, the Smarter Sentencing Act passed the Senate Judiciary Committee with a strong, bipartisan vote -- 13-to-5. I hope to bring the bill to the floor soon.

A nearly identical bill is moving in the House with equally bipartisan support. The lead co-sponsors on the House bill are Representative Raul Labrador, a Tea Party Republican from Idaho and Representative Bobby Scott, a progressive Democrat from Virginia and the first African American to represent his state in Congress since Reconstruction.



## Remarks on the War on Drugs

*Continued from page 4*

Shortly after the federal government shutdown, the four of us – Raul Labrador, Bobby Scott, Mike Lee and I – met in my office in the Capitol to talk about how we could move our bill forward. We all had a good laugh trying to imagine what the Capitol press corps would think if they saw the four of us huddled together.

### What is Driving the Bipartisan Push for Reform?

What is driving this bipartisan push for reform of mandatory minimum federal drug laws? One major, shared concern is the unsustainable cost of the War on Drugs as it has been waged for the last 30 years – particularly the explosive growth in prison spending. Think about this: It costs about \$45 million a year, on average, to operate a federal prison. There are already about 120 federal prisons in America. To build a new federal prison is approximately \$350 million or more in construction costs. All told, the costs of federal incarceration and detention now consume nearly one-third of the U.S. Justice Department’s entire discretionary budget.

Spending ever-more tax dollars on incarceration means not spending those same tax dollars on other more effective, alternative approaches. Law enforcement officers risk their lives every day to keep us safe and we have made real progress in reducing violent crime because of their efforts. But too often, we are now undermining public safety in order to continue to a costly and counterproductive mistake of over-incarceration.

A few examples: The two main law enforcement grant programs that Congress funds are the COPS program and the Byrne Justice Assistance Grants program. Many of you are probably familiar with both programs. The COPS program was created 20 years ago to help state and local law enforcement agencies hire additional police officers.

Byrne grants help agencies enhance officer safety with improved training, equipment and technology. Last year the COPS program and the Byrne Grant program together distributed less than \$30 million to state and local law enforcement agencies in the

Seventh Circuit. That’s \$30 million total for hundreds of law enforcement agencies in Illinois, Indiana and Wisconsin. That covers just a fraction of what’s needed. By comparison, the Chicago Police Department spent more than \$100 million last year just on police overtime payments.

Another example: We know from more than 20 years of experience that drug courts work. They help to break the cycle of addiction and recidivism, and they maximize limited financial resources. Veterans’ courts are newer but they are showing similarly positive results. Last year, Congress awarded \$1.7 million for drug courts in all three Seventh Circuit states combined. Remember, we spend \$45 million taxpayers’ dollars to operate one federal prison. And we spend less than 4 percent of that amount to operate drug courts in three states.

The Second Chance Act authorizes federal funding for state and federal re-entry programs – to help people leaving prison re-enter their communities, so they don’t re-offend. It helps ex-offenders with basics like housing, job training, and drug treatment if they need it. Last year Congress provided less than \$1.5 million total to Second Chance programs in all three Seventh Circuit states.

In addition, in the last three years, the U.S. Drug Enforcement Administration and federal prosecutors have lost more than 1,500 positions. One of the most important responsibilities of government is to protect its citizens. When it comes to violent gang members, terrorists, and other dangerous criminals, long prison sentences make sense.

But why should taxpayers always spend \$30,000 a year to incarcerate a non-violent drug offender when there are proven alternatives that cost less and often do a better job of breaking the cycle of addiction and recidivism?

Listen to this warning from the Justice Department. Quote: “If ... we do not reduce the prison population and prison spending, there will continue to be fewer and fewer prosecutors to bring charges, fewer agents to investigate federal crimes, less support to state and local criminal justice partners, less support for treatment, prevention and intervention programs and cuts along a range of other criminal justice priorities.”

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## Remarks on the War on Drugs

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### Social Costs of the War on Drugs

Another problem with mandatory minimum drug sentences is that they disproportionately harm minority communities. While rates of drug use and selling are similar across racial lines, people of color are far more likely to be prosecuted and sentenced for drug offenses.

You've heard the statistics but they are worth repeating: Latinos account for 17 percent of the U.S. population -- but 35 percent of federal inmates. African Americans make up 13 percent of the U.S. population -- but 37 percent of the federal prison population. Across America -- particularly in communities of color -- inflexible drug sentencing policies are ruining the lives of countless people who might have benefitted from less expensive, more effective policies, including treatment and a second chance.

Let me tell you about one of those people. Her name was Eugenia Jennings. I first heard Eugenia's story a few years ago when her brother Cedric testified before a Senate subcommittee hearing I chaired. The purpose of the hearing was to examine the consequences of an unfair policy that set much harsher penalties for crack cocaine than for powder cocaine -- the so-called "crack/powder disparity."

Eugenia Jennings was born in Alton, Illinois, to a poor, single mother. She was the seventh of 21 children in her family. She was abandoned and seriously abused as a child. At 13, she ran away from an abusive foster home and dropped out of school. At 15, she started using crack. When she became pregnant at 16, she stopped using drugs. But -- desperate for money to support her daughter -- she began selling drugs.

Eugenia was barely 23 years old and the mother of three small children when she was convicted for twice trading small amounts of crack for clothing. For those offenses, Eugenia Jennings was sentenced to more than 20 years in federal prison.

The judge in the case was U.S. District Court Judge Patrick Murphy. I want to read to you what Judge Murphy said when he sentenced Eugenia Jennings to more than two decades in prison. It's a long quote, so bear with me.

Judge Murphy said, quote: "Mrs. Jennings, I'm not mad at you. . . . The fact of the matter is, nobody has ever been there for you when you needed it. Never. You never had anyone who stood up for you. All the government's ever done is just kick your behind. When you were a child and you had been abused, the government wasn't there. When your stepfather abused you, the government wasn't there. When your stepbrother abused you, the government wasn't there. But, when you get a little bit of crack, the government's there. Now is that fair? No. It's not. And have you been punished? You bet. Your whole life has been a life of deprivation, misery, whippings, and there is no way to unwind that."

The judge went on to say: "I don't know how you can be a human being and observe this and know her life story and not have empathy for her. It's truly a tragedy. But," he concluded, "the truth of the matter is, it's not in my hands. Congress has determined that the best way to handle people who are troublesome is we just lock them up."

So he imposed the sentence the law demanded. But Eugenia didn't allow the harsh sentence to crush her spirit. She was a model prisoner and a star employee. She got sober again in prison, won numerous awards, sewed thousands of pairs of shorts for the military.

Then she developed a rare and serious form of leukemia. A few days before Christmas 2011, Eugenia Jennings was released. After 10 years in a federal prison, her sentence was commuted by President Obama -- the first of a very few prison sentences he has commuted. She arrived home just in time to see her eldest daughter graduate from high school -- and she beat her cancer into remission twice. Last October, the cancer finally claimed her. She was 36 years old.

Let me ask you: Was it worth more than a quarter-million taxpayer dollars to keep Eugenia Jennings locked up for a decade, away from her children?

And it's not just the offenders themselves who pay a high price when we incarcerate lower-level, non-violent offenders. Like Eugenia, many of these prisoners are mothers of small children. According to one study, one of every 50 children in America today has a parent in prison. The crisis is so acute that Sesame Street recently produced an educational kit to help families with children ages 3 to 8 who are coping with a parent's incarceration.

Judge John Curtin, a U.S. District judge in Buffalo New York, has called the plight of such children "an especially cruel" consequence of the War on Drugs and predicted that "the engine of punitive punishment of mothers will haunt this nation for many years to come."

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## Remarks on the War on Drugs

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### Corrective Steps

As I mentioned, most of the mandatory minimum drug sentences that are choking America’s jails and prisons were passed in 1980s. They were rooted in a fear of crime and some fundamental misunderstandings. One of the most egregious examples was the 1986 federal law that imposed a 100-to-1 disparity between crack cocaine and powder cocaine offenses. Under that law, a person arrested with five grams of crack could receive the same sentence as someone arrested with 500 grams of cocaine. Same drug, vastly different punishments.

The reason for the wide disparity was the mistaken belief that crack was vastly more potent and more dangerous than powder cocaine. The crack/powder disparity, like other aspects of the War on Drugs, was especially devastating to people of color. African Americans made up approximately 30 percent of crack users, but they accounted for more than 80 percent of those sentenced under the disparate and now discredited “crack/powder” guidelines.

### Fair Sentencing Act

The U.S. Sentencing Commission called for an end to the crack/powder disparity more than 20 years ago. It probably won’t surprise you to know that Congress did not respond immediately to the Commission’s recommendation. But we did respond.

2010 was one of the most politically rancorous years in memory. Yet, Congress voted unanimously in 2010 to pass a bill, which I authored, called the Fair Sentencing Act. It marked the first significant step in reforming federal drug sentencing laws since the War on Drugs began. The Fair Sentencing Act eliminated the mandatory minimum sentence for simple possession of crack cocaine. And it reduced the crack/powder sentencing disparity -- from 100-to-1 down to 18-to-1.

I had hoped we could eliminate the disparity entirely, but politics is the art of compromise and even reducing the disparity was a significant victory for justice and fiscal responsibility. I was proud to stand next to President Obama when he signed the Fair Sentencing Act into law. The U.S. Sentencing Commission estimates the Fair Sentencing Act will save taxpayers tens of

millions of dollars – savings that can be used for programs that can actually reduce drug use and make us safer.

### Smarter Sentencing Act

The next step in the effort to reform federal drug sentencing is the Smarter Sentencing Act -- a modest but important and bipartisan bill. It includes four changes that will reduce prison costs and overcrowding and make our communities safer.

First, the Smarter Sentencing Act would reduce -- but not eliminate -- certain mandatory minimum sentences for nonviolent drug offenses only. Let me repeat: It would apply to non-violent offenses only. It would not weaken the penalties for gun or gang crime or other violent offenses.

Second, the Smarter Sentencing Act would allow federal judges to waive certain mandatory minimum sentences when individual circumstances warrant it. Again, we are talking only about non-violent cases where weapons are not used.

Third, the Smarter Sentencing Act would allow certain inmates who were sentenced under the old crack-powder sentencing disparity to petition for reductions of their sentences. Let me be clear about this: This part of the Smarter Sentencing Act does not automatically reduce a single sentence. Not one. What it does is allow individuals to petition courts and prosecutors for a review of their case, consistent with current law and the Fair Sentencing Act. A judge can grant -- or deny -- any petition, whatever option best serves the interests of public safety.

Fourth and finally, the Smarter Sentencing Act directs the U.S. Attorney General to invest the savings from these sentencing changes in programs that will actually reduce America’s drug problem and make our communities safer. We would invest the savings in proven, cost-effective alternative approaches such as crime prevention, drug and veterans’ courts, effective substance abuse treatments, and re-entry programs that help offenders claim their places as productive members of their communities.

We know from the work of the Sentencing Commission that crack offenders who are released early are less likely to commit new crimes than those who serve their full prison term. Who is in a better position to decide whether someone sentenced under the old guidelines deserves a second chance? A judge and prosecutor who know all of the details of a case – or politicians who know nothing about the case?

Congress subjects federal judges to a rigorous confirmation process. That process is intended to make sure that the people who receive lifetime appointments as federal judges possess exceptional expertise and judgment. It makes no sense for



## Remarks on the War on Drugs

*Continued from page 7*

Congress to then tie judges' hands and require them to impose one-size-fits-all punishments in cases we have never heard. We should allow judges to consider the facts of each case and then decide what punishment is fair and just, using reasonable guidelines, and their own expertise, common sense and conscience.

### Support For Sentencing Reform

The American people strongly support this idea. In one recent poll, more than 80 percent of people said they trusted judges – more than politicians – to determine the appropriate length of prison sentences. In another poll, 71 percent of the people asked said they supported eliminating all mandatory minimum sentences for nonviolent offenders.

We know that the kinds of reforms we are proposing work because they are already working in a growing number of states. In recent years, states – including some deep red states– have changed their policies to give more discretion to judges and allow more alternatives to incarceration. The results include lower spending on prisons – and lower violent crime rates.

The coalition working to revise federal mandatory minimum drug sentences is wider than almost any I have ever seen on any issue.

The principles of the Smarter Sentencing Act are unanimously supported by the bipartisan United States Sentencing Commission. Among federal judges, the Seventh Circuit Judicial Council urged Congress more than 20 years ago to repeal mandatory minimum sentences. And the Judicial Conference of the United States, which represents all federal judges, has opposed mandatory minimum sentences for more than 50 years.

Justice Anthony Kennedy, who was nominated to the U.S. Supreme Court by President Reagan, seemed to speak for many of his colleagues when he said, quote: “I am in agreement with most judges in the federal system that mandatory minimums are an imprudent, unwise and often unjust mechanism for sentencing.”

The Smarter Sentencing Act also has strong support among law enforcement groups. Among the groups endorsing it are the International Union of Police Associations, the National Organization of Black Law Enforcement Executives, the Major Cities Chiefs Association; as well as the Association of Prosecuting Attorneys and more than 100 retired prosecutors and judges. We also have the support of the American Federation of Government Employees'

Council of Prison Locals, which represents the 28,000 correctional workers in the Federal Bureau of Prisons.

The Smarter Sentencing Act is endorsed by faith leaders and dozens of civil rights organizations. It is supported by leading victims' rights advocates, who understand that out-of-control prison costs devour scarce funds that could be spent to prevent crime in the first place.

Among the conservatives who have questioned mandatory minimums are former federal judge Michael Mukasey, who served as U.S. Attorney General under President George W. Bush; Dick Thornburgh, Attorney General under President George H.W. Bush; President Reagan's Attorney General, Ed Meese; Former Speaker of the House Newt Gingrich; David Keene, former president of the American Conservative Union; and even the Governor of “tough on crime” Texas, Rick Perry. I never in a million years expected to get a fan letter from Grover Norquist. But I recently received a letter of support for the Smarter Sentencing Act that was signed by Grover and other leading conservatives including Ralph Reed, Heritage Action and the National Association of Evangelicals.

I've also spoken with President Obama and Attorney General Holder and I know they are committed to working with our bipartisan group in Congress to reform our sentencing laws.

One more thought: When President Nixon declared the “War on Drugs,” he said, quote: “We must now candidly recognize that the deliberate procedures embodied in present efforts to control drug abuse are not sufficient in themselves.”

More than 40 years and a trillion dollars later, a growing and diverse coalition of Americans spanning the political spectrum has found the courage to say, once again, our present efforts to control drug abuse are not sufficient. Many federal mandatory minimum drug sentences cost too much and lock up too many people for too long, while sacrificing public safety efforts and resources we need. We must do better. We can do better.

We need your help. We need you to urge each of your members of Congress to work with us to pass the Smarter Sentencing Act. The Seventh Circuit includes Illinois, Indiana and Wisconsin. Right now, our co-sponsors are all from Illinois and all in the House. They are Representatives Jan Schakowsky, Danny Davis and Mike Quigley. If your Members of Congress are among those whose names I just read, thank them. If they aren't on the list yet, ask them to join us.

I'll close with this: Being tough on crime doesn't mean simply voting reflexively for ever-harsher punishments, no matter the cost or consequences. Being tough on crime also means being tough on failed criminal justice policies – and investing hard-earned taxpayer dollars on programs that actually work to increase public safety and respect for our judicial system.

Thank you again for asking the tough questions, offering smart solutions, and inviting me to be part of this discussion.

## PLEADING AFFIRMATIVE DEFENSES

*After Twombly  
and Iqbal**By Derek Molter\**

The substantial change that the U.S. Supreme Court initiated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009), to the standard for reviewing complaints subject to a motion to dismiss is by now familiar. The 2007 *Twombly* decision “retired” the pleading standard for complaints and insisted that plaintiffs plead enough facts that, if true, could plausibly entitle plaintiffs to relief. The 2009 *Iqbal* decision confirmed that this new approach applies to all cases. Now there is an emerging debate among courts throughout the country about whether the same shift should apply to affirmative defenses subject to a Rule 12(f) motion to strike.<sup>1</sup>

There has long been a standard approach to pleading affirmative defenses. An attorney reviews the complaint, consults a list of potential defenses, and asserts every defense that could apply generically to claims the plaintiff is asserting without concern for whether there are facts supporting each particular defense in the specific case being litigated. The parties will sort out which defenses are at issue through discovery. In pleading affirmative defenses, attorneys typically provide just a description of the defense, and they omit reference to facts upon which the defenses will rest.<sup>2</sup> For example, Form 30 in the Federal Rules of Civil Procedure provides a sample pleading for the statute of limitations defense: “The plaintiff’s claim is barred by the statute of limitations because it arose more than \_\_\_\_\_ years before this action was commenced.”<sup>3</sup> This approach parallels the approach plaintiffs long adopted in pleading their claims.

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The uncertainty about whether *Twombly* and *Iqbal* apply to affirmative defenses leaves defense counsel in a difficult spot. They must weigh the risk of waiver by under-pleading defenses and not being permitted to amend later against the risk that inadequately pleading defenses will result in the defenses being struck without sufficient opportunity to amend later. Making things all the more difficult, courts applying the *Twombly* and *Iqbal* standard to affirmative defenses have not provided much guidance as to what is required of defendants. Mitigating these concerns to some degree, many of these courts have been quite forgiving in applying the standard to affirmative defenses, particularly where plaintiffs cannot show any prejudice from the denial of a motion to strike. And the liberal standards for amending pleadings also lessen the waiver risk.<sup>4</sup> This article aims to aid practitioners navigating these issues.

Part I discusses the evolution of the pleading standards for claims and defenses. Part II provides an overview of the three conclusions courts have reached in deciding whether *Twombly* and *Iqbal* apply to affirmative defenses. Part III provides suggestions for practitioners facing this new uncertainty.

### I. Background

Any analysis of the standards for motions to dismiss and motions to strike must begin with Rule 8 of the Federal Rules of Civil Procedure. Rule 8 provides:

(a) **Claim for Relief.** A pleading that states a claim for relief must contain:

\* \* \*

(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and

\* \* \*

(b) **Defenses; Admissions and Denials.**

(1) **In General.** In responding to a pleading, a party must:

(A) state in short and plain terms its defenses to each claim asserted against it; and

(B) admit or deny the allegations asserted against it by an opposing party.

\* \* \*

(c) **Affirmative Defenses.**

(1) **In General.** In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense . . .

A frequent point of dispute is the degree to which Rule 8's requirements of "a short and plain statement of the claim showing that the pleader is entitled to relief," and a statement "in short and plain terms" of the "defenses to each claim" means litigants must plead specific facts.<sup>5</sup> The Supreme Court's recent decisions addressing this issue disclaim a change in the standard, but they certainly represent some degree of evolution.

#### A. "No Set of Facts" Standard

For about fifty years, *Conley v. Gibson*, 355 U.S. 41 (1957) supplied the standard for Rule 12(b)(6) motions to dismiss challenging the sufficiency of plaintiffs' pleadings. *Conley* was a class action lawsuit in which African-American employees sued under the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, seeking to compel their collective bargaining agent to represent them fairly. "In summary, the complaint made the following allegations relevant to [the] decision:"

Petitioners were employees of the Texas and New Orleans Railroad at its Houston Freight House. Local 28 of the Brotherhood was the designated bargaining agent under the Railway Labor Act for the bargaining unit to which petitioners belonged. A contract existed between the Union and the Railroad which gave the employees in the bargaining unit certain protection from discharge and loss of seniority. In May 1954, the Railroad purported to abolish 45 jobs held by petitioners or other Negroes all of whom were either discharged or demoted. In truth the 45 jobs were not abolished at all but instead filled by whites as the Negroes were ousted, except for a few instances where Negroes were rehired to fill their old jobs but with loss of seniority. Despite repeated pleas by petitioners,

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the Union, acting according to plan, did nothing to protect them against these discriminatory discharges and refused to give them protection comparable to that given white employees. The complaint then went on to allege that the Union had failed in general to represent Negro employees equally and in good faith. It charged that such discrimination constituted a violation of petitioners' right under the Railway Labor Act to fair representation from their bargaining agent. And it concluded by asking for relief in the nature of declaratory judgment, injunction and damages.<sup>6</sup>

The district court granted defendants' motion to dismiss for failure to state a claim upon which relief could be granted, and the appellate court affirmed. The Supreme Court reversed.

The Court stated that "[i]n appraising the sufficiency of the complaint," the rule is "that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."<sup>7</sup> The Court explained that "the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim."<sup>8</sup> Instead, "all the Rules require is 'a short and plain statement of the claim that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'"<sup>9</sup> Moreover, "[t]he Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits."<sup>10</sup>

Consistent with other circuits,<sup>11</sup> the Seventh Circuit has long applied a similar standard for Rule 12(f) motions to strike affirmative defenses. Specifically, the Seventh Circuit has directed courts to only grant a Rule 12(f) motion to strike if "it appears to a

certainty that plaintiffs would succeed despite any state of the facts which could be proved in support of the defense and are inferable from the pleadings."<sup>12</sup> The seminal case is *Heller Financial, Inc. v. Midwhey Powder Co., Inc.*, 883 F.2d 1286 (7th Cir. 1989).

*Heller* was a breach of contract case involving agreements related to the purchase of equipment for processing a dairy by-product. The trial court struck all eleven of the defendant's affirmative defenses.

Of Midwhey's eleven affirmative defenses, four went to personal jurisdiction and venue (defenses 1-4). The others included claims that: the co-generation equipment was unmerchantable and never accepted by Midwhey; Heller did not deal in good faith; the contracts, i.e., the lease and Agreement, were unconscionable; the contracts contained unenforceable penalty, damages, and attorney's fees clauses; the contracts' interest rates were usurious; and, finally, Edward & Lee, as Heller's agent, made certain misrepresentations, thus voiding the contracts.<sup>13</sup>

In affirming the order striking all of the defenses, the Seventh Circuit explained that because "[a]ffirmative defenses are pleadings . . . subject to all pleading requirements of the Federal Rules of Civil Procedure," "defenses must set forth a 'short and plain statement,' Fed. R. Civ. P. 8(a), of the defense."<sup>14</sup> It was proper to strike these defenses, the court reasoned, because they were "nothing but bare bones conclusory allegations" that "omitted any short and plain statement of facts and failed totally to allege the necessary elements of the alleged claims."<sup>15</sup>

The defenses were not only insufficiently pled, they were apparently baseless, as "the district court found all of Midwhey's affirmative defenses, except those based on personal jurisdiction and venue, frivolous, and ordered sanctions under Fed. R. Civ. P. 11."<sup>16</sup> For example, one affirmative defense alleged usurious interest rates,



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but that defense was unavailable to corporations in the relevant jurisdictions.<sup>17</sup> Although not relevant to its merits analysis, the court also noted that it was clear that there was no prejudice to the defendant from striking the defenses because the defendant never even moved to amend the defenses after the district court struck them as being insufficiently pled.<sup>18</sup>

Despite affirming the decision to strike the affirmative defenses, the court acknowledged the “general rule that motions to strike are disfavored” because they “potentially serve only to delay.”<sup>19</sup> However, where “motions to strike remove unnecessary clutter from the case, they serve to expedite, not delay.”<sup>20</sup> “Ordinarily, defenses will not be struck if they are sufficient as a matter of law or if they present questions of law or fact.”<sup>21</sup> “Affirmative defenses will be stricken only when they are insufficient on the face of the pleadings.”<sup>22</sup>

The Supreme Court recently “retired” *Conley*’s “no set of facts” standard, replacing it with a plausibility standard and giving rise to the question of whether there is now also a new standard for pleading affirmative defenses.

### B. *Conley*’s Retirement and the New Plausibility Standard

In *Twombly*, the U.S. Supreme Court “granted certiorari to address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct,”<sup>23</sup> and, in a 7-2 decision, the Court held “that stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made.”<sup>24</sup> *Twombly* was an antitrust case under Section 1 of the Sherman Act, 15 U.S.C. § 1, which requires a “contract, combination . . . , or conspiracy, in restraint of trade or commerce” for liability to attach. The question before the court was “whether a [Section] 1 complaint can survive a motion to dismiss when it alleges that major telecommunications providers engaged in certain parallel conduct unfavorable to competition, absent some factual context suggesting agreement, as distinct from identical, independent action.”<sup>25</sup>

In holding that the complaint was insufficiently pled, the Court reasoned that “[t]he need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects the threshold requirement of Rule 8(a)(2) that the ‘plain statement’ possess enough heft to ‘sho[w] that the pleader is entitled to relief.’”<sup>26</sup> “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.”<sup>27</sup> Courts must dismiss complaints where plaintiffs “have not nudged their claims across the line from conceivable to plausible.”<sup>28</sup>

The Court was concerned with conserving defendants’ and judicial resources and precluding plaintiffs from leveraging the enormous expense of litigation to obtain settlements for meritless claims.<sup>29</sup> For example, the Court cited a statement by Judge Posner that “some threshold of plausibility must be crossed at the outset before a patent antitrust case should be permitted to go into its inevitably costly and protracted discovery phase.”<sup>30</sup> The Court also cited an article by Judge Easterbrook for the proposition that “[i]t is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through careful case management given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side.”<sup>31</sup>

While *Twombly*’s holding seems at least in tension with *Conley*’s “no set of facts” standard, the Court concluded that *Conley*’s iteration of the standard had “earned its retirement.”<sup>32</sup> The Court did not believe the *Twombly* holding was inconsistent with *Conley* but rather that lower courts had been mistaken in taking the “no set of facts” language literally and in interpreting the standard without regard to the context of the factual allegations to which the Court had applied the *Conley* standard.<sup>33</sup>

Two years later, the Court confirmed that the *Twombly* standard applied to all cases, explaining that “[t]hrough *Twombly* determined the sufficiency of a complaint sounding in antitrust, the decision was based on our interpretation and application of Rule 8,” and “[t]hat Rule in turn governs the pleading standard ‘in all civil actions and proceedings.’”<sup>34</sup> The Court reiterated that Rule 8 “demands more than an unadorned, the defendant-unlawfully-harmed-me accusation.”<sup>35</sup> It found “[t]wo working principles [that] underlie [the] decision in *Twombly*.”<sup>36</sup>

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First, “the tenet that a court must accept as true all of the allegations contained in a complaint” does not apply “to legal conclusions.”<sup>737</sup> Accordingly, “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”<sup>738</sup> Rule 8 “does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.”<sup>739</sup>

“Second, only a complaint that states a plausible claim for relief survives a motion to dismiss.”<sup>740</sup> Determining this plausibility is “a context-specific task that requires the reviewing court to draw on its judicial experience and commonsense.”<sup>741</sup> “[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged — but it has not ‘show[n]’ — that the pleader is entitled to relief.”<sup>742</sup>

The Court suggested a two-step process for evaluating pleadings. A court “can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.”<sup>743</sup> The court should then assume the veracity of the remaining well-pleaded facts and “determine whether they plausibly give rise to an entitlement to relief.”<sup>744</sup>

*Twombly* and *Iqbal* did not address affirmative defenses. But because affirmative defenses are also governed by Rule 8, which the Supreme Court was interpreting in those cases, the question arises whether courts must follow the same two-step process for evaluating affirmative defenses.

### II. Diverging Views as to Whether *Twombly* and *Iqbal* Apply to Affirmative Defenses

Courts fall into three camps when addressing the question of whether *Twombly* and *Iqbal* require defendants to plead enough facts that, if true, could plausibly entitle them to prevail under a particular affirmative defense.

#### A. The Majority of Courts Conclude *Twombly* and *Iqbal* Apply to Affirmative Defenses

Courts in Illinois (Northern,<sup>45</sup> Central,<sup>46</sup> and Southern<sup>47</sup> Districts), Indiana (Northern District<sup>48</sup>), and Wisconsin (Eastern<sup>49</sup> and Western<sup>50</sup> Districts) have held that the *Twombly* and *Iqbal* plausibility

standard applies to affirmative defenses. This is the majority view both within the Seventh Circuit and nationally.<sup>51</sup> See *Riemer v. Chase Bank, U.S.A., N.A.*, 274 F.R.D. 637, 639 and notes 1 and 3 (N.D.Ill. 2011)(collecting cases). The opinions rely on four reasons.

First, “[t]he Seventh Circuit has noted that affirmative defenses are pleadings and subject to the pleading requirements of the Federal Rules of Civil Procedure.”<sup>52</sup> Because *Twombly* and *Iqbal* were interpreting Rule 8’s pleading requirements, courts reason that the holdings should apply equally to affirmative defenses, which are also governed by Rule 8. “With complaints and with defenses, the purpose of pleading requirements is the same,” which “is to give fair notice to the opposing party that there is some plausible, factual basis for the assertion and not simply to suggest some possibility that it might apply to the case.”<sup>53</sup> These courts conclude that “[t]o require less of a defendant sets the pleading bar too low.”<sup>54</sup> Under this view, a “requirement that an affirmative defense be pleaded in accordance with the *Twombly-Iqbal* standard simply means that it be pleaded in a way that is intelligible, gives fair notice, and is plausibly suggested by the facts.”<sup>55</sup> This is consistent with “Rule 8(a)(2)’s ‘short and plain statement of the claim’ language,” with “Rule 8(b)(1)(A)’s requirement that a defendant ‘state in short and plain terms its defenses to each claim,’” and “Rule 8(d)(1)’s requirement that all pleadings be ‘simple, concise, and direct.’”<sup>56</sup>

Second, these courts conclude that applying different standards to claims and affirmative defenses would be confusing and lead to inconsistent results. The concern is that such an approach “would require courts to interpret pleadings under different standards depending on the form of the pleading.”<sup>57</sup> Illustrating this point, in *Oleksy v. General Electric Co.*, General Electric asserted an affirmative defense that a patent was invalid based on prior use. General Electric also asserted a counterclaim for declaratory judgment that the patent was invalid based on prior use. “The affirmative defense and the counterclaim [relied] on the same factual allegations.”<sup>58</sup> “If the Court were to adopt GE’s position, it would then be required to review the same factual allegations under two different standards and could potentially reach a result where it found the affirmative defenses were sufficiently pled but the counterclaim was not despite the fact they relied on the exact same factual allegations.”<sup>59</sup>

Third, there is a concern that it would not be “fair to require a plaintiff to provide the defendant with enough notice that there is a plausible, factual basis for her claim under one pleading standard and then permit the defendant under another pleading standard simply to suggest that some defense may possibly apply in the case.”<sup>60</sup>

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Finally, applying *Twombly* and *Iqbal* to affirmative defenses may conserve resources. “[A] plaintiff will not be left to the formal discovery process to find-out whether the defense exists and may, instead, use the discovery process for its intended purpose of ascertaining the additional facts which support a well-pleaded claim or defense.”<sup>61</sup>

It is difficult to discern where these courts draw the line between an adequately and inadequately pled defense. In *Cincinnati Insurance Co. v. Kreager Bros. Excavating*,<sup>62</sup> the Cincinnati Insurance Company alleged that the defendants defaulted on a promissory note, and the defendants asserted these four affirmative defenses:

1. Plaintiff, by its acts or omissions or the acts or omissions of its agents or representatives, has waived its right to pursue any claims against the Defendants.
2. Plaintiff, by its acts or omissions or the acts or omissions of its agents or representatives, is estopped from pursuing any claims against the Defendants.
3. Plaintiff, by its acts or omissions or the acts or omissions of its agents or representatives, has failed to mitigate its damages.
4. Plaintiff has failed to fulfill conditions precedent to its claims against the Defendants.<sup>63</sup>

The court concluded that “[t]he defendants’ affirmative defenses are concise and do not have any surrounding factual support,” and “[s]uch boilerplate defenses without any support anywhere in the pleadings do not comply with Rule 8(a).<sup>64</sup> The defendants argued “that the bases of their defenses can be inferred from the fact that they agreed that the promissory note was signed but disagree whether it was defaulted on,” but the court disagreed, stating that “this gives no insight into what activities

Cincinnati or its agents engaged in that would preclude it from pursuing the claim.”<sup>65</sup> Likewise, defendants did not “point[] to any part of the pleading that shows what Cincinnati did or did not do to cause it to fail to mitigate its damages, nor do the defendants refer to a condition in the parties’ agreement that Cincinnati failed to fulfill.”<sup>66</sup>

Yet, courts applying *Twombly* and *Iqbal* seem to require defendants to plead more facts for some defenses than others. For example, in *Palomares v. Second Fed. Savings & Loan Assoc. of Chicago*,<sup>67</sup> the court found in an employment discrimination case that the defendants’ assertion “that each Plaintiff was discharged for non-discriminatory reasons” adequately pled an affirmative

defense under *Twombly* and *Iqbal* because it “provides Plaintiffs with sufficient notice of the basis for the defense and is neither redundant nor immaterial.”<sup>68</sup> On the other hand, the court found that the affirmative defense that “Plaintiffs’ claims for monetary relief are barred to the extent that the Plaintiffs failed to mitigate their damages” was insufficient because it “provides no factual support for this defense to explain what steps Plaintiffs could have taken to mitigate their damages,” nor did the defendant “establish[] that Plaintiffs had a duty to mitigate their damages,” making the defense

“merely a bare bones conclusory allegation.” The court did not explain why, for example the defendant did not need to plead what the nondiscriminatory reasons for discharging the employees were, but the defendant did need to plead what steps the defendant failed to take in mitigating damages.

It is clear that courts in this group will often decide that conclusory defenses are inadequately pled, but it is less clear what these courts will require of defendants to plead facts that will move defenses from the conceivable to the plausible.

### B. A Large Minority of Courts Conclude *Twombly* and *Iqbal* Do NOT Apply to Affirmative Defenses

Courts in Illinois (Northern<sup>69</sup> and Southern Districts<sup>70</sup>) and Indiana (Northern<sup>71</sup> and Southern<sup>72</sup> Districts) have held that *Twombly* and *Iqbal*’s plausibility standard does not apply to affirmative defenses. This is the minority view both within the Seventh Circuit and nationally, but numerous courts have reached this conclusion.<sup>73</sup> These courts rely on six reasons.

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First, these courts believe Rule 8 compels this result.<sup>74</sup> *Twombly* and *Iqbal* specifically addressed Rule 8(a)(2), which provides that “[a] pleading that states a claim for relief must contain . . . a short and plain statement of the claims showing that the pleader is entitled to relief.”<sup>75</sup> In contrast, Rule 8(b), which governs “defenses,” and Rule 8(c), which governs “affirmative defenses,” do not contain this language. Also, the Form 30 examples of failure to state a claim and statute of limitations defenses “provide[] no factual allegations in support of the defense[s], and form 30 is sufficient under the rules.”<sup>76</sup>

Second, courts conclude that this result furthers the policy concerns underlying *Twombly* and *Iqbal*. “[T]he driving force behind *Twombly* and *Iqbal* was to make it more difficult to use a bare-bones complaint to open the gates to expensive discovery and force an extortionate settlement.”<sup>77</sup> In contrast, “the risk of nuisance affirmative defenses does not warrant an extension of the ‘plausibility’ standard.”<sup>78</sup> As one judge colorfully noted, it “has never once lost sleep worrying about defendants filing nuisance affirmative defenses.”<sup>79</sup>

Third, these courts see this result as more fair than the alternative given the time constraints on answering a complaint. “[W]hereas a plaintiff generally has the benefit of the period of the statute of limitations, which may extend from many months to several years, to investigate and file a complaint, a defendant typically has only 21 days in which to serve an answer, including affirmative defenses, to the complaint.”<sup>80</sup>

Fourth, applying *Twombly* and *Iqbal* to affirmative defenses may needlessly increase motions practice. Defendants would plead fewer defenses and then move to amend to add defenses after discovery, which plaintiffs would oppose.<sup>81</sup> Indeed, defendants will almost never have information related to some defenses — such as a failure to mitigate damages — before the defendants are required to answer the complaint.<sup>82</sup> Disputes may also arise when defendants seek discovery regarding defenses they have not pled.<sup>83</sup> “[M]otions to strike often do not serve to refine issues and aid in a more expeditious resolution of a case, but serve instead to generate another round of briefing to be addressed before dispositive motions can be reached.”<sup>84</sup>

Fifth, these courts believe that there is no prejudice to plaintiffs by not applying the plausibility standard to affirmative defenses because plaintiffs can just ignore the defenses. Under this view, “[i]n a typical case, it quickly becomes apparent that most of the affirmative defenses are not viable, and the parties simply ignore them. No judicial intervention is necessary.”<sup>85</sup>

Sixth, this approach acknowledges the functional differences between a complaint and affirmative defenses. “Unlike a plaintiff filing a complaint, a defendant asserting an affirmative defense does not bring the jurisdiction of the federal courts to bear on what was previously a private matter.”<sup>86</sup> “[D]eciding whether a complaint survives a motion to dismiss may determine whether discovery will occur at all, whereas an affirmative defense at most affects the scope of discovery.”<sup>87</sup>

Most civil cases are resolved before trial, and the Court rarely has to deal with most affirmative defenses. Motions to dismiss help resolve cases; motions to strike, in most cases, waste everyone’s time. In the case where a motion to strike is useful — statutes of limitations, some unique defenses — the issues are largely legal, and the facts are better developed in motion practice than in the pleadings.<sup>88</sup>

“While applying the same standard to plaintiffs and defendants may satisfy our sense of consistency and symmetry, the rules value functionality over formalistic concerns for symmetry.”<sup>89</sup>

### C. Some Courts Conclude that Whether *Twombly* and *Iqbal* Apply to Affirmative Defenses Depends on the Specific Case and Defense

A small number of courts have a third view: It depends.

At least one court views the pre-*Twombly* and post-*Twombly* standards as “not materially different” with regard to affirmative defenses.<sup>90</sup> Comparing *Twombly* to the statement in *Woodfield v. Bowman*, 193 F.3d 354, 362 (5th Cir. 1999), that the purpose of the pleading requirements as they relate to affirmative defenses is to give the plaintiff “fair notice” of the defenses being advanced,<sup>91</sup> the court observed that “under both standards, ‘[s]pecific facts are not necessary; the statement need only give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.’”<sup>92</sup> “The degree of factual specificity, if any, to provide the plaintiff with fair notice of the affirmative defense depends on the specific case and the specific defense.”<sup>93</sup>

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Applying this context-specific standard, the court struck some defenses and allowed others. The defenses for “statute of limitations,” “mistake,” “no damages,” “speculative damages,” “no sufficient intent,” and “standing” were “not pled with much detail,” but that did not warrant striking them because “the basis for the defenses is largely self-explanatory given the nature of the alleged violation.”<sup>94</sup> The defenses of “offset” and “failure to mitigate” “sufficiently inform the plaintiff of the issues raised,” and “it would not be reasonable to expect the defendant to have detailed information about mitigation or offset at this early stage of the litigation.”<sup>95</sup>

On the other hand, affirmative defenses of “laches,” “waiver,” “estoppel,” “consent/acquiescence,” “plaintiff’s fault,” “fault of others,” and “unclean hands” are equitable defenses.<sup>96</sup> Because they were not pled “with any degree of specificity” “beyond bare-bones legal conclusions,” they were “not sufficient to provide plaintiff with fair notice,” and the court struck those defenses.<sup>97</sup>

Another court has developed a more straightforward rule for this approach. For the affirmative defenses that Rule 8(c) lists, with the exception of fraud, “the designation of a listed defense is sufficient notice to a plaintiff of its basic thrust.”<sup>98</sup> For other defenses, the defendant must “provide a semblance of content to its details.”<sup>99</sup>

### III. Confronting the Uncertainty in the Pleading Standard

The uncertainty as to whether the plausibility standard applies to pleading affirmative defenses should cause defense counsel to rethink their strategy for prevailing on affirmative defenses.

First, counsel should research whether the judge presiding over the case has ruled on the issue before. The diverging views on this issue have not only led to divisions between districts, but also divisions between chambers in the same district. Counsel should further research what the prevailing view is in the relevant district, as some courts may be influenced by a desire to remain consistent with other courts in the district.<sup>100</sup>

Second, counsel should plead at the outset as many facts as possible — the who, what, where, when, and how — with regard to each affirmative defense. It is likely that most of the time most

of this information will be unavailable. But even pleading just minimal information may save a defense from a motion to strike. For example, recently in *Miller v. Ghirardelli Chocolate Co.*,<sup>101</sup> the court decided that *Twombly* and *Iqbal* applies to affirmative defenses, and it found that a statute of limitations defense was adequately pled under the standard merely by “identifying some of the applicable statutes of limitations.” The court likewise declined to strike a defense based on putative class members’ “[a]cceptance of goods after reasonable opportunity to inspect.”<sup>102</sup> Of course the defendant could not at the pleadings stage have facts as to whether putative class members accepted goods after a reasonable opportunity to inspect, but the court declined to strike the defense because “the court cannot tell that these defenses are inapplicable.”<sup>103</sup> Courts may also decline to strike defenses that lack some of the supporting facts because, even though the courts believe *Twombly* and *Iqbal* apply, there is no prejudice in denying the motion. The *Miller* court declined to strike the following defenses for this reason:

23. Contributory Fault: The recovery of Plaintiff and/or other class members is barred and/or should be reduced because of contributory negligence or fault and/or comparative negligence or fault.
24. The [First Amended Complaint], and each cause of action alleged therein, is barred by the doctrines of unclean hands, estoppel, waiver, and laches.
25. Plaintiff, and any class members, failed or refused to exercise reasonable care and diligence to avoid loss and minimize damages, and therefore, may not recover for losses that could have reasonably prevented.<sup>104</sup>

Third, counsel should continue pleading the defenses they would have pled before *Twombly* and *Iqbal* even if facts are not yet uncovered to plead. There should be little risk of Rule 11 sanctions for adhering to the standard practice in pleading affirmative defenses while there is widespread disagreement among the courts as to whether there should be any change in that practice. This will minimize the risk that by failing to plead a defense counsel will waive it. This is also consistent with the view of the third group of courts discussed above, which conclude that fact pleading may only be required for some defenses and not others. *Miller* is again illustrative where the court denied a motion to strike a preemption defense that the defendant pled as follows: “The claims are barred to the extent that they are preempted by federal law, including specifically by FDA labeling requirements and the prohibition on private rights of action to enforce FDA rules.”<sup>105</sup>

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Fourth, counsel should consider alleging at least each of the elements of the affirmative defenses even if counsel cannot allege specific facts in support of those elements. For example, rather than simply asserting that the plaintiff's claims are barred by laches, counsel should consider alleging that (1) the plaintiff inexcusably delayed asserting his or her rights, (2) the plaintiff impliedly waived his or her rights by knowingly acquiescing in existing conditions, and (3) the defendant was prejudiced by the delay.<sup>106</sup> Even before *Twombly* and *Iqbal*, the Seventh Circuit affirmed the order striking defenses in *Heller* in part because the defendants "failed totally to allege the necessary elements of the alleged" defenses.<sup>107</sup>

Fifth, counsel should adjust their approach to developing a case management plan to account for the possibility that defenses will be struck and the answer will need to be amended. Given that defendants may need to develop facts through discovery before pleading all of their defenses, defense counsel should advocate a later deadline for defendants to amend their answers. And much like counsel may negotiate a timeframe for supplementing discovery, defense counsel may also want to negotiate how promptly answers must be amended. If defendants wait too long to seek leave to amend an answer, plaintiffs may argue that they are prejudiced by the inability to seek discovery of the new defenses. On the other hand, it may be unnecessarily time consuming and inefficient for the parties and the court to require defendants to move to amend their complaints immediately every time a new defense is discovered.

Sixth, counsel should consider moving to amend to replead defenses that are struck to preserve the issue for appeal. In *Heller*, the Seventh Circuit noted that it was clear that there was no prejudice to the defendant from striking the defenses because the defendant never even moved to amend the defenses after the court struck them as being insufficiently pled. Some courts applying *Twombly* and *Iqbal* to affirmative defenses also look to whether the defendant is prejudiced, and moving to amend may bolster the record on appeal showing prejudice.<sup>108</sup>

## IV. Conclusion

Jeremy Bentham taught that the power of the lawyer is in the uncertainty of the law. Uncertainty regarding the standard for pleading affirmative defenses is unavoidable until appellate guidance develops, particularly given the large number of district courts falling into conflicting camps. Mindful of the district courts' diverging views and the strategic considerations discussed above, counsel can minimize the consequences of this uncertainty.

## Notes:

<sup>1</sup> There is a growing focus on this issue in the academic and practice literature as well. See, e.g., Nathan A. Leber, Note, *Solving a Pleading Plague: Why Federal Courts Should Strike Insufficient Affirmative Defenses Under the Twombly-Iqbal Plausibility Standard*, 61 Clev. St. L. Rev. 231 (2013); Nathan Pysno, Note, *Should Twombly and Iqbal Apply to Affirmative Defenses?*, 64 Vand. L. Rev. 1633 (2011); Melanie A. Goff & Richard A. Bales, A "Plausible" Defense: *Applying Twombly and Iqbal to Affirmative Defenses*, 34 Am. J. Trial Advoc. 603 (2011); Anthony Gambol, Note, *The Twombly Standard and Affirmative Defenses: What is Good for the Goose is Not Always Good for the Gander*, 789 Fordham L. Rev. 2173 (2011); James V. Bilek, Comment, *Twombly, Iqbal, and Rule 8(c): Assessing the Proper Standard to Apply to Affirmative Defenses*, 15 Chap. L. Rev. 377 (2011); Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 Duke L.J. 1, 101-103 (2010).

<sup>2</sup> *Romantine v. CH2M Hill Eng'rs*, No. 09-973, 2009 U.S. Dist. LEXIS 98699, at \*3 (W.D. Pa. Oct. 23, 2009); see also *Wells Fargo & Co. v. United States*, 750 F. Supp. 2d 1049, 1051 (D. Minn. 2010) ("Affirmative defenses are almost always simply listed in answers; only rarely do defendants plead much in the way of facts in support affirmative defenses.").

<sup>3</sup> Fed. R. Civ. P. Form 30 ¶ 6.

<sup>4</sup> See Fed. R. Civ. P. 15(a)(2) ("The court should freely give leave when justice so requires.").

<sup>5</sup> Fed. R. Civ. P. 8(a)(2) & (b)(1)(A).

<sup>6</sup> *Conley*, 355 U.S. at 42-43.

<sup>7</sup> *Id.* at 45-46 (emphasis added).

<sup>8</sup> *Id.* at 41, 47.

<sup>9</sup> *Conley*, 355 U.S. at 47.

<sup>10</sup> *Conley*, 355 U.S. at 48.

<sup>11</sup> See, e.g., *Marine Overseas Servs., Inc. v. Crossocean Shipping Co.*, 791 F.2d 1227, 1233 (5th Cir. Tex. 1986) ("The pleading of affirmative defenses is governed by the same liberal standards as those for a complaint.").



# After *Twombly* and *Iqbal*

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<sup>12</sup>*Williams v. Jader Fuel Co.*, 944 F.2d 1388, 1400 (7th Cir. 1991) (quotations and citations omitted).

<sup>13</sup>*Heller Financial, Inc.*, 883 F.2d at 1289 (7th Cir. 1989).

<sup>14</sup>*Id.* at 1294.

<sup>15</sup>*Id.* at 1295.

<sup>16</sup>*Id.*

<sup>17</sup>*Id.* at 1295 n.1.

<sup>18</sup>*Id.* at 1294.

<sup>19</sup>*Id.*

<sup>20</sup>*Id.*

<sup>21</sup>*Id.*

<sup>22</sup>*Id.*

<sup>23</sup>*Twombly*, 550 U.S. at 553 (2007).

<sup>24</sup>*Id.* at 556.

<sup>25</sup>*Id.* at 549.

<sup>26</sup>*Id.* at 557.

<sup>27</sup>*Id.* at 555 (citations omitted).

<sup>28</sup>*Id.* at 570; *see also id.* at 555 (“Factual allegations must be enough to raise a right to relief above the speculative level.”).

<sup>29</sup>*See id.* at 558.

<sup>30</sup>*Id.* at 558 (2007) (quoting *Asahi Glass Co. v. Pentech Pharm., Inc.*, 289 F. Supp. 2d 986, 995 (N.D. Ill. 2003) (Posner, J. sitting by designation)).

<sup>31</sup>*Id.* at 559 (quotations and citation omitted) (citing Easterbrook, *Discovery as Abuse*, 69 B.U. L. Rev. 635, 638 (1989)).

<sup>32</sup>*Id.* at 544.

<sup>33</sup>*Id.* at 562-63.

<sup>34</sup>*Iqbal*, 556 U.S. at 684.

<sup>35</sup>*Id.* at 678.

<sup>36</sup>*Id.*

<sup>37</sup>*Id.*

<sup>38</sup>*Id.*

<sup>39</sup>*Id.* at 678-79.

<sup>40</sup>*Id.* at 679.

<sup>41</sup>*Id.*

<sup>42</sup>*Id.* (quoting Fed. R. Civ. P. 8(a)(2)).

<sup>43</sup>*Id.*

<sup>44</sup>*Id.*

<sup>45</sup>*See, e.g., La. Firefighters’ Ret. Sys. v. N. Trust Invs., N.A.*, No. 09 C 7203, 2012 U.S. Dist. LEXIS 22693, at \*16 (N.D. Ill. Feb. 23, 2012); *Cassetica Software, Inc. v. Computer Sciences Corp.*, No. 11 C 2187, 2011 U.S. Dist. LEXIS 108646, at \*12 (N.D. Ill. Sept. 22, 2011); *Palomares v. Second Fed. Savings & Loan Assoc. of Chicago*, No. 10-cv-6124, 2011 U.S. Dist. LEXIS 56949, at \*3-4 (N.D. Ill. May 25, 2011).

<sup>46</sup>*Local 165 v. DEM/EX Group Inc.*, No. 09-1356, 2010 U.S. Dist. LEXIS 22707 (C.D. Ill. Mar. 11, 2010); *OSF Healthcare Sys. v. Banno*, No. 08-CV-1096, 2010 U.S. Dist. LEXIS 7584, at \*3 (C.D. Ill. Jan. 5, 2010).

<sup>47</sup>*Payne v. Core Minerals Operating Co.*, No. 11-cv-456-JPG-PMF, 2011 U.S. Dist. LEXIS 136587, at \*2 (S.D. Ill. Sept. 28, 2011) (magistrate judge opinion); *Carretta v. May Trucking Co.*, No. 09-158-KJR, 2010 U.S. Dist. LEXIS 26302, at \*5-6 (S.D. Ill. Mar. 19, 2010) (magistrate judge opinion); *Darnell v. Hoelscher, Inc.*, No. 09-204-JPG, 2009 U.S. Dist. LEXIS 112942, at \*5-6 (S.D. Ill. Dec. 4, 2009).

<sup>48</sup>*Cincinnati Ins. Co. v. Kreager Bros. Excavating, Inc.*, No. 2:12-cv-470-JD-APR, 2013 U.S. Dist. LEXIS 85743, at \*3-4 (N.D. Ind. June 18, 2013) (magistrate judge opinion).

<sup>49</sup>*United States SEC v. Sachdeva*, No. 10-C-747, 2011 U.S. Dist. LEXIS 32544, at \*2 (E.D. Wisc. Mar. 16, 2011).

<sup>50</sup>*Greenheck Fan Corp. v. Loren Cook Co.*, No. 08-cv-335-jps, 2008 U.S. Dist. LEXIS 75147, at \*4 (W.D. Wisc. Sept. 25, 2008) (magistrate judge opinion).

<sup>51</sup>*See, e.g., Lane v. Page*, 272 F.R.D. 581, 590 n.5 (D.N.M. Jan. 14, 2011) (collecting cases).

<sup>52</sup>*Kimbrew v. Advocate Health & Hosps. Corp.*, No. 10 C 4531, 2010 U.S. Dist. LEXIS 136330, at \*3 (N.D. Ill. Dec. 8, 2010).

<sup>53</sup>*Palmer v. Oakland Farms, Inc.*, No. 5:10cv00029, 2010 U.S. Dist. LEXIS 63265, at \*15 (W.D. Va. June 24, 2010) (magistrate judge opinion).

<sup>54</sup>*Id.*

<sup>55</sup>*Id.* at \*15-16.

<sup>56</sup>*Id.*

<sup>57</sup>*Oleksy v. Gen. Electric Co.*, No. 06 C 01245, 2013 WL 3233259, \*49 (N.D. Ill. June 26, 2013).

<sup>58</sup>*Id.*

<sup>59</sup>*Id.* at \*50.

<sup>60</sup>*Palmer*, 2010 U.S. Dist. LEXIS 63265, at \*13.

<sup>61</sup>*Id.* at \*16.

<sup>62</sup>No. 2:12-cv-470-JD-APR, 2013 U.S. Dist. LEXIS 85743 (N.D. Ind. June 18, 2013) (magistrate judge opinion).

<sup>63</sup>*Id.* at \*1-2.

<sup>64</sup>*Id.* at \*4-5.

<sup>65</sup>*Id.* at \*5.

<sup>66</sup>*Id.* at \*6.

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## After *Twombly* and *Iqbal*

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<sup>67</sup> *Palomares*, 2011 U.S. Dist. LEXIS 56949, at \*8.

<sup>68</sup> *Id.* at \*7 (N.D. Ill. May 25, 2011).

<sup>69</sup> *Leon v. Jacobson Transp. Co.*, No. 10 C 4939, 2010 U.S. Dist. LEXIS 123106, at \*3 (N.D. Ill. Nov. 19, 2010).

<sup>70</sup> *Ford v. Psychopathic Records, Inc.*, No. 12-cv-0603-MJR-DGW, 2013 U.S. Dist. LEXIS 93141 (S.D. Ill. July 3, 2013).

<sup>71</sup> *Cottle v. Falcon Holdings Mgmt., LLC*, No. 2:11-CV-95-PRC, 2012 U.S. Dist. LEXIS 10478 (N.D. Ind. Jan. 30, 2012) (magistrate judge opinion).

<sup>72</sup> *J & J Sports Productions, Inc.*, No. 1:10-cv-1563-WTL-TAB, 2011 U.S. Dist. LEXIS 77373 (S.D. Ind. July 15, 2011).

<sup>73</sup> *See, e.g., Lane v. Page*, 272 F.R.D. 581, 588-97 (D.N.M. Jan. 14, 2011) (collecting cases).

<sup>74</sup> *Cottle*, 2012 U.S. Dist. LEXIS 10478 (“First, the language of Rule 8(a)(2) relied on by the Supreme Court in *Twombly* and *Iqbal*, that “[a] pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief” Fed. R. Civ. P. 8(a) (emphasis added), is not contained in Rules 8(b) or 8(c), which govern defenses and affirmative defenses, respectively.”).

<sup>75</sup> Fed. R. Civ. P. 8(a)(2) (emphasis added).

<sup>76</sup> *Lane*, 272 F.R.D. at 594.

<sup>77</sup> *Leon*, 2010 U.S. Dist. LEXIS 123106, at \*3; *Cottle*, 2012 U.S. Dist. LEXIS 10478, at \*9 (same); *Ford*, 2013 U.S. Dist. LEXIS 93141, at \*17 (same).

<sup>78</sup> *Cottle*, 2012 U.S. Dist. LEXIS 10478, at \*9; *see also Ford*, 2013 U.S. Dist. LEXIS 93141 (S.D. Ill. July 3, 2013) (agreeing that affirmative defenses “can easily be ignored” and therefore “the likelihood of a defendant filing nuisance defenses is unlikely”).

<sup>79</sup> *Leon*, 2010 U.S. Dist. LEXIS 123106, at \*3.

<sup>80</sup> *Cottle*, 2012 U.S. Dist. LEXIS 10478, at \*10; *Leon*, 2010 U.S. Dist. LEXIS 123106, at \*3 (same).

<sup>81</sup> *Id.* at \*11.

<sup>82</sup> *Leon*, 2010 U.S. Dist. LEXIS 123106, at \*3 (“[T]he Court would like to avoid having to rule on multiple motions to amend the answer during the course of discovery as the defendant obtains additional information that would support those affirmative defenses (such as mitigation of damages) that the defendant has no practical way of investigating before discovery.”); *see also Voeks v. Wal-Mart Stores, Inc.*, No. 07-C-0030, 2008 U.S. Dist. LEXIS 846, at \*17 (E.D. Wis. Jan. 7, 2008) (“It would not be reasonable to expect the defendant to have detailed information about mitigation or offset at this early stage of the litigation.”); *Yash Raj Films (USA) Inc. v. Atl. Video*, No. 03 C 7069, 2004 U.S. Dist. LEXIS 9739, \*11-12 (N.D. Ill. May 27, 2004) (denying motion to strike affirmative defenses for failure to mitigate damages and for set off because “at this point in the litigation” the defendant “does not have access to information that would enable” the defendant to state such a defense with more particularity”).

<sup>83</sup> *Leon*, 2010 U.S. Dist. LEXIS 123106, at \*3 (“The Court would also like to avoid the discovery disputes that would inevitably develop as a defendant seeks discovery related to affirmative defenses it had not stated in its answer.”); *Cottle*, 2012 U.S. Dist. LEXIS 10478, at \*11.

<sup>84</sup> *Ford*, 2013 U.S. Dist. LEXIS 93141, at \*18.

<sup>85</sup> *Cottle*, 2012 U.S. Dist. LEXIS 10478, at \*11 (quoting *Wells Fargo & Co. v. United States*, 750 F. Supp. 2d 1049, 1052 (D. Minn. 2010)); *see also Leon*, 2010 U.S. Dist. LEXIS 123106, at \*1 (“Often that which a party wants stricken is harmless and can easily be ignored.”)

<sup>86</sup> *Lane*, 272 F.R.D. at 595-596.

<sup>87</sup> *Id.* at 595-596.

<sup>88</sup> *Id.* at 596.

<sup>89</sup> *Id.* at 595-596 (citation omitted).

<sup>90</sup> *Voeks*, 2008 U.S. Dist. LEXIS 846, at \*16 (comparing *Twombly* standard to standard in *Woodfield v. Bowman*, 193 F.3d 354, 362 (5th Cir. 1999) (cited for the proposition that the purpose of the pleading requirements as they relate to affirmative defenses is to give the plaintiff “fair notice” of the defenses being advanced.”).

<sup>91</sup> *Id.* at \*16.

<sup>92</sup> *Id.* (quoting *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007) (alterations in *Voeks*)).

<sup>93</sup> *Id.* at \*17 (emphasis added).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Kaufmann v. Prudential Ins. Co. of Am.*, No. 09-10239-RGS, 2009 U.S. Dist. LEXIS 68800, at \*2 (D. Mass. Aug. 6, 2009).

<sup>99</sup> *Id.*

<sup>100</sup> *See, e.g., Miller v. Ghirardelli Chocolate Co.*, No. C 12-04936 LB, 2013 U.S. Dist. LEXIS 86417, at \*8 (N.D. Cal. June 19, 2013) (“Courts in this district consistently have applied the *Twombly-Iqbal* pleading standard to the pleading of affirmative defenses, requiring a defendant to allege enough facts to state a claim to relief that is plausible on its face.”).

<sup>101</sup> *Id.* at \*17 (emphasis added).

<sup>102</sup> *Id.* at \*5 & 14.

<sup>103</sup> *Id.* at \*14.

<sup>104</sup> *Id.* at \*15-16.

<sup>105</sup> *Id.* at \*11.

<sup>106</sup> *Hutchinson v. Spanierman*, 190 F.3d 815 (7th Cir. 1999) (stating elements of laches defense).

<sup>107</sup> *Heller Financial, Inc. v. Midway Powder Co.*, 883 F.2d 1286, 1295 (7th Cir. Ill. 1989).

<sup>108</sup> *Id.* at 1294.



H A N D L I N G  
Jury Instructions  
with *Care*

By Matthew D. Krueger and A.J. Peterman\*

*“Amid a sea of facts and inferences, instructions are the jury’s only compass.”*

*United States v. Walters*, 913 F.2d 388, 392 (7th Cir. 1990)

Drafting jury instructions can easily fall to the bottom of a lawyer’s to-do list. Litigating a case involves many seemingly more pressing demands. And cases settle so often that drafting jury instructions early may feel like a waste. Besides, one might think, drafting the instructions is a mechanical task — just copying case law and pattern instructions.

But there are compelling reasons to pay careful attention to jury instructions, from a case’s inception through its appeal, in civil and criminal cases alike. *See* Sylvia Walbolt and Cristina Alonso, *Jury Instructions: A Road Map for Trial Counsel*, 30 LITIGATION 29 (Winter 2004). These reasons become evident when viewing a case in hindsight, through appellate decisions reviewing jury instructions. The Seventh Circuit has addressed jury instructions in hundreds of cases, producing a rich body of guidance. These cases illustrate the importance of jury instructions and how litigants can advance their cause by handling them carefully.

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# Handling Jury Instructions

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## The Jury’s Only Compass

Consider first that appellate courts give jury instructions extraordinary weight. Courts presume that jurors understand and follow their instructions. *Gacy v. Welborn*, 994 F.2d 305, 313 (7th Cir. 1993). This bedrock principle persists even as social science research casts doubt on whether jurors, in fact, understand or follow instructions. *See, e.g.*, Judith L. Ritter, *Your Lips Are Moving: Dissecting the Presumption That Jurors Understand Instructions*, 69 Mo. L. Rev. 163, 198-201 (2004). Moreover, this presumption cannot be rebutted—even if, for example, jurors would admit that they did not heed the instructions. *See Hyde v. United States*, 225 U.S. 347, 381-84 (1912); Fed. R. Evid. 606(b). The “presumption” is actually “a rule of law—a description of the premises underlying the jury system, rather than a proposition about jurors’ abilities and states of mind.” *Gacy*, 994 F.2d at 313.

In keeping with this presumption, appellate courts treat jury instructions as critical components of a trial. Indeed, instructions can cure the harm caused by evidentiary errors and improper arguments. *E.g., Jones v. Lincoln Elec. Co.*, 188 F.3d 709, 732 (7th Cir. 1999). The corollary is that instructional misstatements or gaps are more serious than other errors. For example, if the trial court wrongly refuses to give a defense instruction, it is no substitute that defense counsel made the point in closing arguments. Instructions are “the jury’s only compass.” *United States v. Walters*, 913 F.2d 388, 392 (7th Cir. 1990). On appeal, the Seventh Circuit applies well-established standards

to review challenges to jury instructions. The review consists of two inquiries. The first is to determine whether the instruction is legally correct. Here, the court of appeals “review[s] *de novo* whether jury instructions ‘fairly and accurately summarize the law.’” *United States v. Quintero*, 618 F.3d 746, 753 (7th Cir. 2010). This requirement is elemental: The instructions cannot misrepresent the law.

The second inquiry focuses on the district court’s choice of words. The “district court is afforded substantial discretion with respect to the precise wording of instructions so long as the final result, read as a whole, completely and correctly states the law.” *United States v. Lee*, 439 F.3d 381, 387 (7th Cir. 2006). This standard is highly deferential, and the court of appeals usually rejects challenges to the district court’s formulation.



That said, the Seventh Circuit does reverse when a technically accurate instruction may have confused the jury. For example, in a recent products liability case, the Seventh Circuit disallowed an instruction that the defendant was not liable if the plaintiff was the “sole proximate cause” of his own injury. *Stollings v. Ryobi Technologies, Inc.*, 725 F.3d 753, 770 (7th Cir. 2013). This was a correct legal statement: If the plaintiff was the only source of his own injury, the defendant could not have caused it. But the instruction was confusing because it invited the jury to consider the plaintiff’s conduct when the defendant had abandoned any claim that the plaintiff was contributorily negligent. *Id.* For that reason, the court of appeals ordered a retrial.

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## Handling Jury Instructions

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### Handling Jury Instructions in the District Court

These cases yield practical tips for district court practice. First, litigants should not approach jury instruction drafting as a quick copy-and-paste job. Rather, to avoid jury confusion, counsel should thoughtfully compose instructions that are simple and clear. As the Pattern Criminal Jury Instructions advise, this means avoiding “legalisms, in order to produce instructions that will be as understandable as possible to lay jurors.” Seventh Circuit Pattern Criminal Jury Instructions, at ii (2012). Clarity is also helped by dropping some instructions altogether: “Unless it is necessary to give an instruction, it is necessary not to give it, so that the important instructions stand out and are remembered.”

*United States v. Hill*, 252 F.3d 919, 923 (7th Cir. 2001).

Second, litigants should approach the instructions as a chance to persuade jurors. Of course, the jury instruction cannot misstate the law. Apart from that, however, the district court’s broad leeway to craft instructions means that litigants can propose instructions that best communicate their theory of the case.

To illustrate, many criminal statutes require that the defendant acted “knowingly.” Knowledge can be especially tough to prove when a scheme involves multiple actors or complex transactions, and the defendant denies having known certain facts. If the evidence supports it, prosecutors may seek an “ostrich” instruction, which defines “knowingly” to include willful blindness. See Pattern Criminal Jury Instructions 4.10 (2012). Counsel can debate what “willful blindness” entails, and some read the Supreme Court’s decision in a recent patent-infringement case as defining it stringently, even for criminal cases. See *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S.Ct. 2060 (2011). The Court held that willful blindness describes a defendant who “subjectively believe[d]” there was “a high probability” that a

fact existed and yet took “deliberate actions to avoid learning” it. *Id.* at 2069. If a criminal defendant had a relatively passive role, he may prefer *Global-Tech’s* formulation and emphasize that he took no “deliberate actions” to avoid learning a fact. The prosecution, on the other hand, may prefer the jury be told it suffices that the defendant “deliberately avoided the truth,” because that arguably encompasses passive behavior, such as neglecting to ask questions.

Finally, it is never too early to integrate the jury instructions into case planning. If the instructions are the jury’s “sole compass,” parties will want to orient their case accordingly from the beginning. Ideally, the jury will hear the same formulations of the legal elements that appear in a party’s complaint, indictment, or answer. Ideally, those formulations will guide the party’s discovery and trial preparation. And, ideally, counsel will use those formulations in opening and closing arguments. That way, when the jurors finally hear their charge, they will easily understand how the law applies to the arguments and evidence.

### Handling Jury Instructions on Appeal

Jury instructions are often attacked on appeal, perhaps because such challenges can present discrete legal issues. Given the standards outlined above, appellants should try to frame their challenge as running to the instruction’s legal accuracy to invoke *de novo* review and minimize deference to the lower court. Before asserting such a challenge, however, keep in mind the scope of appellate inquiry. The court of appeals does not review a challenged instruction in a vacuum. Rather, as the Supreme Court has explained, jury instructions must be viewed in their “entire[ty]” and “as part of the whole trial.” *United States v. Park*, 421 U.S. 658, 674-75 (1975). Thus, a snippet of a jury instruction that appears problematic when viewed in isolation may be sufficient when read in context. See, e.g., *United States v. Kirklin*, 727 F.3d 711, 716 (7th Cir. 2013).

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## Handling Jury Instructions

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If an instruction is erroneous, the Seventh Circuit will not reverse unless the error affected the trial. Determining just what standard governs this review for prejudice is another point that warrants attention. The first question is whether the error was preserved for appellate review. Assuming it was, in civil cases, the Seventh Circuit’s test is straightforward, asking simply whether “a party was prejudiced by the instruction.” *Schobert v. Illinois Dep’t of Transp.*, 304 F.3d 725, 732 (7th Cir. 2002).

Criminal cases present further nuances. Certain errors are deemed “structural defects in . . . the trial mechanism,” requiring automatic reversal. *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993). Misstating the “reasonable doubt” standard falls into this category. *See id.* Such “structural” errors are rare, however, and most preserved errors are subject to harmless error review. *See Fed. R. Crim. P. 52(a)*. For example, even if the jury charge omitted an entire element of an offense, harmless error review still applies. *See Neder v. United States*, 527 U.S. 1, 15 (1999).

The next question is which harmless-error standard applies. The Supreme Court has established two modes, depending on the type of error. Errors that violate a constitutional right are held to the stringent standard articulated in *Chapman v. California*, 386 U.S. 18 (1967). This standard deems an error harmless only if “it appears ‘beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.’” *Neder*, 527 U.S. at 15 (quoting *Chapman*, 386 U.S. at 24). Omitting or misstating an element of the offense typically qualifies as a constitutional error, falling under *Chapman’s* standard. *See, e.g., United States v. Ramsey*, 406 F.3d 426, 432 (7th Cir. 2005).

By contrast, errors that do not implicate constitutional rights are subject to the more lenient standard announced in *Kotteakos v. United States*, 328 U.S. 750 (1946). *See, e.g., United States v. Robinson*, 724 F.3d 878, 891 (7th Cir. 2013). These include evidentiary errors, such as how the jury should regard a prior conviction or a co-conspirator’s statement. *Id.* at 888;

*United States v. Goines*, 988 F.2d 750, 774 (7th Cir. 1993). Under *Kotteakos*, an error is harmless if the court of appeals “can say ‘with fair assurance’ that the judgment was not ‘substantially swayed by the error.’” *Robinson*, 724 F.3d at 891 (quoting *Kotteakos*, 328 U.S. at 765). Although the government bears the burden under both standards, the *Kotteakos* standard is significantly easier for the government to meet. Notably, if both parties assert that a certain standard applies, the Seventh Circuit may well go with them, even if one party could have sought a more favorable standard. *See Sorich v. United States*, 709 F.3d 670, 674 (7th Cir. 2013).

In reviewing for harmless error, the court of appeals will assess the error in light of the whole case. If the evidence supports the jury’s verdict as correctly instructed, or if the losing party never presented arguments that turned on the correct instruction, the court will not reverse. *See, e.g., Schobert*, 304 F.3d at 733-34. This is basic stuff. Still, the Seventh Circuit sees and rejects jury-instruction challenges for lack of prejudice with great frequency. Before raising a jury instruction issue on appeal, think hard about whether the disputed instruction really mattered. Better yet, handle the jury instructions with care from the start, and you may avoid the need to take an appeal altogether.

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CHOOSING ADR FOR COMMERCIAL CONTRACT DISPUTES:

## the Good, the Bad, *and* the Common Law

By Freya K. Bowen\*

**A**lternative Dispute Resolution (ADR) is a well-established and valuable feature of our current litigation system. The Seventh Circuit routinely notes the “liberal federal policy favoring arbitration agreements” and admonishes courts to address questions of arbitrability “with a healthy regard for the federal policy favoring arbitration.” *Duthie v. Matria Healthcare, Inc.* 540 F.3d 533, 536-37 (7th Cir. 2008). Accordingly, although “the touchstone for interpreting an arbitration clause must be the intention of the parties,” *Agco Corp. v. Anglin*, 216 F.3d 589 (7th Cir. 2000), federal policy requires that “ambiguities in the language of the agreement should be resolved in favor of arbitration.” *BCS Ins. Co. v. Wellmark, Inc.* 410 F.3d 349 (7th Cir. 2005). The courts’ deference to the parties initial choice to arbitrate thus means that “[w]ithin exceedingly broad limits, the parties to an arbitration agreement choose their method of dispute resolution and are bound by it however bad their choice appears to be either *ex ante* or *ex post*.” *IDS Life Ins. Co. v. Royal Alliance Associates, Inc.*, 266 F.3d 645, 649 (7th Cir. 2001).

Of course, ADR of all kinds has been controversial since its inception. Indeed, the purpose of the Federal Arbitration Act “was to end a tradition of judicial hostility toward arbitration agreements and place them on a par with other contracts.” *Universal Reinsurance Corp. v. Allstate Ins. Co.*, 16 F.3d 125, 129 (7th Cir. 1994). To date, much of the debate surrounding ADR (including both mediated settlements and arbitration) has focused on its impact on the particular kinds of disputes which are viewed as raising public policy concerns. For example, scholars have expressed concerns about the use of ADR in disputes between parties with unequal bargaining power, such as consumer contracts of adhesion and tort claims brought by indigent plaintiffs against corporations, or those addressing issues with wide-spread public impact, such as school desegregation or antitrust cases. In the context of complex commercial litigation, however, ADR is not typically viewed as implicating public policy concerns.

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This article addresses a largely overlooked issue of public concern arising out of ADR in connection with complex commercial transactions: the depletion of the body of common law that practitioners rely upon to guide the resolution of disputes and provide certainty to commercial transactions.

As Judge Posner pointed out more than thirty years ago in “Adjudication As a Private Good,” the private market in adjudication produces dispute resolution, but not rule creation.<sup>1</sup> This observation has been borne out over the intervening decades as more commercial disputes are resolved privately and confidentially, and the number of published cases addressing commercial contract interpretation necessarily dwindles.<sup>2</sup> Moreover, as the Seventh Circuit has noted, even those rare arbitration opinions which are not private and confidential are nonetheless not entitled to any precedential weight, and “are more like jury verdicts than like the decisions of courts.” *IDS Life Ins. Co. v. Amer. Life Ins. Co.*, 136 F.3d 537, 543 (7th Cir. 1998). Yet private decision-makers rely on the body of public common law decisions when resolving disputes, and businesses rely on established precedent to provide certainty and predictability to commercial transactions.

### ADR: The Classic Critique

Thirty years ago, Owen Fiss of Yale Law School initiated a debate between ADR advocates and supporters of public adjudication with his seminal article “Against Settlement.”<sup>3</sup> Proponents of ADR, Fiss argued, incorrectly envision courts as resolving “quarrels between neighbors who had reached an impasse and turned to a stranger to help.” From this perspective, it makes no difference to the public values advanced by adjudication whether that stranger called upon to settle the matter is the state (*i.e.*, a court) or a privately-retained mediator or arbitrator. Instead, Fiss argued,

dispute resolution should not be viewed as merely a means for resolving private quarrels, but rather as the mechanism by which society achieves structural transformation and advances public moral values.

As Fiss framed it, “[c]ivil litigation is an institutional arrangement for using state power to bring a recalcitrant society closer to our chosen ideals.” Although Fiss conceded that ADR, which he referred to under the blanket term “settlement,” streamlines overcrowded court dockets, he argued that it “is a capitulation to the conditions of mass society that should neither be encouraged nor praised.” According to Fiss, ADR undermined public values in three key ways.



First, he argued, it magnified the imbalance of power between the parties because poorer parties with fewer resources are less equipped to gather and evaluate the data needed to predict the outcome of litigation, causing them to undervalue their case, and are more vulnerable to accepting less than their case is worth because of the need for immediate payment. Second, Fiss argued that ADR involving organizations or groups suffers from a lack of legitimacy because “[w]e do not know who is entitled to speak for these entities and to give the consent upon which so much of the appeal of settlement depends.” Third, Fiss argued that ADR eliminates the basis for continuing judicial involvement, which Fiss deemed essential for achieving the kind of structural transformation he envisioned as the aim of civil litigation. Essentially, Fiss’s critique of ADR worries about a world in which *Brown v. Board of Education*, 347 U.S. 483 (1954), had been quietly and confidentially settled out of court.

“Against Settlement” provoked a significant reaction in the academic literature and remains central to current discussions of the values advanced by ADR. As Carrie Menkel-Meadow explained in her influential essay “Whose Dispute is it Anyway?,”<sup>4</sup> the divide between opponents and proponents of ADR stems from different understandings of who “owns” a dispute, as well as the role of courts in dispute resolution. If a legal dispute is the property



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of the public and is the material out of which society fashions its social, legal, political, and even moral framework, private resolution is necessarily inimical to public values. On the other hand, she argued, “[f]or those who regard our legal system as a public service for private dispute resolution, or as a democratic and participatory party initiated system, the dispute and its resolution remain the property of the parties and can be removed from the system in any way, as long as the parties consent.”

### ADR and the Depletion Of Commercial Precedent

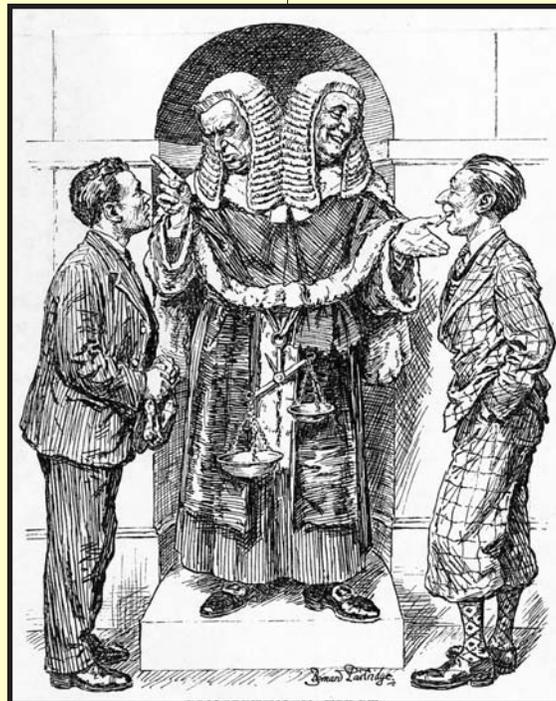
At first glance, these debates about public and societal values seem to have little bearing on ADR in the context of complex commercial litigation. After all, these disputes typically involve contacts between sophisticated entities with roughly equal bargaining power.

If the parties to such a contract opt for ADR, what of it? Such disputes appear to implicate none of the concerns associated with large-scale social-issue litigation such as school desegregation cases or consumer class actions. Moreover, regardless of any public policy concerns implicated by ADR, that ship, as a concept, has already sailed — parties to commercial contracts increasingly opt for some kind of ADR mechanism.

Yet it is possible that if this trend continues, ADR concerning commercial contracts might suffer as result of its own success. As more such disputes are moved out of the public realm and into private, confidential resolutions, the body of common law commercial contract issues will necessarily decrease, leaving fewer common-law decisions for mediators and arbitrators to draw upon. In a sense, common law rules and precedents can

be thought of as a quintessential “public good” — a beneficial product that cannot be provided to one consumer without making it available to all. As David Luban pointed out in his influential article “Settlements and the Erosion of the Public Realm,” litigants who engage the services of a private decision-maker to resolve their dispute have no incentive to pay extra for a reasoned opinion enunciating a rule that benefits only future litigants who would receive that benefit for free.<sup>5</sup>

Yet legal rules and precedents are important for providing order and predictability to commercial transactions. As Posner and Landes pointed out, “much of the social benefit of litigation, viewed as a rule-creating activity, is received by people who may never be involved in any litigation.”<sup>6</sup> Moreover, ADR relies on established rules and precedents both to establish the value of a particular dispute, and thereby to facilitate settlement, and to provide the rule of decision (or at least guide the decision-maker) in arbitrations.



### Advice to Commercial Clients

So what is the best dispute resolution option for a corporate entity negotiating a commercial contract? The ideal provision would give that entity the choice of resolving a dispute arising under the contract by traditional litigation in a court of competent jurisdiction or instead opting for binding arbitration. For instance, many commercial insurance policies provide insureds with this option or provide for some kind of hybrid process whereby the parties agree to participate in confidential non-binding mediation and only then to proceed to litigation or binding arbitration after a specified period of time if the earlier measures fail.

Given the large and growing number of commercial disputes resolved through confidential arbitration, why would a corporate client want to retain the option of proceeding in court? First, there may be times when an entity wishes to force



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an adversary to make a litigation position public. Particularly if the client believes that adversary's position is extreme or unfounded, it may be beneficial to require the adversary to make a public statement and thereby risk drawing the attention of other existing or potential business partners.

Additionally, there may be occasions when a client's adversary has more to lose by an adverse judicial interpretation of a particular term or provision that appears in multiple contracts, thus increasing that entity's exposure beyond the lawsuit at issue. The adversary's exposure might then afford the client greater leverage in settlement negotiations. Conversely, depending upon the particular client's business, it may be advantageous to establish favorable precedent on a key issue that will impact similar situations likely to arise in the future. Finally, although corporate entities often prefer the streamlined procedures and finality that ADR frequently provides, there may be times when a client may wish to avail itself of the more robust discovery typically available in traditional litigation, or, when the stakes are high enough, to retain the option of an appeal of an adverse decision. For a discussion of other considerations involved in the decision whether to litigate or arbitrate, *see* Robert Shapiro, *I Hate Arbitration (Most of the Time)*, 30 LITIGATION 36, 38 (Winter 2004).

Of course, on balance, much of the time it will be in the client's best interest to opt for ADR and, ultimately, binding arbitration. The benefits of ADR are well-known. The availability of streamlined procedures can serve to reduce both the costs of litigation and the time required to achieve a final result. Moreover, parties can ultimately elect to control ADR proceedings by, for example, contracting for particular discovery procedures or opting for various types of "fast track" proceedings. In addition, the confidentiality of the proceeding may be especially attractive.

For instance, a corporate policyholder may decide to settle litigation in part to avoid adverse publicity and thus may prefer arbitration of any related insurance coverage dispute in order to avoid re-hashing the details of the underlying action(s) in public. Other corporate

entities will have strong business reasons for wishing to keep details of commercial disputes private. ADR also may be more conducive to maintaining a less adversarial relationship between the parties, which may prove critical in the context of ongoing businesses relationships when parties need to find a way to continue to negotiate future agreements despite finding themselves temporary adversaries.

Finally, parties may alleviate concerns about the risk of absolute and immediate finality in an arbitration award by agreeing to a well-structured private appeal to a selected arbitration tribunal. For instance, the International Institute for Conflict Prevention and Resolution ("CPR") provides an arbitration appeal procedure that permits an appellate tribunal to affirm, modify or set aside an award (but not to remand it to the initial tribunal) and provides that when an award is fully affirmed by the appellate tribunal the appellant must bear the entire cost of the appeal, including the appellee's legal fees.<sup>7</sup>

## The Dilemma

Given the well-established benefits of ADR, and the flexibility to contract around most perceived disadvantages of private dispute resolution, increasing numbers of sophisticated commercial entities will likely continue to opt for ADR. As a result, commercial litigation runs the risk of encountering "the tragedy of the commons" (or the "tragedy of the common law") — individuals, acting independently and rationally according to each one's self-interest, ultimately weaken a common resource in a manner contrary to the group's long-term interests. Not only will the number of decisions interpreting common contract terms and commercial concepts decrease, but, arguably, the quality might decrease as well (or at least the investment of judicial time and research needed to produce the same quality might increase).

Typically, the most sophisticated parties engaged in a high-stakes dispute about a complicated issue will be inclined to seek out the most experienced and competent counsel and to provide that counsel with the resources necessary to thoroughly investigate and vigorously litigate that issue. The decision-maker in such a dispute thereby receives the benefit of high-quality research

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and advocacy to assist in rendering a high-quality decision. Indeed, the results of Judge Posner’s recent survey of judges published in “What Judges Think of the Quality of Legal Representation” found that judges rated commercial litigation and intellectual property litigation as having both the highest average quality of representation, and the lowest frequency of perceived disparity in the quality of opposing counsel.<sup>8</sup> If the best advocacy by the most experienced counsel is diverted from the public to the private realm and results in written work and decisions hidden from public view, courts lose the benefit of that advocacy when rendering subsequent public decisions. Moreover, as the frequency of relevant judicial decisions declines, sophisticated parties with high-stakes disputes may turn to ADR even more frequently, continuing the cycle. As Luban noted, the authority of the courts themselves can be thought of as “a public good furthered by adjudication.”<sup>9</sup>

Thus, “each litigant who proceeds to judgment and acquiesces in it thereby subsidizes a judicial authority that is available for future litigants.” Conversely, as more litigants opt for ADR, “the salience of adjudication fades and authority of the court weakens.” Thus the view that courts are a less desirable forum for litigating high-stakes commercial disputes may become a self-fulfilling prophecy as fewer of those disputes end up in court and development of the common law in that area diminishes. Parties that might have preferred to resolve their dispute in a public forum for any of the reasons discussed above may then feel constrained to opt for a private resolution anyway, based on a perception that the risk of proceeding in court is too high.

Unfortunately, even if a “tragedy of the commons” threatens the body of common law commercial precedent, there may be little that practitioners in the field can do about it. In many circumstances it will be in the client’s best interest to opt for ADR rather than public adjudication. Lawyers have an ethical

duty to advance the interest of their client in any given dispute and can in good conscience only advise clients to incur the costs and risks of “making law” on a particular issue when it is in that client’s genuine best interest to do so. If the body of common law shrinks and the salience of judicial adjudication declines in part as a collective result of these individual decisions, the uncertainty and risk associated with adjudication could increase and tip the scales even more heavily in favor of opting for ADR.

### Notes:

- <sup>1</sup> William M. Landes and Richard A. Posner, “Adjudication As a Private Good,” 8 J. LEGAL STUD. 235, 240 (1979).
- <sup>2</sup> See Charles L. Knapp, “Taking Contracts Private: The Quiet Revolution in Contract Law” 71 FORDHAM L. REV. 761 (2002).
- <sup>3</sup> Owen Fiss, “Against Settlement” 93 YALE L. J. 1073 (1984).
- <sup>4</sup> Carrie Menkel-Meadow, “Whose Dispute Is It Anyway? A Philosophical and Democratic Defense of Settlement (In Some Cases),” 83 GEO. L. J. 2663 (1995).
- <sup>5</sup> 83 GEO. L. J. at 2622.
- <sup>6</sup> Landes and Posner, 8 J. LEGAL STUD. at 241.
- <sup>7</sup> See CPR Arbitration Appeal and Commentary. The appellate tribunal can vacate the award on any of the grounds in Section 10 of the Federal Arbitration Act, see 9 U.S.C. § 10(a), but can also conduct a limited merits review and set aside an award that “contains material and prejudicial errors of law of such a nature that it does not rest upon an appropriate legal basis,” or “is based upon factual findings clearly unsupported by the record.” CPR, Rules of Appeal Procedure, 8.
- <sup>8</sup> Richard A. Posner and Albert H. Yoon, “What Judges Think of the Quality of Legal Representation,” 63 STAN. L. REV. 317, 332 (2011).
- <sup>9</sup> Luban, 83 GEO. L. J. at 2625.

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# eMails

*By Mark Neubauer\**

There is no question that the worst thing that has happened in my life is the invention of email. All of us are drowning in emails; hundreds of emails each day. And they cannot be ignored. Some are merely “junk” emails – masses of communication sent to millions of us. But others have great import — business or personal — with the sender anxiously waiting for a response.

Each of us becomes impatient when we reach out to someone else by email and they do not instantaneously respond. “What is the matter with them?” we ask ourselves. “Why hasn’t she responded to my email – it’s been an hour.” So we feel to compelled to rapidly respond to emails. And while we are responding to one email, a prompt comes up interrupting our thought, so we get yet another email.

Gone are prior means of communication. Faxes are extinct. Written letters are becoming rapidly a dinosaur. Even voicemail is declining in usage. And heaven forbid we actually walk down the hall to see someone. In short, we are not talking to each other, but content to text or email someone.

Emails lead to misinterpretation. We do not hear a vocal inflection of the sender and think someone is angry when they are not. The sender cannot gauge the demeanor of the recipient, eliminating the ability to backtrack when someone misinterprets an email.

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No one I know has been able to manage their emails. Instead, we spend countless hours each day sorting emails into file cabinets for later retrieval. In both business and law, emails become something that run our life.

Emails require a new etiquette. Not only responding promptly, but using obscure abbreviations like “LOL” or the proverbial happy face. Simple manners become annoyances. Please don’t say “thank you” to my email. It merely requires me to require another 10 seconds reading it and deleting it. Heaven forbid, do not “Reply All” when you only need to reply to the sender, and the worst offender is the person who uses “Reply All” to say “Thank you.” That single act it can require thousands of people to merely go through the action of deleting. Think of the time cumulatively spent on that simple delete keystroke.

Worse, the pace of emails precludes thought and deliberation. Instead, we respond without thinking with whatever words immediately traipse across our mind. Often those are the wrong words.

A wizened old judge tells the story that captures the drawbacks of emails:

“Years ago, partners in law firms had secretaries. They performed a weird ritual called ‘shorthand.’

When you became agitated against one of your partners, you would call your secretary in and dictate a lengthy diatribe. Wisely, she would not type that

diatribe until after you returned from your three-martini lunch.

By then, your anger of the moment had worn off. When she showed you your earlier tirade, you waived it off saying, ‘Aw, Jim’s an OK guy. Just rip up that note.’

Today, however, you instantaneously send Jim an angry email. He responds in kind. Back and forth like a tennis volley, the angry emails go in a verbal war.”

This isn’t progress. It is the decline of human interaction.



So remember some simple thoughts in dealing with emails. “KIS.” Keep it simple. Wait before you send an email or a response. Reflect on the email as if it had the same gravity as that old formal letter. Review each email as if you may one day be called to a witness stand and not be embarrassed by what you wrote. And when in doubt about an email, don’t send it. It will save you the agony of an angry email war.

In short, emails have changed our world. They make communication easier but also harder at the same time.



PETITIONS FOR REVIEW OF SECOND AND SUCCESSIVE CLASS  
CERTIFICATION ORDERS UNDER RULE 23(F):  
*A Practitioner's Guide*

*By Frank M. Dickerson III\**

Federal Rule of Civil Procedure 23(f), adopted in 1998, created a new opportunity for interlocutory appeals from district court rulings on class action certification. After more than 15 years, the federal courts of appeals have established a basic framework for when they will grant a petition for review pursuant to Rule 23(f). But certain important questions remain unsettled, one of which is when a court of appeals may or should grant a petition for review of a second or successive ruling on class certification. The Seventh Circuit recently addressed the standard for ruling on such petitions in *Driver v. AppleIllinois, LLC*.<sup>1</sup> The “material alteration” standard articulated in *Driver*; however, is not self-executing. In many cases, it will require close analysis of changes in the original class certification ruling. Understanding when a successive class certification ruling makes a Rule 23(f) petition proper therefore requires careful examination of how *Driver* and other decisions from the Seventh Circuit have handled such petitions in the past. It also is crucial to understand how the more general limitations on and standards for Rule 23(f) appeals apply in the successive ruling context. Review of these authorities offers insight on the Seventh Circuit’s approach to Rule 23(f) petitions.

**Rule 23(f) And Accompanying Notes**

Rule 23(f) provides that:

A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.<sup>2</sup>

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Rule 23(f) itself is silent with respect to the standards a court of appeals should apply in determining whether to review a class certification decision. The advisory committee notes provide limited clarification. The advisory committee notes state that “[t]he court of appeals is given unfettered discretion whether to permit the appeal, akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari.”<sup>73</sup> The advisory committee suggested that this discretion is similar to that provided for in 28 U.S.C. § 1292(b), with two notable exceptions. Unlike § 1292(b), Rule 23(f) does not require certification by the district court judge, and does not require that the district court’s order “involve[] a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.”<sup>74</sup>

The advisory committee anticipated that relief would be granted sparingly, as “many suits with class-action allegations present familiar and almost routine issues that are no more worthy of immediate appeal than many other interlocutory rulings.”<sup>75</sup> Still, review would be appropriate where “[a]n order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation” or where “[a]n order granting certification ... may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.”<sup>76</sup>

### Standards For Granting Review Under Rule 23(f) Generally

For any petition under Rule 23(f) to succeed, including a petition for review of a second or successive decision on class certification, the issue on appeal must fit within one of the two situations that the Seventh Circuit has identified as being appropriate for appeals from class certification decisions. These situations, which closely track the justifications for the Rule offered in the advisory notes, are: (1) where an order granting or denying class certification would end the case, without regard for the

merits, either through voluntary dismissal by the plaintiff or settlement by the defendant and (2) where granting review under Rule 23(f) would advance development of the law.

The first situation arises for plaintiffs where an order declining to certify a class would “sound[] the death knell of the litigation.”<sup>77</sup> The “death knell” approach recognizes that in some cases the denial of class certification will effectively end the action, because the representative plaintiff’s claim is too small to justify the investment in continued litigation.<sup>8</sup> While this may often be the case, the Seventh Circuit has cautioned that appellate courts “must be wary lest the mind hear a bell that is not tolling,” as some attorneys may pursue actions where “the representative plaintiff would find it uneconomical to carry on with the case ... in hope of prevailing for a single plaintiff and then winning class certification (and the reward of larger fees) on appeal, extending the victory to the whole class.”<sup>79</sup> As such, a plaintiff seeking Rule 23(f) review should be prepared to submit evidence in its petition in support of the claim that denial of class certification rings the “death knell” for its claim.

The “death knell” has a mirror image for defendants, where the mere certification of a class may effectively compel a settlement, “even when the plaintiff’s probability of success on the merits is slight.”<sup>10</sup> The Seventh Circuit has expressed concern that “class actions can have this effect on risk-averse corporate executives (and corporate counsel)” and “also that some plaintiffs or even some district judges may be tempted to use the class device to wring settlements that are unjustified but popular.”<sup>11</sup> For both plaintiffs and defendants, “when the stakes are large and the risk of a settlement or other disposition that does not reflect the merits of the claim is substantial, an appeal under Rule 23(f) is in order.”<sup>12</sup> In either case, “the appellant must demonstrate that the district court’s ruling on class certification is questionable ... taking into account the discretion the district judge possesses in implementing Rule 23, and the correspondingly deferential standard of appellate review.”<sup>13</sup>

The second situation in which interlocutory review under Rule 23(f) may be appropriate is where “an appeal may facilitate the development of the law.”<sup>14</sup> Because class actions are often settled or “resolved in a way that overtakes procedural matters, some fundamental issues about class actions are poorly developed.”<sup>15</sup> The Seventh Circuit has indicated that, where the legal issue

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would contribute to the “development of the law, it is less important to show that the district judge’s decision is shaky.”<sup>16</sup> While “trivial” questions are “poor candidates for the use of Rule 23(f),” “more fundamental” questions that are likely to “escape effective disposition at the end of the case” are “appropriate in an appeal under Rule 23(f).”<sup>17</sup>

Other circuits have embraced interlocutory review under these circumstances,<sup>18</sup> and have also suggested that 23(f) review is appropriate in cases of manifest error or when special circumstances warrant immediate review. A number of circuits have noted that “[i]n interlocutory review may be appropriate when it promises to spare the parties and the district court the expense and burden of litigating the matter to final judgment only to have it inevitably reversed by this Court on an appeal after final judgment.”<sup>19</sup> In such circumstances, “interlocutory review may be warranted even if none of the other factors supports granting the Rule 23(f) petition.”<sup>20</sup> Several courts have cautioned that review under this standard is only available where “the error in the district court’s decision [is] significant; bare assertions of error will not suffice. Any error must be truly ‘manifest,’ meaning easily ascertainable from the petition itself.”<sup>21</sup> In addition, several courts, recognizing the broad discretion granted by Rule 23(f), “are in agreement that restrictions on review should not preclude review in special circumstances that neither the advisory committee’s notes nor the courts foresaw.”<sup>22</sup>

### Special Considerations For Petitions For Review of Second or Successive Orders Regarding Class Certification Under Rule 23(f)

Rule 23(f) “does not forbid a [party] to file repeated motions seeking . . . permission to appeal if, as is not uncommon, the district

judge alters the class definition from time to time and therefore issues a new certification order each time.”<sup>23</sup> The Seventh Circuit is willing to consider a petition for review of a second or successive class certification order when there has been a material alteration to the original class certification order. But it is unlikely to grant a petition challenging an order that, in form or in substance, merely denies reconsideration, makes insignificant changes to the certified class, or affects the nature of the class litigation. Such orders are not, in the Court’s view, “an order granting or denying class certification,” the only kind of order Rule 23(f) authorizes the Court to review. Such orders are instead either denials of untimely reconsideration motions or routine case management orders.

#### 1. Untimely Reconsideration

Rule 23(f) requires that a party file a petition requesting appellate review “within 14 days after the order [granting or denying class-action certification] is entered.” A timely motion for reconsideration defers the time for appeal until after the district judge has disposed of the motion.<sup>24</sup> While it is relatively simple to determine the timeliness of an appeal from an initial class certification ruling, determining the timeliness of a petition for review of a second or successive ruling is more complex. The primary concern for the petitioner is whether the Rule 23(f) petition will be seen as seeking review of a

new decision by the district court, and therefore timely, or simply as a challenge to the denial of a belated motion to reconsider, and therefore untimely.

The Seventh Circuit’s decision in *Asher v. Baxter International, Inc.*<sup>25</sup> is instructive in this context. In *Asher*, the plaintiffs had great difficulty identifying a lead plaintiff pursuant to the Private Securities Litigation Reform Act of 1995.<sup>26</sup> Plaintiffs moved for certification three times over almost two years, each time offering a different lead plaintiff but otherwise making identical claims.<sup>27</sup> Plaintiffs declined to appeal from the first two denials of class certification. After the third such denial, plaintiffs requested that the district court deny their own motion for class certification to enable them to appeal under Rule 23(f).<sup>28</sup>



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The Seventh Circuit rejected the plaintiffs' petition for appeal, concluding that it was untimely under Rule 23(f)'s time limit. The Seventh Circuit accepted the defendant's argument that the 14-day time to petition expired after the district court's initial denial of class certification, unpersuaded by plaintiffs' argument that each order granting or denying class certification starts a new time period.<sup>29</sup> The court had previously held that "the [time allowed] under Rule 23(f) cannot be extended by making another motion for class certification" because a successive motion for class certification may be analogous to a motion for reconsideration, which must be filed within the 14-day period to be timely.<sup>30</sup> The court reasoned that "Rule 23(f) sets a brief limit because the appeal is interlocutory; if the disposition is not reversed swiftly, the case should proceed in district court."<sup>31</sup> The court concluded that, just because plaintiffs have "the ability to extend the debate about certification in the district court does not mean that the window of opportunity for appellate review must be open indefinitely."<sup>32</sup> The Court will not "become embroiled in questions such as whether the district court judge's ruling was tentative, definitive, or something in between; that would be a formula for paralysis."<sup>33</sup>

The Seventh Circuit may have retreated from the more sweeping implications of *Asher* in *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*<sup>34</sup> In *McReynolds*, the plaintiffs' initial motion for class certification was denied by the district court, and the Seventh Circuit denied a Rule 23(f) petition. A year later, after the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*,<sup>35</sup> plaintiffs again moved for class certification. The district court again denied their motion, and plaintiffs petitioned for review under Rule 23(f).

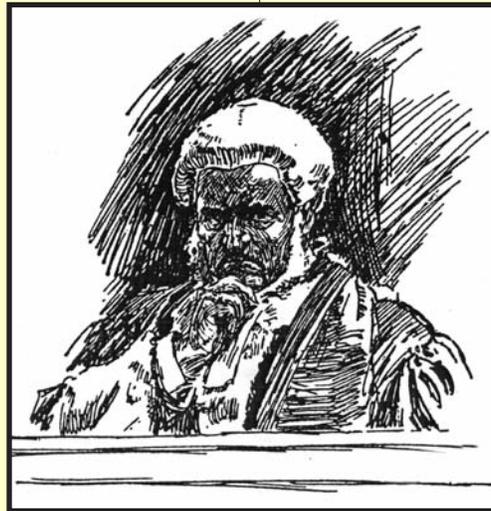
Just as in *Asher*, the defendant argued that the plaintiffs' petition for review was barred by the 14-day time limit of Rule 23(f). The Seventh Circuit acknowledged that a deadline cannot be extended by a motion for reconsideration of a previously appealable order

outside the time limit for an appeal, but concluded that "it doesn't follow that the failure to take a timely appeal from one interlocutory order operates as a forfeiture, jurisdictional or otherwise, of the right to appeal a subsequent order."<sup>36</sup> The court concluded that "[a] rule limiting parties to one interlocutory appeal from a grant or denial of class certification would disserve Rule 23(f)."<sup>37</sup> In cases where "it becomes clear in the course of the lawsuit, as a result of new law or newly learned facts, that the denial of certification was erroneous" and "an appeal from the denial of certification may either end the litigation or at least place it on a path to swift resolution, the court of appeals should have discretion to allow the appeal."<sup>38</sup>

The *McReynolds* decision addresses the concern, raised in *Asher* and by other circuit courts,<sup>39</sup> that allowing such appeals would open the floodgates to additional legislation. It explains that the court of appeals "can always deny leave to appeal" in cases where "it would have to do mental contortions in order to make up its collective mind whether appeal should be allowed."<sup>40</sup> In addition, the decision also notes that a challenge would only be "timely if filed as soon as the development warranting a new motion for certification occurs" and "untimely if the plaintiff dawdles."<sup>41</sup> Contrary to the concern expressed in *Asher*, the *McReynolds* decision stressed that "if the appeal is ... based on developments that may warrant certification, allowing the appeal may well speed up rather than slow down the litigation."<sup>42</sup>

After *McReynolds*, it is possible that at least some petitions for review of orders refusing to change a class certification ruling may be granted. A motion seeking to certify or decertify a class on the basis of "new law or newly learned facts" "may not be, either in form or, more importantly, in substance, a motion to reconsider the previous denial."<sup>43</sup> A petition for review of a second or successive class certification order that does not rely on new law or facts, on the other hand, is likely to be treated as an appeal from an untimely motion to reconsider, and rejected as outside Rule 23(f)'s 14-day time limit.

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### 2. Immaterial Alteration

The Seventh Circuit has also looked to the requirement that a petition under Rule 23(f) seek review of “an order granting or denying class certification” to determine whether a petition for review of a second or successive order regarding class certification is appropriate. Often, after an order granting class certification, the district court may alter the scope of the class. The Seventh Circuit recently denied review in *Driver v. AppleIllinois, LLC*, which raised this issue. In *Driver*, the Seventh Circuit considered a “second petition by the remaining defendant in a class action suit for permission to appeal from the denial . . . of his challenge to the certification of the class.”<sup>44</sup> The class in *Driver* was composed of “waiters, bartenders, and other tipped employees at restaurants owned by” the defendant, who contended that they were required to perform substantial non-tipped duties while being paid only the lower minimum wage applicable to tipped workers under Illinois law.<sup>45</sup>

The Seventh and Tenth Circuits have held, “and other courts of appeals have implied, that to justify a second appeal from an order granting or denying class certification the order appealed from must have ‘materially alter[ed] a previous order granting or denying class certification.’”<sup>46</sup> The Seventh Circuit has both a “practical and [an] interpretive” “reason for requiring a material alteration” in the initial order.<sup>47</sup> The requirement is necessary from a practical perspective, because otherwise “parties could file Rule 23(f) petitions whenever there was the slightest change in the class definition, resulting in the entry of a modified class certification order.” From an interpretive perspective, because “Rule 23(f) authorizes appeals only of orders ‘granting or denying class-action certification,’ an order that alters the class certification immaterially can’t readily be thought a grant or a denial of certification, while an order that alters the certification materially is to that extent a grant or denial of certification.”<sup>48</sup> Moreover, the “material alteration” approach avoids “the arbitrariness of denying [a Rule 23(f) petition] just because the order was not formally a grant or denial of certification, when if the judge had defined the class as narrowly in his original

certification order that order would have unequivocally been within the scope of Rule 23(f).”<sup>49</sup>

The order at issue in *Driver* altered the class definition from “employees ‘who worked as tipped employees earning a sub-minimum, tip credit wage rate, and who performed duties unrelated to their tipped occupation for which they were not paid at the minimum wage rate’” to “employees ‘who worked as tipped employees earning a sub-minimum, tip credit wage rate.’”<sup>50</sup> The Seventh Circuit concluded that the “change in the class definition” “was a material alteration” in the prior order certifying the class.<sup>51</sup>

### 3. Orders Other Than Those Relating To Class Certification

Review under Rule 23(f) is limited to an order granting or denying class action certification. As a consequence, Rule 23(f) petitions will be denied when the petitioner seeks review of an order other than that governing class certification. In *Driver*, for instance, the Seventh Circuit denied the petition for review, despite having concluded that the district court had materially altered the class certification order. The petitioner in *Driver* did not seek to challenge the order altering class certification, but instead sought to “renew his challenge to the initial grant of certification on grounds derived from developments in the litigation since that grant, including subsequent rulings by the district court.”<sup>52</sup> Such a challenge, the court held, is inappropriate under Rule 23(f). Review under Rule 23(f) is limited to the order altering the scope of class certification; it is not available for “every order the judge issues that a party doesn’t like.”<sup>53</sup>

In the event that a later development in the litigation “undermine[s] the reason for certifying a class in the first place,” the defendant can always move the “judge to decertify the class on the basis of new developments.”<sup>54</sup> If the judge refuses, “her refusals won’t be appealable under Rule 23(f),” the Seventh Circuit reasoned, because “[a] refusal to decertify a class is neither an order granting nor an order denying certification; it is merely a denial of reconsideration of a previous ruling.”<sup>55</sup> The court’s reasoning on this point is not easy to reconcile with its conclusion in *McReynolds* that review under Rule 23(f) may be appropriate where “new law or newly learned facts” call the district court’s initial ruling on certification into question.<sup>56</sup>



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As a practical matter, orders that undermine the reasons previously given for granting or denying class certification seem no different from new law or facts that do the same. But, for now at least, the Seventh Circuit has signaled that it will distinguish between the effect of intervening orders and the effect of intervening legal and factual developments in exercising its Rule 23(f) jurisdiction.

## Conclusion

Rule 23(f) grants great discretion to appellate courts when considering petitions for review. In the context of appeals from second and successive orders granting or denying class certification, the Seventh Circuit has chosen to exercise that discretion to accept only appeals that not only meet the usual Rule 23(f) standards but also involve a “material alteration” to the initial order,<sup>57</sup> or perhaps intervening legal or factual developments. Attention to these principles will ensure that a litigant makes the strongest case for review of a second or successive order for class certification under Rule 23(f).

### Notes:

- <sup>1</sup> 739 F.3d 1073 (7th Cir. 2014).
- <sup>2</sup> Fed. R. Civ. P. 23(f).
- <sup>3</sup> Fed. R. Civ. P. 23(f) advisory committee notes.
- <sup>4</sup> *Id.*
- <sup>5</sup> *Id.*
- <sup>6</sup> *Id.*
- <sup>7</sup> *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832, 834 (7th Cir. 1999).
- <sup>8</sup> *Id.*
- <sup>9</sup> *Id.*
- <sup>10</sup> *Id.* See also *Reliable Money Order, Inc. v. McKnight Sales Co.*, 704 F.3d 489, 497 (7th Cir. 2013) (granting 23(f) review where class certification results in a “dramatic increase in potential liability” that “would raise the prospect of coercing a settlement from” the defendant); *Szabo v. Bridgeport Mach., Inc.*, 249

- F.3d 672, 675 (7th Cir. 2001) (granting 23(f) review where “class certification turns a \$200,000 dispute ... into a \$200 million dispute” which “may induce a substantial settlement even if the [plaintiff’s claim] is weak”).
- <sup>11</sup> *Blair*, 181 F.3d at 834.
- <sup>12</sup> *Id.* at 835.
- <sup>13</sup> *Id.*
- <sup>14</sup> *Id.* See also, e.g., *Parko v. Shell Oil Co.*, 739 F.3d 1083, 1084 (7th Cir. 2014) (“We have decided to grant [defendant’s] request [to appeal pursuant to 23(f)] in order to clarify class action law.”); *Hughes v. Kore of Indiana Enterprise, Inc.*, 731 F.3d 672, 674 (7th Cir. 2013) (“We have decided to allow the appeal in order to further the development of class action law.”).
- <sup>15</sup> *Blair*, 181 F.3d at 834.
- <sup>16</sup> *Id.*
- <sup>17</sup> *Id.*
- <sup>18</sup> See, e.g., *Waste Management Holdings, Inc. v. Mowbray*, 208 F.3d 288, 292-295 (1st Cir. 2000); *Hevesi v. Citigroup, Inc.*, 366 F.3d 70, 75-76 (2d Cir. 2004); *Lienhart v. Dryvit Systems, Inc.*, 255 F.3d 138, 142-146 (4th Cir. 2001); *In re Delta Air Lines*, 310 F.3d 953, 957-59 (2002); *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 957-59 (9th Cir. 2005); *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1274-75 (11th Cir. 2000); *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 89, 102-106 (D.C. Cir. 2002).
- <sup>19</sup> *Prado-Steiman*, 221 F.3d at 274-75; see also *Chamberlan*, 402 F.3d at 958-59.
- <sup>20</sup> *Prado-Steiman*, 221 F.3d at 1275.
- <sup>21</sup> *Chamberlan*, 402 F.3d at 959; see also *Prado-Steiman*, 221 F.3d at 1275.
- <sup>22</sup> *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d at 105; see also, e.g., *Mowbray*, 208 F.3d at 294; *Prado-Steiman*, 221 F.3d at 1276.
- <sup>23</sup> *Driver*, 739 F.3d at 1074.
- <sup>24</sup> *Blair*, 181 F.3d at 837.
- <sup>25</sup> 505 F.3d 735 (7th Cir. 2007).
- <sup>26</sup> Pub. L. 104-67, 109 Stat. 737 (codified in relevant part at 15 U.S.C. § 78u-4).
- <sup>27</sup> *Asher*, 505 F.3d at 738.
- <sup>28</sup> *Id.*
- <sup>29</sup> *Asher*, 505 F.3d at 739. At the time *Asher* was decided, Rule 23(f) provided for a 10-day time limit. The time limit was changed to a 14-day period consistent with the revised methodology for calculating timeliness adopted in the 2009 amendments to the Federal Rules of Civil Procedure. See Fed. R. Civ. P. 23(f) & advisory committee notes; see also Fed. R. Civ. P. 6 advisory committee notes.
- <sup>30</sup> *Id.* See also *McNamara v. Flederhof*, 410 F.3d 277, 281 (5th Cir. 2005) (“[T]o hold that—no matter how styled—a motion under Rule 23(c) is always distinct from a motion to reconsider would allow a party to subvert the [fourteen]-day time limit prescribed in Rule 23(f).”).
- <sup>31</sup> *Id.*
- <sup>32</sup> *Id.*
- <sup>33</sup> *Id.* at 740.

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<sup>34</sup> 672 F.3d 482 (7th Cir. 2012).

<sup>35</sup> 131 S. Ct. 2541 (2011).

<sup>36</sup> *McReynolds*, 672 F.3d at 486.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> See, e.g., *Carpenter v. Boeing Co.*, 456 F.3d 1183, 1190-91 (10th Cir. 2006).

<sup>40</sup> *McReynolds*, 672 F.3d at 487.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 486.

<sup>44</sup> *Driver*, 739 F.3d at 1074.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 1076 (quoting *Matz v. Household International Tax Reduction Investment Plan*, 687 F.3d 824, 826 (7th Cir. 2012). See also *Carpenter v. Boeing Co.*, 456 F.3d 1183 1191 (10th Cir. 2006) (holding that to justify a second appeal from an order granting or denying class certification, the order appealed from must have materially altered a previous order granting or denying class certification);

*cf. In re DC Water & Sewer Authority*, 561 F.3d 494, 496 (D.C. Cir. 2009) (implying same); *Gutierrez v. Johnson & Johnson*, 523 F.3d 187, 193 (3d Cir. 2008) (implying same); *Jenkins v. BellSouth Corp.*, 491 F.3d 1288, 1291-92 (11th Cir. 2007) (implying same).

<sup>47</sup> *Driver*, 739 F.3d at 1076.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *McReynolds*, 672 F.3d at 486.

<sup>57</sup> *Driver*, 739 F.3d at 1076.

<sup>58</sup> *McReynolds*, 672 F.3d at 486.

## Upcoming Board of Governors' Meeting

Meetings of the Board of Governors of the Seventh Circuit Bar Association are held at the East Bank Club in Chicago, with the exception of the meeting held during the Annual Conference, which will be in the location of that particular year's conference. Upcoming meetings will be held on:

Tuesday, May 13, 2014 *(at the annual conference)*

Saturday, September 6, 2014

*All meetings will be held at the East Bank Club, 500 North Kingsbury Street, Chicago at 10:00 AM*



# Quit Using Times New Roman!

AND OTHER THOUGHTS ON LEGAL TYPOGRAPHY

By William Katt\*

The home page of the website of the United States Court of Appeals for the Seventh Circuit (<http://www.ca7.uscourts.gov>), like many court websites, features links to items that the Court believes are of particular importance to practitioners, parties, and the general public. Among these are links to things like the court’s Electronic Case Filing system, calendars, oral argument recordings, published opinions, rules, procedures, and forms. These links are important and useful, and their appearance on a court website front page is hardly surprising. The links are also almost universally self-explanatory. (For example, “ECF Document Filing System” takes one to the Court’s ECF Document Filing System, and “Oral Arguments” takes one to a search engine of audio recordings of oral arguments.)

But right there in the middle of the page is one link that is not self-explanatory and that is not generally found on other court websites. “*Painting with Print . . .*,” says the link, written in italics. A click-through reveals that this is a link to a copy of a 2004 Journal of the Association of Legal Writing Directors article by Ruth Anne Robbins: *Painting with Print: Incorporating Concepts of Typographic and Layout Design Into the Text of Legal Writing Documents*. The Robbins article is one of the leading authorities on legal typography.

Wikipedia describes “Typography” as “the art and technique of arranging type in order to make the language it forms most appealing to transparent learning and recognition.” *Typography*, <http://en.wikipedia.org/wiki/Typography> (last visited May 4, 2014). We might paraphrase this definition to define legal typography as “the art and technique of arranging type in *legal documents* in order to make the language it forms most appealing to transparent learning, recognition, *and persuasion*.” “Arranging

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type” in this context refers to decisions about things like typefaces (fonts and their assorted styles like **boldface**, underline, and *italics*), spacing, and the balance between type and white space on the page.

By linking *Painting with Print* right on the Court’s front page, the Seventh Circuit sends a message that the Court values and appreciates typography, and that lawyers should too. And the Seventh Circuit’s PRACTITIONER’S HANDBOOK FOR APPEALS makes this point explicit:

Judges of this court hear six cases on most argument days and nine cases on others. The briefs, opinions of the district courts, essential parts of the appendices, and other required reading add up to about 1,000 pages per argument session. Reading that much is a chore; remembering it is even harder. You can improve your chances by making your briefs typographically superior. It won’t make your arguments better, but it will ensure that judges grasp and retain your points with less struggle. That’s a valuable advantage, which you should seize.

PRACTITIONER’S HANDBOOK FOR APPEALS TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT (2012 ed.), available at <https://www.ca7.uscourts.gov/Rules/handbook.pdf>.

The Court values briefs and other submissions that account for typography because it believes that such documents are more easily retained and understood by judges. Unsurprisingly, this conclusion is backed by scientific research.

### The relationship between typography and improved reader retention and understanding

In *Painting with Print*, Robbins details some of this scientific research. Researchers and psychologists studying adult reading have measured the effects of typographical features and visual effects on the legibility and organization of a document. Chief among these studies is an analysis of the impact of capitalization and so-called “cueing devices” like **boldface**, underline, and *italic* text on reading speed. It turns out, for example, that the use of ALL CAPS type lengthens adult reading time for an average reader by 12 to 13%. *Italics* slowed reading time up to 4.5%, and underlining may slow reading time as much as 8 to 11%.

Generally speaking, ALL CAPS and cueing devices like underlining are intended to supply additional emphasis or to focus extra attention on a word or words. But slowing down reading, especially by as much as 12 to 13%, rather than incentivizing the reader to pay close attention to the emphasized text, tempts the reader instead to skip over it.

CONSIDER THIS PARAGRAPH. WHEN YOU ENCOUNTERED IT, WERE YOU TEMPTED TO SKIP IT ENTIRELY AND JUMP TO THE NEXT PARAGRAPH? DID YOU MANAGE TO WADE THROUGH IT ANYWAY?

Exceptionally slowed reading over an extended period distracts and annoys the reader and risks losing their attention. Based on these studies, a writer seeking to engage the reader and seize attention should avoid selecting type that will excessively slow reading.

### Making your brief typographically superior

As the HANDBOOK explains, Federal Rule of Appellate Procedure 32 already incorporates certain typographical principles with its rules regarding clarity of print, selection of typeface, size, and style; spacing, and word or line length limits. Everyone, in other words, is making use of these techniques because they are required to do so. So how does one use typography to improve one’s brief? What aspects of type selection and arrangement should a lawyer consider when preparing a brief or other legal document?

The HANDBOOK itself offers a few suggestions, and *Painting with Print* also draws some conclusions from the research Robbins describes. There are other resources as well, including Matthew Butterick’s 2010 book, *Typography for Lawyers*, which Bryan Garner describes in the book’s foreword as a “tour de force.”

All of these authorities are worth their own time and study, but the busy litigator or appellate lawyer should certainly give consideration to at least the following recommendations (while always first being mindful that a court’s rules are rules must be followed above all else).

1. Never use ALL CAPS for anything longer than a word or two (and even First Caps should be avoided).

As noted above, ALL CAPS reduces reading speeds by 12 to 13%. That finding led the researchers who conducted the study way back in the mid-1960s to recommend even then that “[ALL CAPS] printing should be eliminated whenever rapid and consumer views are a consideration.” Robbins, *supra*, at 117.

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## Quit Using Times New Roman!

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Picking up where they left off, Robbins urges that “it is time for attorneys to retire the ill-suited practice of using all caps in headings, boilerplate, and any other place where the object is to emphasize rather than de-emphasize the content.” *Id.*

ALL CAPS, of course, is perhaps most often used for brief titles and headings. Butterick allows for the use of ALL CAPS for one-word headings like “INTRODUCTION” or “ARGUMENT,” but urges avoidance of ALL CAPS for sentence-length headings, because readers will be tempted to skip over them.

Typographically superior alternatives for headings include the use of **boldface**, which studies suggest does not have the same slowdown effect of *italics* or underlining, but rather draws attention at a greater distance. SMALL CAPS and First Caps should also be avoided for sentence-length headings, as these too slowdown the reader and risk the skipping over of an important document guidepost. The headings in this article use boldface and avoid unnecessary capitalization.

### 2. Quit using Times New Roman.

The choice of font is another important aspect of typography. The default font in Microsoft Word, which is the word processor many if not most attorneys use, is Times New Roman, and as a result Times New Roman is perhaps the most frequently selected font for legal documents.

But as everyone who pays attention to typography will tell you, Times New Roman is a newspaper font designed above all to convey information in small print in narrow columns. Worse, as Butterick persuasively argues, the appearance of Times New Roman in a document connotes apathy. Using Times New Roman, says Butterick, is like saying “I submitted to the font of least resistance”— it is the absence of a font choice, rather than an affirmative choice.

Via the HANDBOOK, the Seventh Circuit discourages the use of Times New Roman and suggests for alternatives the use of fonts that are better suited for books. Briefs are more like books and tend to make use of wider columns of type than do newspapers, so book fonts are a better fit. Some examples offered in the HANDBOOK include:

- Book Antiqua
- Century
- Bookman Old Style

There are many others.

3. Use boldface when adding emphasis to anything more than a word or short phrase, limit the use of italics, and avoid underlining altogether.

As noted above, Robbins explains that studies have concluded that underlining and *italics*, like ALL CAPS, slow the reader, which limits legibility and, correspondingly, reader perception. Underlining is believed to be the worst of these, with *italics* second. **Boldface**, by contrast, does not appear to slow the average reader, and **boldface** letters are perceived at a greater distance than letters in lower case print. Robbins, supra, at 119.

**Boldface** then, should be the typeface signal of choice when seeking to emphasize anything more than a few words, such as in headings — as already noted above in the advice regarding ALL CAPS — or, depending on the context, when seeking to emphasize a sentence or a lengthy phrase in the body of a brief.<sup>1</sup>

Italicizing a single word will not do any great damage, but, as Butterick explains, underlining should never be used. Underlining, like many other typographically-inferior-but-ubiquitous habits of modern brief-writing, is a holdover from the era of the typewriter. Because typewriters had no means of creating **boldface** or *italics* text, underlining was the only alternative.

Modern word processing software and printing capabilities, of course, do away with these limitations and leave things in the author’s discretion. And where there is discretion, professional authors and publishers do not use underlining. Books, newspapers, and magazines do not use it. Moreover, says Butterick, word processors apply underlining mechanically, whereas **boldface** and *italics* are capable of being adapted to the font in which they are used.

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<sup>1</sup> There is some tension here between the science Robbins cites (to which the Seventh Circuit website is linking) and the suggestions in the Seventh Circuit’s HANDBOOK. Both agree that underlining should not be used, but the latter specifically suggests using *italics* for emphasis and case names rather than underlining, and generally advises to limit the use of **boldface**. With regard to case names, the BLUEBOOK, A MANUAL FOR CITATION, does not authorize **boldface** for case names, and its citation rules should not be ignored in favor of typographical preferences. With regard to emphasis, italics can be used for emphasis of limited words or phrases without great damage to the reader. And of course as a general matter, emphasis should by definition be limited in its use.



# Quit Using Times New Roman!

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So if it is emphasis you seek: shelve the underlining, limit the italics, and remember that appropriately-used **boldface** is your best bet.

## 4. Insert only one space between sentences.

Like underlining, the use of two spaces between sentences is a holdover from the days of the typewriter. Because typewriters could only use “monospace” fonts — e.g., fonts like Courier New where each typed character has exactly the same width whether it is an “x” or an “m”— the use of two spaces between sentences was introduced as an effective way to visually cue the reader to the beginning of a new sentence. But because word processing software allows for the use of proportionally-spaced fonts like this one (where an “m” is wider than an “x”), the two space visual cue serves no purpose.

In fact, as Robbins argues, two spaces harms the reader experience because “using two spaces with proportionally spaced fonts will create extra gaps, which will cause the reader to experience a greater fixation pause between sentences as her eye searches for the next phase.” Robbins, *supra*, at 129. The HANDBOOK makes the same point: “extra spaces [between punctuation] lead to what typographers call ‘rivers’— wide, meandering areas of white space up and down a page . . . [which] interfere with the eyes moving from one word to the next.”

Butterick points out that the use of one space is the professional standard, and that leading, authoritative style guides like Bryan A. Garner’s THE REDBOOK: A MANUAL ON LEGAL STYLE or THE CHICAGO MANUAL OF STYLE embrace the rule. Butterick, *supra*, at 43.

Notwithstanding the science, the lawyer’s habit of including two spaces between sentences seems to have a great many ardent loyalists. Do not be a practitioner who lets tradition and habit be your guide.

## 5. Make sure to turn on hyphenation if you are using justified text.

Butterick describes justified alignment of paragraphs as “a matter of personal preference.” He acknowledges that it can

give text a cleaner, more formal look as compared to left-aligned text.

The potential problem with justified text, however, is that, similar to the convention of using two spaces between sentences, justified alignment adds white space between words in each line of text, altering the ideal spacing of the font. As the HANDBOOK notes, those “rivers” of white space will interfere with the readers’ eye movement from one word to the next. HANDBOOK, *supra*, at 114. To remedy this problem, briefs using a proportionally-spaced font as most do should only be justified when automatic hyphenation is enabled using your word processor.

In *Painting with Print*, Robbins cites to experts who believe that keeping text left-aligned maximizes legibility “because there is no adjustment needed to word spacing and because ‘the resulting ‘ragged’ right margin adds variety and interest to the page without interfering with legibility.” Butterick, for his part, confesses to using left-aligned rather than justified text. He explains:

In my law practice, I almost never justify text. Why’s that? The justification engine in a word processor is rudimentary compared to a professional page-layout program. I find that word-processor justification can make text look clunky and coarse. Left-aligning the text is more reliable.

Bottom line: the choice is yours. Justify if you wish. But if you do, be sure that hyphenation is enabled.

\* \* \*

For guidance regarding the myriad other small and big things one can do to typographically improve one’s briefs and other legal documents, consult the HANDBOOK and/or get your hands on a copy of Butterick’s TYPOGRAPHY FOR LAWYERS.



A TRIAL LAWYER'S GUIDE TO:  
*Patent Jury Litigation*

By Edward L. Foote and Peter McCabe\*

## I. Overview; Preliminary Understandings

This article on jury trials in patent cases has two limitations:

**First.** It is primarily for the benefit of general trial lawyers and commercial lawyers who become involved in patent litigation. It is designed to cover basic issues and jury strategy for attorneys who are not specialists in intellectual property.

**Second.** A second consideration, which is not reviewed or analyzed in this article, is the option that a party accused of infringement may seek a trial on a written record in the Patent Office to determine the validity of the patent over patents and other printed materials. In short, after the plaintiff has filed a case charging a defendant with infringement, the defendant can request a panel of administrative judges at the Patent Office to further review the “invention” and consider whether the claims are valid. Though called a “trial,” these proceedings are conducted primarily on the written record with limited discovery, and the oral argument takes on more of an appellate argument than a trial. Assuming that the Patent Office in this proceeding decides that the claims are valid, a federal district court trial will occur to determine infringement and any remaining viable affirmative defenses. If the Patent Office and Appeal Board determines the patent claims are invalid, there, of course, would be no trial to determine infringement.

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*Following his graduation in 1955 from the Harvard Law School, Ed Foote joined Winston & Strawn LLP, becoming the head of its litigation department in 1968. He occupied that position until 1994. Now 86 and Of Counsel to the Firm, he has not slowed down a bit and regularly tries major cases of all kinds-- his favorite are patent cases. Tom Sullivan, in a recent article about Foote in the Chicago Daily Law Bulletin, called him the greatest trial lawyer he has seen in the last 55 years. That is a view that is shared not only by lawyers in Chicago but by many across the Nation.*

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In short, this article assumes that there will be a patent trial.

The patent process begins with an application in which the inventor, under oath, states he has developed something new. When that application is received in the Patent Office, it is assigned to an Examiner and usually the first attempt to obtain a patent is “disallowed.” The patent application includes a general statement of “the invention” and detailed specifications describing this “contribution” to some special art. The most important part of the application is not the description of the product or process or the specifications. Rather, the application must state clearly what the inventor “claims.” Patent protection is limited to the exact language used in what the inventor “claims.” Each claim is a distinct statement of some new process, product or improvement based on the specifications.

What happens in the Patent Office is called the “file history” of the patent. Technically, what the Patent Office does is to “allow” the claim or reject the claim. What the Patent Office does is to analyze the specifications and the claims and then the Examiner, reviewing the application, prepares an “office action,” which may disallow the claims with an explanation; after further consideration and amendments, the claim may be “allowed.” It is necessary to become familiar with these office actions; they are important in understanding why the Patent Office determined that this was a new and useful contribution to a particular art.

Another word unique to the patent process is the phrase “prior art,” meaning what has been patented or published on the subject of the invention. As in any trial, knowledge of the facts is critical. In a patent case, the knowledge needed is to understand the technology and the history or knowledge of that technology at the time of the invention in order to understand why the claims were allowed as an improvement over the existing state of technology. The office actions, either allowing or rejecting the claim, often refer to what someone “skilled in the art” would know at the time of the invention. Only persons “skilled in the art” at the time of the invention can be used as experts in the trial of a patent case.

Unlike jury trials relating, e.g., to contract disputes, the patent trial requires the Court, not the jury, to determine disputes that always arise over the “meaning” of the language used in the “claims.” The jury is instructed by the Court on the meaning of the technical terms or disputed terms in the claim language. The meaning of the claim language can control many of the issues that the jury has to decide. The language of the patent, the specifications of the patent and everything that happened in the Patent Office is always helpful in determining the meaning of a particular word or element of a claim. This is called the “intrinsic” evidence. In determining the meaning of disputed language, the Court starts with the intrinsic evidence and arguments about the intrinsic evidence. “Extrinsic” evidence is primarily opinions of experts “skilled in the art” who will advise the Court of the meaning of a particular element as known to those skilled in the art *at the time of the invention*.

## II. Patent Law: Read the Statute: Overview of the Patent Law

The first requirement is to read the United States Code. The relevant statutes can be read in a couple of minutes. As Justice Frankfurter used to caution his law students when he was teaching at Harvard: “read the statute; read the statute; read the statute.” There are five sections of Title 35: 101; 103; 102; 112 and 271. It is useful to have the statutes readily available when in court. To be patentable, the invention must be new and useful. It can be a process, a machine, a composition or an improvement. (Title 35, § 101) This simple statement, five lines of the Code, doesn't end the matter. There are “conditions” relating to patentability that the Patent Office considers in allowing the claims.

**First.** The patent cannot be obtained if the subject matter would have been “obvious,” comparing the invention with the “prior art” to a person having ordinary skill in the art. (Title 35, § 103)

**Second.** The inventor’s rights are what is “claimed.” Each claim must, with particularity, “point out” the subject matter of the invention.

**Third.** The specifications must include an adequate “written description” of the invention.

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Patent lawyers are experts in detailing elements of the invention, whether an article or a method of performing something. Each claim usually has various elements to either produce an article or describe a method of doing something: I claim the invention of the internal combustion engine – an article. It has five elements: a cylinder; a piston operating in that cylinder; combustible material; a gadget (carburetor); to add the combustion material to the cylinder and an ignition part.

Whether the invention is something new to the art and whether the specifications teach how to make the product, these basic concepts are not hard to understand.

In allowing the claims, the Patent Office has determined that the invention is new and useful (§ 101); and the conditions of patentability exist (§ 102). The patent is not obvious under § 103.

The inventor must comply with § 102. The language of § 102 begins with the right to get a patent unless

- (a) a person shall be entitled to a patent unless it was patented or described in a printed publication in the United States or a foreign country before the filing date;
- (b) unless the invention was patented or described in United States or a foreign country or in public use or on sale in this country prior to the application;
- (c) unless the invention was disclosed by the inventor in a foreign country or the United States if filed no more than twelve months before the United States application.

What's going on here is that somebody who "invents something" has to "timely" file the application. The statute asks the following question: What is the actual date that represents one year prior to the date of your application? Did you sell the product before that date? Did you offer to sell the product before that date? Was

there a patent or a printed publication in any country disclosing your invention prior to that critical date? If these conditions are met, the date on which the application is filed controls who has priority to the invention. Thus, it doesn't matter if a person thought of the invention first. The priority of inventors is who wins the race to the PTO.

These requests under § 102 create defenses that may be tried after discovery; in short, the patent could be unenforceable even if infringed.

### III. Infringement

The plaintiff begins the case with the Patent Office on plaintiff's side. The Patent Office in approving the patent, or more technically, allowing the claims of the patent, has decided that the invention was new and useful; and further that all of the conditions of patentability have been established, e.g. the patent is enabling and the so-called prior art (prior sales or other publications) did not render the plaintiff's patent "obvious." As considered *infra*, the defense will revisit all those issues when applicable, but the plaintiff starts with a presumption that all of those requirements and conditions have been met. Otherwise, the claims would not have been allowed.

So the basic job of the plaintiff is to prove infringement and these other issues or patent requirements (*supra*) surface in the defense and defendant's attempt to "overturn" the decisions of the Patent Office. USCA 35 § 271. Infringement occurs when an entity "without authority" makes, uses, offers to sell or sells any patented invention within the United States all imports into the United States any patented invention.

How will the plaintiff prove infringement? Up front, the plaintiff (and the defendant) should begin preparation by determining or predicting what the Federal Judge is going to tell the jury. The jury instruction will include directions on what the claim language "means." The patent will relate to some special "art": mechanical



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engineering, electrical engineering, chemistry, computer software, etc.; infringement naturally depends on what the claims mean. What must the jury find for the plaintiff to prove infringement? It is necessary early on to understand what instructions will be given to the jury.

You are instructed that for the plaintiff to establish infringement, you must find:

- Each element of the claim must be literally practiced in defendants’ device or method.
- For any element that is not literally practiced in the accused device, you may find that the accused device or method is equivalent.
- The method or device is equivalent if you find that the “function, way, and result” are insubstantially different from the function, way, and result identified in the claim.
- Literal infringement occurs when the structure disclosed to perform the means is literally the same or an equivalent structure in the accused product.
- There are different rules for a claim which is written as a “means” claim. A “means” claim is one which is permitted under the Patent Code (section 112, paragraph 6), and gives the patentee an opportunity to claim an element of his invention in functional language. Therefore, the claim may not be limited to any one particular structure. A “means” claim is usually identified by the words, “means for...”. One example of a “means” claim is the following: a means for connecting 2 pieces of wood. The patentee is generally limited to those structures disclosed in the specification which would perform this function and their equivalents. So if a nail is disclosed in the specification, the claim is not limited to just a nail, but any other structures which could be used to connect 2 pieces of wood, such as a screw. If the jury concludes that a screw is an “equivalent” then an accused product which has these structures is literally infringed, pursuant to the statute.

The word *equivalent* has a number of meanings, depending upon the statute or context in which it is used.

Equivalent infringement occurs if the accused article “produces substantially the same result in substantially the same way with substantially the same function as the claim.” If the “equivalent” was “predictable,” meaning an application that one skilled in the art could reasonably foresee, it cannot be an equivalent.

Under section 112, paragraph 6, there is literal infringement of a “means” claim if the accused product includes a structure which performs the function of the means claim or an equivalent structure. Additionally, an accused device or product can infringe under the Doctrine of Equivalents if the structure which performs the identical function described in the claim and performs the identical function in substantially the same way and achieves substantially the same result.

### IV. Defenses: Is The Patent Invalid or Unenforceable?

There are several defenses to a patent case that must be understood in order to practice patent law. These defenses claim that the patent is invalid, even if defendant infringes. The Defendant, in effect, says that the patent should never have issued. While the Patent Office has “allowed” the claims of the patent (and therefore, the patent exists), the Patent Office is not always - that is 100% -- correct, and the patent can be said to be invalid; that is, the claims should never have been allowed.

\* \* \*

#### A. Prior sale

Defendant can invalidate the patent after it has been allowed by the Patent Office by proving that the inventor had offered to sell the product or actually sold the product more than one year before the patent application was filed. In other words, the inventor has to apply for the patent in a timely manner - *compared to the time that the product is sold.*

\* \* \*

#### B. Obviousness

The patent may be invalid because the invention was obvious to one skilled in the specific art - at the time of the application or conception. This invalidity issue requires an understanding of the patents, products and publications that relate to the subject matter of the invention- what is called “*prior art.*”

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**First.** The patent may be invalid because the prior art included several patents or publications that were reasonable to put together or combine and the invention was therefore obvious to one skilled in the art.

**Second.** In a specific application of obviousness, the patent may be invalid because it was “anticipated” by a single piece of prior art before the application was filed.

The defense that is most often used to defeat a patent claim is “obviousness.” The Supreme Court has recently clarified and detailed how a defendant can establish this affirmative defense of “obviousness.” The case is entitled *KSR*. The case addresses the common practice of obtaining a patent by using elements that are known to those skilled in the art, and claim an “invention” by combining those separate elements. What the Supreme Court has recently done is to make it far easier to prove that a claim is obvious (invalid) if it is a “combination” claim. The Court, based upon the Supreme Court’s decision in *KSR*, should instruct the jury as follows:

You are instructed that the defendant contends that the claim is invalid under Section 103 because the elements of the claim were in the prior art and therefore “obvious.” In order to prove that a particular claim is obvious under § 103, the defendant has the burden of proof by clear and convincing evidence (a) that each element in the claim was an “old” element, that is, the element existed in the prior art; (b) that each element performed a particular function in the prior art; (c) that each element of the claim performs “the same function” that was performed by that element in the prior art; and (d) demonstrate that the results obtained from the combination of these prior art elements was predictable or that the results obtained from the combination could be “expected” from such an arrangement.

### C. Inequitable conduct

A patent that has been allowed by the Patent Office, that is, the claims have been allowed and the patent has issued, can be attacked on the grounds of inequitable conduct, which simply means that the processing of the patent was unfair, that appropriate disclosures of

the prior art were not made or that the Patent Office was not advised that there were prior sales or use of the “invention” disclosed in the claims of the patent.

\* \* \*

## V. Damages

If the jury finds for the plaintiff, the patent law provides for damages, interest and costs “adequate to compensate for the infringement.” This would include lost profits. The statute also states that the damages cannot be less than a reasonable royalty.

What is a reasonable royalty? The real question is: What would the infringer have paid to the patent owner in negotiating a license at the time of the infringement? No such negotiations occurred. Therefore, the proof is based upon an “hypothetical negotiation” between the infringer and the patent owner. The practice is to call some experienced witness who qualifies in negotiating licenses, and this expert provides an opinion on what the negotiation result would be in such a negotiation. This article does not review the factors that have to be considered. As an example, whether the patent owner had licensed the product to someone else for a specific royalty. A summary of relevant factors is included in the *Georgia Pacific* case. *Georgia Pacific Corporation v. United States Plywood Corporation*, 318 F. Supp. 1120 (S.D.N.Y. 1970).

The experts for the parties will obviously disagree. It is therefore self-evident that the witness selected should have a good background and reasonable qualifications and be able to detail explicitly in understandable terms the basis for the royalty opinion.

The plaintiff will usually obtain a much larger monetary judgment by proving lost sales and therefore lost profits. This theory is based upon an answer to the following questions: a) Would the patent owner have made the sales that the infringer made? b) Assuming the infringer did not exist, were there any “competitors” or entities that would have made all or part of the sales that the infringer made? In short, were there substitutes? c) If there were no substitutes and the owner had the capacity to fill the orders that had in fact been obtained by the infringer, then the plaintiff has a lost profits claim.

These issues are called the *Panduit Factors*. See *Panduit Corporation v. Stahlin*, 575 F.2d 1152 (6th Cir. 1978).

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The damages may be substantial. The lost profit calculation, assuming that the patent owner had the manufacturing and marketing abilities to produce the products that the infringer sold, is determined as follows:

- the total number of units sold by the infringer;
- that number of units is assumed to be "sales" of the patent owner because there would be no substitutes;
- this number of units is multiplied by the patent owner's prices to get a total dollar value of the diverted sales;
- the costs do not include all costs; only the variable costs are calculated;
- the total value of the sales is reduced by the average variable costs and the result represents the lost profits.

Another damage theory may be applicable: If the patent owner has had to reduce prices and/or increase costs as a result of the infringing sales, this can support a further damage claim.

Non-infringing product sales may be included: these are called "convoy" sales. This represents the sale of unpatented products by the owner that are tied together with the patented product to produce the desired result. Such sales can be added to the lost sales for the patented product.

Suggestions on how to put together a general damage case: The damage study will be based upon a lot of documents produced during the discovery process. The jury is not at all interested in those details. Therefore, relevant summaries are prepared and a summary document stating the conclusions from the underlying documents is offered in evidence.

Other than the infringer's sales, each of the other items can and should be put of record by the plaintiff's president or accountant. There is no need to have to an outside expert "summarize" plaintiff's business. It may be helpful to have some outside

accountant verify or support those determinations, but it is really not necessary.

Someone has to testify that there were only two people in the market - plaintiff and the defendant - and that there were no substitutes available. Again, this can be done through the plaintiff's marketing vice president. In addition, it is at times necessary to call an economist to detail the "market structure." The economist has to learn enough about the business to be able to provide an opinion. If the plaintiff needs such an expert, sufficient time has to be set aside for the expert to have a believable basis for his opinion that the industry is a "two company industry", or that others in the industry do not provide reasonable substitutes. In short, leaving aside major cases that involve huge amounts of money, the plaintiff should begin by relying on those in the company (accountants,

marketing people and the president), who know the business and the competition and the costs, to lay the foundation for the ultimate opinion testimony.



## VI. Trial Strategy: Suggestions; The Face Of The Patent; The Invention

Juries love patents; they regard it as obtaining property, such as agricultural land when the Midwest was settled by homesteading. Each juror knows an uncle, cousin, whoever, who could greatly profit and become comfortable

for life through an invention that could be patented. Attempts by the defense to deride or criticize the Patent Office will be greatly resisted by the average juror.

Further, the average juror is very interested in how you get a patent. There is now a movie which covers all of these items, which is played at the start of many patent trials. It is necessary to review and understand this video before the trial begins.

The statute talks about the invention. Patent lawyers do not talk about an invention. They talk about the technical language used in the claims. The jurors think of an invention.

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The Plaintiff should always call the inventor or one of the inventors and the jury wants to know what was invented - for a lot of reasons - not only because of the trial, but because jurors like to know how you can actually get a patent. This is an opportunity for the plaintiffs to communicate with the jury and provide the jury with information they really want to know. To our great surprise, most Plaintiffs do not ask this

important question: The question to the inventor is: What did you invent? Is it a process? Was it new? After the *KSR* case, it is necessary for the Plaintiff to anticipate the obviousness defense in a “combination” patent. What did you invent? “I put together various things that were pretty well known but never combined. I combined them; that was my invention.” Why do you call this an invention? “Because before my work, the average expert in this field never thought of combining these elements. I did and then I filed my application. I reviewed what others had done, including some patents that preceded me. No one had suggested that this combination would be useful or important.”

Moreover, this “combination” was specifically reviewed by the patent examiner in the file history - The Patent Office allowed these claims and reviewed other patents. There was no objection in the file history that this combination was not an invention.

And the Patent Office necessarily concluded that it was new and useful allowing the claim.

Of course, for the defense, if the Plaintiff does not use this opportunity to disclose the “invention” and, communicate to the jury what the jury really wants to hear, then the defense should seize on that opportunity and, as the first question in cross examination, cut through it all by saying: What is your invention? There's nothing new about any of these elements, is there?

The Plaintiff should bring out what the Patent Office has considered and reviewed.

Is there anything in the file history where the Patent Office suggested that this method, using this procedure or article, was disclosed? If not, then stress what the PTO thought was new about this invention.

Did the Patent Office compare the application to other applications in the same field?

Plaintiff should win these points because it is a difficult job for the defense to overcome the presumptions and activity of the Patent Office. The jurors regard the Patent Office as a reliable and important part of the Federal government. To criticize the actions of the Patent Office is not a good idea unless you can really demonstrate an egregious error.



The Plaintiff should succeed on any issue that the Patent Office considered or presumptively acknowledged because the criticism of the Patent Office or its “error” must be demonstrated by “clear and convincing evidence.”

To successfully attack the decisions of the Patent Office requires a thorough knowledge of the file history. Invariably, there is something in the file history that “limits” the “invention.” (It’s important to limit the “invention” for purposes of the jury even though technically we’re dealing with claims.) Somewhere in the file history the Patent Office

has probably disallowed something and then there is an argument or explanation of why the claim should be reconsidered. The file history provides a basis for cross examination of the inventor (or his expert).

Of course you did not invent X, you’d agree with that, wouldn’t you? You explained to the Patent Office that your situation was different from prior art A, B, and C and you did that in order to get your invention allowed by saying the invention didn’t include A, B or C.

Apart from the defense of the *KSR* “combination”, “obviousness,” there is one other approach that should be considered- and probably used as a defense tool to overcome the jurors’ presumption- conviction- that the Patent Office was right.

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The Patent Office necessarily begins with an examination of the inventor's declaration that he knows of no prior act disclosing "his invention"; a statement that the inventor makes under oath (35 U.S.C., Section 115). There's no other part of the file history that includes the requirement that a statement be under oath - underlining the importance and significance of this statement by the inventor.

The following are suggested approaches:

You didn't spend very much time trying to determine whether others had developed this invention, right?

What did you disclose in your original application as other "art" that related to your invention? Later on you had a "disclosure" of prior art that you didn't include in your affidavit- A through K.

You haven't actually read these patents, have you, or this literature, or this material that appears to disclose your patent?

In our experience, the patent trials rely entirely too much on paid experts; those experts retained by the lawyer will meet with the lawyer and go over all the prior art and positions will be created between the lawyer and the expert regarding the Plaintiffs view that the prior art does not disclose "the invention."

The inventor may or may not have the same knowledge as the expert, particularly since the expert has prepared a report, edited or even drafted by a lawyer. The defense should always consider, therefore, a pretty detailed examination of the inventor's knowledge of the prior art. There is no certainty that this will result in helpful testimony, but it often does.

The point is to limit the "inventions"; the jury may get the idea that this declaration was limited and superficial; the inventor really doesn't know whether this was in the prior art.

All in all, information may be disclosed or "uncovered" to suggest to the jury that the Patent Office was somehow mislead or not informed and the defense.

The Plaintiff has an advantage, not only regarding the affirmative defenses but establishing infringement, that is assuming that the Plaintiff approaches the case taking advantage of the law.

The jury likes patents and will accept an "equivalent" theory, particularly having in mind the instructions on what constitutes an equivalent for infringement.

The question is: Was the equivalent or particular application or item predictable: i.e, within the concept called the invention? If the "equivalent" was not, to one skilled in the art "predictable," then there can be "equivalent" infringement. Apart from this issue of predictability, the Doctrine of Equivalents provides the Plaintiff with a broad basis for supporting infringement.

The defense of course should always defend *infringement* by saying that the accused article -- method -- procedure -- is what is disclosed in the prior art and that such prior art has to be different from the "invention."

The defense should always establish that the Patent Office never said, directly or by implication, that the defendant's "device" or "method" "infringes." Remember the jury- at the start - may think that the Plaintiff's case - of infringement - was supported by the Patent Office.

Finally, one issue which a trial lawyer almost always faces is whether to pursue just the defense of non- infringement or just the defense of invalidity. Most lawyers assert both defenses in a single trial. However, because jurors like patents, our experience is that a jury will rarely find a patent not infringed AND invalid. In view of this, should the lawyer assert both defenses at the trial or, should the lawyer assert only his "best" defense. If the non-infringement defense is strong, then perhaps an invalidity defense should not be included. This issue includes the jury's "judging" the lawyers. Too often, positions are taken that on balance the defendant is not likely to win; it may be a defense, but not a viable defense; the jury may question other good arguments - if they sense the lawyer is overreaching. Likewise, if the validity defense is solid, but the non-infringement defense is weak, then perhaps infringement should be admitted at the start of the trial and all of the evidence will be focused on the invalidity of the patent. If both defenses are strong, then perhaps they should both be asserted. The jury may reach a compromise verdict by finding the patent not infringed, but valid or vice versa. Of course, the ideal situation would be to bifurcate the

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and try invalidity first. If the patent is found invalid, then there would be no need for a separate trial on infringement, of course. This is a strategic issue that the trial lawyer must determine in almost all patent cases.

### Experts

Experts are everywhere in patent litigation. Let me count the ways. The first page of the front cover of the patent is filled with things that the jury will not understand, *infra*.

The following suggestions, experience tells, should be seriously considered in handling experts.

**First.** As considered *infra*, the treating physician is a better witness than an orthopedic expert called to testify who never treated the patient. The inventor is an expert. The inventor should testify on all relevant subjects. The jury wants to know: What did you invent?

**Second.** Always preserve the evidence of an expert in a video deposition. Why? First, the predominant method used by the average juror to gain information is a screen, a television receiver set or a Blackberry. Experience indicates that what is on that screen to the average juror is more credible and believable than live testimony. Second, when testimony is preserved, what it really means is that your story is preserved in a controlled environment and while there is cross examination, that cross examination cannot be later improved or expanded.

**Third.** You don't have to use it. Is the witness available or unavailable? Experts are unavailable. Their schedules are unpredictable and not in concrete.

**Fourth.** There are experts who do not do well in the courtroom, a place that a particular expert may not find comfortable. A conference room video set-up is simply friendlier and consistent with what experts are used to. A bad witness in the courtroom might be a good witness in a conference room.

**Fifth.** Get to the point. A trial is not a deposition. Get the qualifications and then get on with it. Use straightforward, uncomplicated sentences. By the time the expert takes the stand, the jury will have heard enough about a lot of things. Actually, the jury wants to reach a result, usually supporting the patent. After all, the Patent Office liked it. If the expert is really challenging the Patent Office by criticizing, i.e., the patent as invalid or not enabling or was obvious based on the prior art, the jury wants the expert to get to the point and expects your expert to support your case. I do have an opinion and this is my opinion. The real issue is: What is the basis of that opinion and how could you come to a conclusion different from this reliable entity in Washington called the Patent Office? Once the jury hears how much your expert has been paid, it is all the more necessary that an understandable basis for the opinion is plainly stated.

### Cross Examination

Cross examination of patent experts is not materially different from general cross examination, which is somewhat beyond the scope of this article and general trial lawyers are presumed to have a pretty good idea how to cross examine.

Effective cross examination at trial begins with the expert deposition. Some thoughts:

- (a) Why don't we make sure that the expert knows all the good questions so that he can prepare and rehearse for the trial as often as possible -- at times in a practice session with a sample jury? It is simply poor lawyering to let the expert know all your good questions at a deposition.
- (b) Why take the deposition of an expert? Each opinion and the basis of each opinion is in the report. You can always help the witness and have the expert cover things that were omitted. You can always ask him: Do you have any other opinions? Then the report can be expanded and the witness will add more information; again bad lawyering.
- (c) If an examination is needed, i.e. clarification that your expert needs, the question is to simply say: Where in your report is there an opinion on X? Let us turn to X. Where in your report is the basis of opinion X? (Page 34, lines 10-26) Don't ask: Is there any other basis? The

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report is conclusive and complete according to the rule. Is there anything confusing on lines 10-24? Do you want it clarified? All in all, be careful and resist the attempt to show how smart you are in front of your client in a deposition.

### Summary; Abiding Principles

**First.** The Patent Office has ruled and decided much of the case for the plaintiff.

The patent discloses something new and useful.

The specifications are clear.

The claims are not indefinite.

The specifications show someone skilled in the art how to make and use this invention: It is enabling.

**Second.** Jurors like the Patent Office. Plaintiff should win the various defenses relating to the conditions of patentability because the Patent Office has implicitly stated that the invention satisfies those requirements. Otherwise, the claims would not have been allowed. The defendant has to be very careful attacking the Patent Office.

**Third.** Most important - for the defense - is to disclose or explain that the Patent Office did not consider infringement and never reviewed Defendant's product or method.

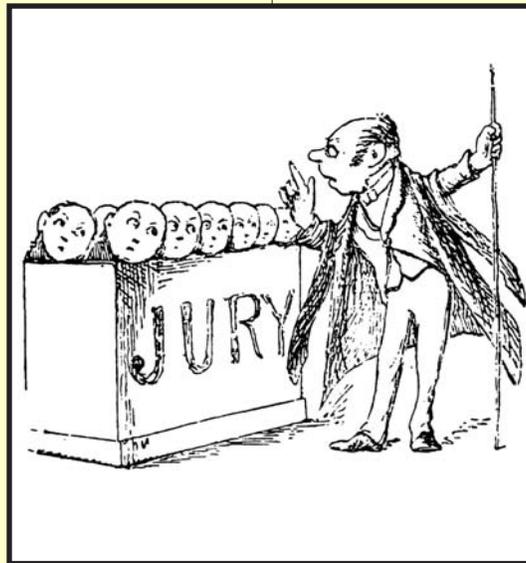
**Fourth.** The inventor is the treating physician. He can be the key to the case. Jurors are suspicious of paid experts; but the jurors appreciate the inventor.

**Fifth.** The many problems of "Markman." Experience teaches that the first thing to do in major litigation is to figure out what you have to prove for the plaintiff and for the defendant. There is no better or surer way of getting a grip on that subject than having a set of jury instructions on the issues of the case prepared early on. Of course, these will be revised over time,

but you have to know what you have to prove before you start getting ready for trial.

A major subset of that discipline is the "Markman" issue. Remember that the Markman "ruling" is part of jury instructions. The Court will tell the jury what certain supposedly ambiguous language in the patent "what it really means." This poses the abiding risk that the Judge will tell the Jury a meaning that a) makes it difficult, even impossible, to prove infringement; or (b) makes it impossible to support an affirmative defense.

**Second.** Does the plaintiff or the defendant want to have the Court examine an extended list of alleged ambiguities? It is in the Court's interest not to take up that much time. It is in the party's interest to exclude -- if need be - supposed phrases that are really not ambiguous.



**Third.** The lawyer must keep in mind the fact that the Patent Office has allowed the claim. Therefore, the written description is adequate; the language used is enabling, meaning someone can actually practice what is disclosed; also, the language is not indefinite. The written description is not adequate. Further, the best mode to practice is disclosed. In short, the Patent Office has already decided those matters because the claim was allowed. The trial lawyer has to consider when to make these arguments. When is it in the best interest of the client to limit the number of supposed ambiguous terms in the patent?

**Fourth.** Many judges require a tutorial, meaning some explanation of the "invention" and how the claims disclose the invention, to have the Court understand the subject matter. The plaintiff should have the inventor present this tutorial and explain it. The defendant's tutorial should start with the "claims" and then:

- (d) explain why a phrase is "ambiguous" (or why it is not ambiguous);
- (e) Why take the deposition of an expert? Each opinion relate the "ambiguous" phrase to intrinsic evidence in the file history;
- (f) review why a particular "meaning" can't be used because of statements made in the file history; or

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(g) the “meaning” claimed may be part of the prior art and, as interpreted, would have caused the Patent Office to disallow the claim.

### VII. The Strategy Of “Getting To Trial”: Markman; Summary Judgment; Temporary Injunctions; Federal Circuit

Patent litigation is simply different: For many years, the idea of a jury trial was not generally accepted and regarded as a questionable and unacceptable procedure. The Markman decision removed from the jury the basic issue in a patent case: the interpretation of the language of the claims.

\* \* \*

**First.** Temporary injunctions are more common in patent litigation; the patent claims may have an early expiration date; or the Plaintiff wants the Defendant out of the market for business reasons; or the temporary injunction is used to early on determine claim construction. The motion for temporary injunction means that there will be expedited discovery and Plaintiff assumes the burden of proving beyond a preponderance of the evidence that plaintiff will “likely succeed” on the issues of infringement and the validity defenses. This mini trial, without a jury, produces documents, interrogatories, depositions, experts; a Markman ruling or hearing and briefing and arguments follow. The granting or the denial of the injunction is appealable so the Federal Circuit who will review how the District Court handled claim interpretation, which is treated as a *de novo* legal proposition. This preliminary appeal will consider other related issues, balancing the equities, etc. Indeed, the losing party in a preliminary injunction proceeding will delay a jury resolution by simply exercising the appellate review option.

**Second.** Assuming this appeal will not end the case, the District Court will then proceed with the usual regular discovery - this time not on an expedited basis - involving depositions, interrogatories, experts, expert depositions that invite summary judgment filings; after the Federal Circuit’s view of the issues supporting or denying the injunction. The problem then surfaces as to whether summary judgment can be granted - or for that matter denied - without a Markman hearing.

**Third.** At this point there is a genuine timing issue that has to be addressed. The Court may treat summary judgment as an opportunity to make a final decision on claim construction, relying in the summary judgment process that includes expert reports, briefs, etc. - the factual or legal basis for a Markman ruling.

If the motion for summary judgment is based on invalidity issues and a Markman ruling, then the infringement positions will have to accommodate the Court’s Markman ruling; that will invite further expert opinions, depositions and a second motion for summary judgment on “infringement.”

The Federal Circuit does not permit an interlocutory appeal on the Markman ruling, so at some point after the temporary injunction procedure, the various summary judgments and the Markman decision, there will be a jury trial primarily on infringement or some affirmative defense.

The procedure above outlined does not cover the case where the Court wants an actual Markman hearing where the evidence, live witnesses, experts, etc. come in to educate the Court on the technology and what those skilled in the art regard as the meaning of language in the patent.

After the jury verdict, a final “trial” occurs on those equitable issues not submitted to the jury: inequitable conduct; estoppel; laches.

In any event, there may be a jury trial, which follows (a) the temporary injunction procedure; (b) the first motion for summary judgment; (c) a Markman hearing and (d) the second motion for summary judgment. Conceivably, the jury could find for the plaintiff and the Judge in the final round, i.e. equitable defenses, could decide the case for the defense notwithstanding the jury trial.

There is then, after these hearings and experiences, an ultimate appeal to the Federal Circuit on the merits.

### Appendix

There is a body of Federal Circuit law that permits an inventor to be his own lexicographer, that a word or words in a claim can have a special meaning, not an ordinary meaning or a dictionary definition. Patent litigation requires an understanding of a dozen or so words that come from the statutes or Federal Circuit opinions. These words have a particular meaning in patent practice.

file history	conception
prior art	reduction to practice
function	best mode
equivalent	Markman
enablement	obviousness
prior sale, use	indefiniteness

# *The Alien Tort Statute*

## AFTER *KIOBEL V. ROYAL DUTCH PETROLEUM*

*By Hon. Ian L. Levin (Retired) and John J. Pavich\**

A momentous decision in international law was handed down by the Supreme Court on April 17, 2013 in *Kiobel v. Royal Dutch Petroleum, et. al.*, 133 S.Ct. 1659 (2013). In *Kiobel*, the Court dealt directly with a tool human rights groups and litigators have been relying on in their U.S. legal efforts to protect and enforce international human rights norms – the Alien Tort Statute (hereinafter “ATS”). This statute, codified in 28 U.S.C. 1350, allows an alien to bring a claim in U.S. federal courts for a violation of international law:

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

Over the past 30 years, human rights advocates have used the ATS to advance human rights cases filed on behalf of the victims of grave atrocities that, generally, have occurred abroad. However, in *Kiobel*, the Supreme Court for the first time held that with certain limited exceptions, the ATS does not apply extraterritorially. So, where does the Statute now apply, and what are these exceptions allowing alien plaintiffs to bring tort claims for international law violations occurring in another country?

In this article, the authors will provide a history of the ATS and then seek to discern its current state. We shall examine the major post-*Kiobel* cases and attempt to identify a possible future of ATS litigation.

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### I. A Brief History of the Alien Tort Statute

The ATS is a more than 220-year old statute originally codified in the Judiciary Act of 1789. Much to the frustration of those tasked with divining the original intent behind the passage of the ATS, there is little in the historical record to cast light on its historical purpose.<sup>1</sup> However, certain clues and insights have allowed ATS scholars to convincingly reconstruct the probable contours of the original motivations behind the founders' decision to incorporate the ATS into the first Judiciary Act.

#### A. The Origins of the ATS in the Judiciary Act of 1789.

As noted above, a question much debated since the rediscovery of the ATS around 1980 is why the statute was adopted in the first place. There is little legislative history of the ATS, and very little discussion of the act's passage in the early historical record. However, contemporary scholarly assessments seem to concur that the ATS was actually adopted as a necessary safeguard of our young nation's national security interests.<sup>2</sup> In 1789, it was commonly understood by the preeminent international law experts of the time that a denial of justice to aliens abroad could be used as a justification for a war of vengeance launched by the alien's home nation.<sup>3</sup> As Alexander Hamilton wrote in *The Federalist*:

As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned.<sup>4</sup>

Professor William Dodge, a well regarded ATS scholar, explained that with passage of the ATS, the United States was also able to provide a federal remedy for torts committed in violation of international law, thereby allowing the First Congress to "protect against the vagaries of state law, the hostility of state courts, and differences in their interpretations of the law of nations, sparing the new nation [much] embarrassment[.]"<sup>5</sup> Professor Anthony D'Amato, another well-known and highly regarded expert of international law, elaborated that "the overriding purpose [of the ATS] was to maintain a rigorous neutrality in the face of the warring European powers."<sup>6</sup>

In sum, these intentional acts against aliens were considered to

have violated the law of nations so that if the U.S. refused to address them, it easily could have given the victim's home nation a just excuse for waging war against the United States.<sup>7</sup>

#### B. The Modern Revival of the Alien Tort Statute

As noted, after its passage in 1789, the ATS essentially lay dormant for nearly 200 years. Then, in 1980, a panel from the Second Circuit Court of Appeals issued its decision in the landmark ATS decision, *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980). *Filártiga* was a wrongful death case brought by Dr. Joel Filártiga and Dolly Filártiga on behalf of their son and brother, Joelito Filártiga.<sup>8</sup> The plaintiffs based federal jurisdiction under the ATS, and alleged that Joelito had been tortured and murdered in Paraguay by Americo Peña-Irala. Peña-Irala was, in 1976, a high-ranking police official during the rule of the Paraguayan dictator General Alfredo Stroessner. The Filártiga plaintiffs alleged that Peña-Irala abducted, tortured and murdered Joelito in violation of international law.<sup>9</sup> The Second Circuit, in reversing the district court's dismissal of the case, explained:

A case properly "aris(es) under the . . . laws of the United States" for Article III purposes if grounded upon statutes enacted by Congress or upon the common law of the United States. The law of nations forms an integral part of the common law, and a review of the history surrounding the adoption of the Constitution demonstrates that it became a part of the common law of the United States upon the adoption of the Constitution. Therefore, the enactment of the Alien Tort Statute was authorized by Article III[. . .]we believe it is sufficient here to construe the Alien Tort Statute, not as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights already recognized by international law. The statute nonetheless does inform our analysis of Article III, for we recognize that questions of jurisdiction "must be considered part of an organic growth part of an evolutionary process," and that the history of the judiciary article gives meaning to its pithy phrases. The Framers' overarching concern that control over international affairs be vested in the new national government to safeguard the standing of the United States among the nations of the world therefore reinforces the result we reach today. Although the Alien Tort Statute has rarely been the basis for jurisdiction during its long history, in light of the foregoing discussion, there can be little doubt that this action is properly brought in federal court. This is undeniably an action by an alien, for a tort only, committed in violation of the law of nations. The paucity of suits successfully maintained under the section is readily attributable to the statute's requirement of alleging a "violation of the law of nations" at the jurisdictional threshold.

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*Filartiga v. Pena-Irala*, 630 F.2d 876, 886-887 (2d Cir. 1980)(internal citations omitted).

The case was remanded to the district court and default judgment in the amount of \$10 million was entered against the defendant Pena. With this decision, the modern embrace of the ATS as a tool in enforcing human rights took hold. *Filartiga* became a widely used precedent for claims involving violations of international law, including claims for torture, crimes against humanity and genocide.<sup>10</sup>

Following *Filartiga*, new cases continued to be filed expanding the reach and judicial interpretation of the ATS. ATS cases were filed against government or quasi-governmental leaders, including cases brought against the former President of the Republika Srpska<sup>11</sup> in Bosnia and the estate of the former leader of the Philippines, Ferdinand Marcos. In *Kadic v. Karadzic*, the Second Circuit confirmed that the ATS could reach the actions of individuals, acting under the color of state action. As the court explained, “[w]e do not agree that the law of nations, as understood in the modern era, confines its reach to state action. Instead, we hold that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.” *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995). Thus, for certain violations of international law (such as war crimes and genocide), individuals could be held liable under the ATS regardless of whether they acted in concert with any state or governmental authority in carrying out their alleged crimes.

In *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 978 F.2d 493 (9th Cir. 1992), the Ninth Circuit determined that the ATS did, in fact, apply extraterritorially to conduct occurring completely outside of the United States’ borders. In reaching its conclusion, the court determined that claims involving alleged violations of *jus cogens* could be heard in U.S. federal courts under the ATS:

[T]here is widespread agreement on this; “all states believe [torture] is wrong, all that engage in torture deny it, and no state claims a sovereign right to torture its own citizens. Under international law, any state that engages in official torture violates *jus cogens*.” We therefore conclude that the district court did not err in founding jurisdiction on a violation of the *jus cogens* norm prohibiting official torture[...]. For these reasons, subject-matter jurisdiction was not inappropriately exercised under § 1350 even though the actions of Marcos–Manotoc which caused a fellow citizen to be the victim of official torture and murder occurred outside of the United States.



*Id.* at 500-501 (internal citations omitted).<sup>12</sup>

As the modern legal contours of the ATS began to take shape, an evolution began to occur in the type of defendants targeted in ATS cases. It was no longer only government or quasi-government perpetrators that needed to take notice of their potential liability -- gradually, multi-national corporations and other powerful entities accused of aiding and abetting international law violations found themselves in the ATS cross-hairs. One of the first cases to find that corporations could be liable under the ATS was *Doe v. Unocal Corp., et. al.*, 963 F.Supp. 880 (D.C. Cir. 1997). In *Doe*, a group of Burmese citizens sued Unocal for aiding and abetting violations of international law committed against the plaintiffs by the Burmese government. Plaintiffs alleged that these violations were committed in furtherance of a

joint venture pipeline defendant Unocal was involved in. In finding that corporations could be liable under the ATS, the district court stated that “[...]private actors may be liable for violations of international law even absent state action.”<sup>13</sup> This finding applied to corporations as well as individuals. This case became the first ATS case against a major multi-national corporation to settle.<sup>14</sup>

The Supreme Court first addressed the re-emergence of the ATS in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). In *Sosa*, the plaintiff was a Mexican national who filed suit, in part, under the ATS against members of the United States Drug Enforcement Agency, a former Mexican policeman and Mexican civilians. In his suit, plaintiff alleged that he was abducted in the U.S. and

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transported against his will to Mexico in order to face prosecution for murder, a charge of which he was eventually acquitted. In upholding the ATS but finding that the plaintiff's claims were not permitted under the Statute, the Court explained:

We think it is correct, then, to assume that the First Congress understood that the district courts would recognize private causes of action for certain torts in violation of the law of nations, though we have found no basis to suspect Congress had any examples in mind beyond those torts corresponding to Blackstone's three primary offenses: violation of safe conducts, infringement of the rights of ambassadors, and piracy. We assume, too, that no development in the two centuries from the enactment of § 1350 to the birth of the modern line of cases beginning with *Filartiga v. Pena-Irala*, 630 F.2d 876 (C.A.2 1980), has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law; Congress has not in any relevant way amended § 1350 or limited civil common law power by another statute. Still, there are good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action of this kind. Accordingly, we think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized. This requirement is fatal to Alvarez's claim.

542 U.S. at 724-725.

With this decision, the Supreme Court affirmed the application of the ATS, but substantially restricted the number of claims permitted by the Statute to only those narrow band of claims recognized by modern international law as being "comparable to the features of the 18th-century paradigms" such as piracy and assaults against ambassadors. While *Sosa* limited the scope of the ATS, it also preserved the ATS as an available remedy for the victims of those particularly egregious human rights abuses meeting the above criteria, such as genocide and crimes against humanity.

## II. *Kiobel v. Royal Dutch Petroleum*

Until the landmark case of *Kiobel v. Royal Dutch Petroleum*, many aspects of ATS litigation were taken as firmly established precedent. Specifically, it was widely assumed that corporations were, like all private individuals, liable under the ATS. Also, it was assumed that given its nature, namely a statute allowing aliens to bring claims for torts committed in violation of international law in federal courts, the ATS must necessarily apply extraterritorially. This changed when the Second Circuit heard the *Kiobel* appeal.

In *Kiobel*, twelve Nigerian plaintiffs representing a putative class sued in the Southern District of New York in September of 2002. They alleged that Royal Dutch Petroleum and its subsidiaries aided and abetted numerous violations of international law allegedly committed by the Nigerian government in the Ogoni region of Niger. The district court found that the corporate defendants could be held liable for violations of international law including torture, arbitrary detention, and crimes against humanity.



The Second Circuit determined that the case should be dismissed. It *sua sponte* confronted the issue of corporate liability under international law and for the first time determined that because corporations could not legally violate international law, they likewise could not be liable under the ATS. 621 F.3d at 147.

Several subsequent Circuit Court decisions disagreed, finding that corporations could indeed be liable under international law for violations of international law. For example, Judge Posner's panel opinion in *Flomo* held that corporate liability indeed exists under international law:

The factual premise of the majority opinion in the *Kiobel* case is incorrect. At the end of the Second World War the allied powers dissolved German corporations that had assisted the Nazi war effort, along with Nazi government and party organizations — and did so on the authority of customary international law. The second of the[] Control Orders [for the liquidation of Nazi organizations] found that I.G. Farben (the German chemical cartel) had "knowingly and prominently engaged in building up and maintaining the German war potential," and it ordered the seizure of all its assets and that some of them be made "available for reparations." *Id.*

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643 F.3d 1013 at 1017 (citations omitted). *Accord Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 54-55 (D.C. Cir. 2011) *vacated*, 527 F. App'x 7 (D.C. Cir. 2013); *Sarei v. Rio Tinto, PLC*, 671 F.3d 736 (9th Cir. 2011) *cert. granted, judgment vacated sub nom. Rio Tinto PLC v. Sarei*, 133 S. Ct. 1995, 185 L. Ed. 2d 863 (U.S. 2013); and *Romero v. Drummond Co., Inc.*, 552 F.3d 1303, 1315 (11th Cir. 2008).

With the question of corporate liability under the ATS now having resulted in a circuit split, the Supreme Court granted the *Kiobel* plaintiffs' petition for a writ of certiorari. The original question presented to the Court was whether corporations could be liable under international law for violations of international law. However, following an initial round of briefing and oral argument, the Supreme Court took the unusual step of ordering supplemental briefing on a new question. The Court directed the parties "to file supplemental briefs addressing the following question: Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. §1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States."

Solely based on this question, and without addressing the corporate liability issue, the Court unanimously affirmed the Second Circuit's dismissal. However, the Justices authored four different opinions, detailing somewhat dramatically different rationales for the decision. In his majority opinion, Chief Justice Roberts wrote that the presumption against extraterritoriality indeed applies to the ATS, and "constrain[s] courts exercising their power under the ATS." *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 at 1665 (2013). However, the portion of the opinion likely to be responsible for much of the future litigation and debate over the ATS was found toward the end:

On these facts, all the relevant conduct took place outside the United States. And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application.

133 S. Ct. 1659 at 1669.

### III. Post-Kiobel Decisions

Following *Kiobel*, it was recognized by many commentators that the expressions in the Court's majority and concurring opinions would need to be further analyzed by the lower courts in order to determine the new post-*Kiobel* parameters of the ATS. See, e.g., *Opinion Juris -- Kiobel Insta-Symposium: What Remains of the ATS*, by Marty Lederman, accessed on January 25, 2014 at <http://opiniojuris.org/2013/04/18/kiobel-insta-symposium-what-remains-of-the-ats/>. The Court's various opinions appeared to recognize that the door to the ATS had not, in fact, been slammed shut, but precisely how ajar the door remained had yet to be determined. A number of lower court decisions have begun to shape the post-*Kiobel* ATS landscape.

The first post-*Kiobel* decision was *Mwani v. Bin Laden and al Qaeda*, 947 F.Supp.2d 1 (2013). In *Mwani*, citizens of Kenya sued Al-Qaeda and its leader, Osama Bin Laden, for injuries they and their relatives suffered in Al Qaeda's 1998 attack on the U.S. Embassy in Nairobi, Kenya. At first glance, this was a case seemingly destined for dismissal under the newly restrictive ATS *Kiobel* guidelines. Even though the plaintiffs in *Mwani* were foreign citizens, suing a foreign entity and foreign individual for events occurring entirely in another country, the court ruled that, in fact, key events distinguished the case from *Kiobel*:

The factual circumstances behind the torts claimed in this case are easily distinguishable from the circumstances at issue in *Kiobel*. *Kiobel* involved Nigerian plaintiffs suing foreign corporations for allegedly assisting in various human rights violations that occurred in Nigeria[...]. It is obvious that a case involving an attack on the United States Embassy in Nairobi is tied much more closely to our national interests than a case whose only tie to our nation is a corporate presence here. Ample evidence has been presented for me to conclude that the events at issue in this case were directed at the United States government, with the intention of harming this country and its citizens. As noted by the D.C. Circuit, this attack was orchestrated "not only to kill both American and Kenyan employees inside the building, but to cause pain and sow terror in the embassy's home country, the United States." *Mwani v. bin Laden*, 417 F.3d 1, 13 (D.C.Cir.2005). Plaintiffs also presented evidence that the attackers were involved in an ongoing conspiracy to attack the United States, and overt acts in furtherance of that conspiracy took place within the United States. *Id.*

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The Supreme Court left open the question of “just when the presumption against extraterritoriality might be ‘overcome.’” *Kiobel*, 133 S.Ct. at 1673 (J. Breyer, concurring). Surely, if any circumstances were to fit the Court’s framework of “touching and concerning the United States with sufficient force,” it would be a terrorist attack that 1) was plotted in part within the United States, and 2) was directed at a United States Embassy and its employees.”

947 F. Supp. 2d at 5.

This decision was significant not only because of its status as the first post-*Kiobel* ruling, but also because it seemed to provide some much needed guidance regarding what might constitute facts that sufficiently “touch and concern” with sufficient force the United States to overcome the presumption against extraterritoriality. And the reasoning is quite logical -- an attack planned, in part, in the United States and which aims to target U.S. citizens and property certainly is an event directly impacting U.S. interests. Therefore, it should come as no surprise and create little international strife that a case resulting from such an attack could be heard in U.S. courts.

The second post-*Kiobel* ruling was *Mohammadi v. Islamic Republic of Iran*, 947 F. Supp. 2d 48 (D.D.C. 2013). The facts were these: the siblings of an Iranian citizen prisoner who was allegedly tortured to death in an Iranian prison brought suit in the United States against the Islamic Republic of Iran, its President and others. In finding that the facts alleged essentially constituted a “foreign-cubed” case and therefore failed to meet the “touch and concern” test of *Kiobel*, the district court said:

[A]lthough the conduct underlying the plaintiffs’ claims against the Islamic Republic of Iran and the Revolutionary Guard in the instant case are undoubtedly egregious, they do not meet the threshold set out in *Kiobel*. In addition, to the extent that the plaintiffs seek to pursue claims under the ATS against [foreign] defendants Ahmadinejad and Khamenei — the president and Supreme Leader of Iran, respectively — for conduct that occurred entirely within the sovereign territory of Iran, those claims are also barred under the holding of *Kiobel*. As a result, the Court does not have subject-matter jurisdiction to hear such claims, and they must be dismissed.

*Id.* at 71.

While it is unsurprising that the Mohammadi plaintiffs were unable to sustain their ATS claims in a post-*Kiobel* world, a decision in June of 2013 from the U.S. District Court for the Eastern District of Virginia was somewhat unexpected. In *Shimari v. CACI International, et. al.*, the plaintiffs were four Iraqi citizens who filed suit under the ATS against the defendant military contractor. In the suit, plaintiffs alleged that they were subject to abuse and torture while detained by the defendants at Abu Ghraib prison in Iraq. *Shimari v. CACI International, et. al.*, 951 F.Supp.2d 857 (E.D.Va. 2013). Due to the fact that the suit included U.S. based corporate defendants and allegations of abuse that allegedly occurred in a U.S. controlled prison in Iraq, some commentators thought this case might present a blueprint for a successful post-*Kiobel* ATS claim. *See, e.g., Opinion Juris -- Is This the Model of a Viable Post-Kiobel ATS Lawsuit?*, by Kevin Heller, accessed on January 25, 2014 at <http://opiniojuris.org/2013/05/10/is-this-the-model-of-a-viable-post-kiobel-ats-lawsuit/>. However, in dismissing the case, the court held:

The application of *Kiobel* to this case compels the dismissal of Plaintiffs’ claims invoking international law for lack of subject matter jurisdiction. As *Kiobel* explained, absent congressional action, the ATS cannot provide jurisdiction for alleged violations of the law of nations where the alleged conduct occurred in territories outside the United States. *Id.* Here, as in *Kiobel*, Plaintiffs are barred from asserting ATS jurisdiction because the alleged conduct giving rise to their claims occurred exclusively on foreign soil. Plaintiffs allege that torture and war crimes occurred during their detention in Abu Ghraib, a location external to United States territory. Additionally, Plaintiffs’ ATS claims do not allege that any violations occurred in the United States or any of its territories. Therefore, on these facts, the Court holds that *Kiobel*’s bar against extraterritorial application of the ATS governs here and dismisses Plaintiffs’ claims.

*Shimari* included several factual allegations which seemed likely to satisfy the “touch and concern” test of *Kiobel*. First, the presence of U.S. incorporated defendants provided a connection to the U.S. lacking in *Kiobel*. Second, the complaint alleged a conspiracy between the defendant’s agents and members of the U.S. military. Third, the complaint alleged a pattern of torture and abuse occurring entirely within the confines of a prison in Iraq allegedly controlled by the United States. Nevertheless, the district court found these connections insufficient to overcome the presumption against

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territoriality. Significantly in its ruling, the district court emphasized that plaintiffs had not alleged that any relevant conduct actually occurred in the United States, as opposed to U.S. controlled territory, thus distinguishing it from the *Mwani* case. The case continues, as the plaintiffs have appealed the dismissal to the Fourth Circuit.

In August of 2013, in *Sexual Minorities of Uganda v. Scott Lively*, 2013 WL 4130756 (D.Mass. 2013), the court found that the presumption against extraterritoriality had been overcome. In *Sexual Minorities of Uganda v. Scott Lively*, the plaintiff, an organization representing groups advocating for the fair and equal treatment of lesbian, gay, bisexual, transgender, and intersex (LGBTI) people in Uganda, filed suit against a U.S. citizen, Scott Lively. In the suit, the plaintiff alleged that Lively conspired with others in Uganda to persecute members of LGBTI groups in Uganda in violation of international law. Of critical importance to the court's ruling was that the defendant allegedly took steps in the United States, including active planning from his home and office in Massachusetts, in furtherance of the persecution. According to the court:

The fact that the impact of Defendant's conduct was felt in Uganda cannot deprive Plaintiff of a claim. Defendant's alleged actions in planning and managing a campaign of repression in Uganda from the United States are analogous to a terrorist designing and manufacturing a bomb in this country, which he then mails to Uganda with the intent that it explode there. The Supreme Court has made clear that the presumption against the extraterritorial application of a statute comes into play only where a defendant's conduct lacks sufficient connection to the United States.[...]

Even the narrowest construction of the *Kiobel* holding, set forth in the separate concurrence of Justice Alito on behalf of himself and Justice Thomas, made clear that an ATS cause of action will lie where the "domestic conduct is sufficient to violate an international law norm that satisfies *Sosa's* requirements of definiteness and acceptance among civilized nations."

An exercise of jurisdiction under the ATS over claims against an American citizen who has allegedly violated the law of nations in large part through actions committed within this country fits comfortably within the limits described in *Kiobel*.

2013 WL 4130756 at \*13-14.

One of the first Court of Appeals to discuss the ATS after *Kiobel* was the Second Circuit. In *Balintulo v. Daimler AG*, 727 F.3d 174 (2d Cir. 2013), the plaintiffs were victims of the apartheid regime in South Africa who brought suit under the ATS against various multinational corporations, which had done business with the apartheid regime. It was alleged that their corporate activities aided and abetted the regime's crimes in violation of international law. The corporate defendants petitioned the Second Circuit to allow an interlocutory appeal of the district court's denial of their motions to dismiss. In denying the petition, the Court of Appeals determined that the defendants need only return to the district court and file a motion for judgment on the pleadings, which the district court would be obligated to grant pursuant to *Kiobel*.

The Court of Appeals rejected the plaintiffs' argument that *Balintulo* satisfied the "touch and concern" with sufficient force test of *Kiobel* because some of the defendants were U.S. corporate citizens and also because the United States had a strong national interest in ending the South African apartheid regime:

The complaint alleges only vicarious liability of the defendant corporations based on the actions taken within South Africa by their South African subsidiaries. Because the defendants' putative agents did not commit any relevant conduct within the United States giving rise to a violation of customary international law — that is, because the asserted "violation[s] of the law of nations occur[ed] outside the United States,"— the defendants cannot be *vicariously liable* for that conduct under the ATS.

727 F.3d at 189-92 (internal citations omitted).

*Balintulo* thus joined *Shimari* in holding that mere U.S. citizenship of a defendant was insufficient to overcome the presumption against extraterritoriality. However, *Balintulo* seemed to hold out the possibility that if any of the relevant conduct giving rise to the international law violations occurs in the U.S., the presumption, at least against a U.S. corporation or citizen, might be overcome.<sup>15</sup>

In *Chen Gang v. Zhao Zhizhen, et. al.*, 2013 WL 5313411 (D.Conn. 2013), the plaintiffs, citizens of China and followers of the Falun Gong spiritual movement, sued under the ATS and Torture Victim Protection Act, alleging the defendant, the former chief of a state owned television and radio bureau, though his media and propaganda activities, had aided and

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abetted international law violations, including acts of torture, arbitrary arrest and detention and crimes against humanity against the plaintiffs. The district court dismissed:

Despite plaintiffs’ attempts to distinguish their claims from those in *Kiobel*, this case is also a paradigmatic “foreign-cubed” case. The plaintiffs are all “past or present residents of the People’s Republic of China, or visitors to that country”, SAC ¶ 1, the defendant is a Chinese citizen, *id.* ¶ 10, and the alleged violations of international law that the defendant allegedly aided and abetted—torture, arbitrary arrest and detention, crimes against humanity and violation of the rights to life, liberty, security of persons and peaceful assembly and association — all took place entirely abroad, in “Mainland China.” *See id.* ¶2. Under *Kiobel*, the ATS does not confer jurisdiction over such exclusively extraterritorial claims[...]

Because the alleged abuses occurred in China and do not sufficiently “touch and concern” the United States, the Court does not have subject matter jurisdiction over the plaintiffs’ ATS claims.

*Chen Gang v. Zhao Zhizhen*, 3:04CV1146 RNC, 2013 WL 5313411 (D. Conn. 2013). *See also Korber v. Bundesrepublik Deutschland, et. al.*, 739 F.3d. 1009 (7th Cir. 2014).<sup>16</sup>

Again, the decision in *Chen Gang* should not be surprising. It is difficult to imagine foreign-cubed cases, that is where the parties are all foreigners and the relevant conduct all occurred abroad, satisfying the “touch and concern” the U.S. “with sufficient force” test of *Kiobel*.

### IV. The Future of the ATS

Plaintiffs clearly face serious obstacles in successfully pursuing a claim under the ATS. Post-*Kiobel* decisions reflect the

lower courts’ disinclination to find that U.S. citizenship alone will satisfy the “touch and concern” with sufficient force language of *Kiobel*. However, not *all* of the relevant conduct in an ATS claim need occur domestically in order to sustain an ATS claim. Rather, if a complaint adequately alleges that *some* significant conduct giving rise to the claim occurred within the United States, the ATS claimant may be able to survive a motion to dismiss.<sup>17</sup> What, then, would qualify as sufficient U.S. based conduct?

Certain of the decisions discussed above indicate that where defendants have actively planned, within the borders of the United States, a violation of international law which occurs in another country, this type of domestic operational planning may sufficiently “touch and concern” the United States. How

much of the planning and strategizing need occur within the United States remains unclear, but it must, at a minimum, have a meaningful impact on the related events occurring abroad.

It is possible that other domestic activities related to events abroad allegedly committed in violation of international law may also satisfy *Kiobel*. For example, if a U.S. based company were to dispatch its U.S. citizen officers and employees to another country in order to actively assist and/or carry out an activity in violation of international law, it would seem logical for those harmed by such activities to be allowed to bring a suit against the

company in the United States. Of course, in such a case, there would also likely be an element of domestic planning, if in no other area than the corporate logistical planning of sending its corporate employees to the foreign country. Other possibilities might include individuals who, from their U.S. home or office, directly advise the foreign perpetrators of international law violations. Another activity that might satisfy *Kiobel* would be a U.S. based individual or entity which directly financed foreign activities qualifying as international law violations. What seems clear is that a truly foreign-cubed case would not survive a motion to dismiss.



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In the short-term, ATS litigation will revolve around the type of U.S. based conduct that must occur as part of an international law violation. While the post-*Kiobel* cases decided thus far provide some guidance, as Justice Kennedy wrote in his *Kiobel* concurrence, “[t]he opinion for the Court is careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute.” 133 S. Ct. at 1669. It is these “significant questions” that the lower courts will be called on to answer in the coming months and years.

### Notes:

<sup>1</sup> *International Litigation and Practice*, Edited by Legum, Barton; ABA Publishing, Chicago; 2005, Chapter 16, page 198.

<sup>2</sup> *The Alien Tort Statute and the Founding of the Constitution*, Anthony D’Amato, 82 *American Journal of International Law* 62 at 65 (1988).

<sup>3</sup> *Id.*

<sup>4</sup> THE FEDERALIST NO. 80 at 517 (A. Hamilton)

<sup>5</sup> William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the “Originalists,”* 19 *HASTINGS INTL & COMP. L. REV.* 221,237 (1996).

<sup>6</sup> D’Amato *supra*, n. 5 at p. 63.

<sup>7</sup> Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 *The University of Chicago Law Review* 445 at 454 (2011).

<sup>8</sup> See *Filártiga v. Peña-Irala -- Case Synopsis*, accessed on January 17, 2014 at: <http://ccrjustice.org/ourcases/past-cases/filártiga-v.-peñ-irala>

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Kadic v. Karadzic*, 70 F.3d 232 (2d Circuit, 1995).

<sup>12</sup> Until *Kiobel*, nearly every other court to have addressed the issue followed this precedent in finding that the ATS applied extraterritorially. The Seventh Circuit recently put it this way:

And second, the defendant argues that the statute has no extraterritorial application, except to violations of customary international law that are committed on the high seas. Courts have been applying the statute extraterritorially (and not just to violations

at sea) since the beginning; no court to our knowledge has ever held that it doesn't apply extraterritorially; and [the Supreme Court decision] in *Sosa* was a case of nonmaritime extraterritorial conduct yet no Justice suggested that therefore it couldn't be maintained. Deny extraterritorial application, and the statute would be superfluous, given the ample tort and criminal remedies against, for example, the use of child labor (let alone its worst forms) in this country.

*Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013 at 1025 (7th Cir. 2011).

<sup>13</sup> *Doe v. Unocal Corp.*, 963 F. Supp. 880, 891 (C.D. Cal. 1997) *aff'd in part, rev'd in part sub nom. Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002) *on reh'g en banc sub nom. John Doe I v. Unocal Corp.*, 403 F.3d 708 (9th Cir. 2005).

<sup>14</sup> *The Unocal Settlement: Implications for the Developing Law on Corporate Complicity in Human Rights Abuses*, Rachel Chambers, accessed on January 20, 2014 at: <http://www.wcl.american.edu/hrbrief/13/unocal.pdf>

<sup>15</sup> On remand, the district court dismissed two foreign corporate defendants from the case, yet she declined to immediately dismiss the remaining U.S. corporate defendants. She granted the plaintiffs an opportunity to brief the issue of corporate liability under the ATS, citing *Licci ex rel Licci v. Lebanese Canadian Bank SAL*, 732 F.3d 161 (2d Cir. 2013). See *In Re South African Apartheid Litigation*, Docket # 256, December 26, 2013 (02 MDL 1499).

<sup>16</sup> Judge Easterbrook's opinion for the panel in *Korber* held that *Kiobel* “holds that §1350 [of the Alien Tort Statute] cannot be used to contest the acts of foreign nations taken within their own borders.”

<sup>17</sup> But see *Giraldo v. Drummond Co., Inc.*, 2:09-CV-1041-RDP, 2013 WL 3873960 (N.D. Ala. July 25, 2013), currently in appeal to the 11th Circuit, in which the U.S. District Court for the Northern District of Alabama granted a U.S. corporate defendant's motion for summary judgment, despite allegations that the corporate officers had made relevant decisions regarding the alleged international human rights violations from the U.S. corporate offices. According to the court:

In its final analysis, the *Kiobel* Court cited to *Morrison v. National Australia Bank Ltd.*, 130 S.Ct. 2869 (2010), when addressing the operation of “touch and concern” in displacing the presumption against extraterritoriality. As *Morrison* succinctly stated, “the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever some domestic activity is involved....” 130 S.Ct. at 2883–84. The Court held that the analysis depended “not upon the place where the deception originated,” but upon the focus of the statute at issue (which in *Morrison* was the purchase and sale of securities). That is, where a complaint alleges activity in both foreign and domestic spheres, an extraterritorial application of a statute arises only if the event on which the statute focuses did not occur abroad. (*See* Doc. # 448 at 4). Of course, the ATS focuses on the torts of extrajudicial killings and war crimes (violations of the law of nations), and in the *Balcero* case, the tort at issue occurred abroad, in Colombia, and not in the United States.



## EVENTS OF INTEREST

# Around *the* Circuit

### Court of Appeals

Diane Wood became Chief Judge of the Seventh Circuit on October 1, 2013 (see *The Circuit Rider 2* (November 2013)).

Senior Judge William J. Bauer was honored by the Chicago Bar Association on March 21, 2014 for his “Distinguished Career on the Seventh Circuit” spanning 40 years.

Judge John Daniel Tinder has announced that he will take senior status on February 18, 2015.

### Central District of Illinois

Colin Stirling Bruce was sworn in on October 7, 2013 to replace District Judge Michael McCuskey.

Senior Bankruptcy Judge Gerald Fines will retire on May 31, 2014.

Magistrate Judge John Gorman retired on February 28, 2014 and was replaced by former Chief Federal Public Defender, Jonathan Hawley.

Thomas P. Schanzle-Haskins was selected to replace Magistrate Judge Byron G. Cudmore who retired in 2013.

### Northern District of Illinois

Sara Lee Ellis was sworn in to replace Judge Joan Gottschall on October 23, 2013. (*See the Article in this issue*)

Andrea Robin Wood was sworn in to replace Judge William Hibbler on November 18, 2013. (*See the Article in this issue*)

Assistant United States Attorney Manish Shah was confirmed unanimously by the Senate on April 30, 2014, to replace Judge Joan Lefkowitz, who took senior status last year.

Judge James Holderman took senior status on December 31, 2013.

Senior Magistrate Judge P. Michael Mahoney will retire on May 31, 2014 after 38 years of service. (*See the Article in this issue*). He has been replaced by Iain Johnston.

Former Assistant United States Attorney Zachary Fardon was sworn in as the United States Attorney for the Northern District of Illinois on November 25, 2013.

Senior Magistrate Judge Arlander Keys will leave the bench on May 31, 2014. (*See the Article in this issue*)

### Southern District of Illinois

Judge G. Patrick Murphy retired on December 1, 2013 and District Court Clerk Nancy Rosenstengel has been nominated to replace him.

Judge J. Phil Gilbert took senior status on March 15, 2014. Staci Yandle has been nominated as his replacement.

Judge William Stiehl retired at the end of January 2014.

### Southern District of Indiana

Bankruptcy Judge James Coachys will retire on September 30, 2014.

### Eastern District of Wisconsin

Pamela Pepper, Chief Judge of the Bankruptcy Court in Milwaukee, has been nominated to be a District Judge.

Judge Charles Clevert took senior status at the end of 2013.

Bankruptcy Judge M. Dee McGarity will take senior status on January 31, 2015.

William Duffin, a former President of the Seventh Circuit Bar Association, was selected to replace Magistrate Judge Patricia Gorence, who continues to serve as a Senior Magistrate Judge.

### Western District of Wisconsin

James Peterson has been nominated to succeed Senior Judge John Shabaz, who passed away on August 31, 2012.

At the meeting of the of the Board of Governors of the Seventh Circuit Bar Association on March 1, 2014, Chief Judge Wood made special mention of the extraordinary contributions made by Senior Judge Barbara Crabb, who has worked tirelessly, maintaining a full case load even after Judge Shabaz took senior status and has continued to do so following his death.



FEDERAL BAR ASSOCIATION CHICAGO CHAPTER  
**Upcoming *Events***

**MAY 8, 2014**

- 1:00 p.m. Award for Excellence in Pro Bono and Public Interest Service  
Everett McKinley Dirksen United States Courthouse  
25th Floor Ceremonial Courtroom
- 4:00 p.m. 50th Anniversary of the Civil Rights Act of 1964  
Everett McKinley Dirksen United States Courthouse  
25th Floor Ceremonial Courtroom  
CLE Credit - Free
- 6:00 p.m. President's Reception  
Chicago Bar Association  
321 S. Plymouth Court, Chicago, 2nd Floor  
Open to all FBA Members

**JUNE 5, 2014**

- 1:00 p.m. Settling Patent Infringement Actions  
John Marshall Law School  
315 S. Plymouth Court, Chicago  
3.5 CLE credits  
FBA & IPLAC Members \$35/Nonmembers \$75  
*(Reception to follow)*

**JUNE 24, 2014**

- 12:30 p.m. Ethics Program for Members  
Kirkland & Ellis LLP  
300 N. LaSalle Street, Chicago  
4 hours of PR MCLE credit - Free  
*(Reception to follow)*

**JULY 17, 2014**

- 1:00 p.m. Criminal Law Program  
Jenner & Block  
353 N. Clark Street, Chicago  
\$100 members/\$125 nonmembers/free to students  
*(Reception to follow)*

**JULY 22, 2014**

- TBA Young Lawyer/Summer Associates Program  
Everett McKinley Dirksen United States Courthouse  
25th Floor Ceremonial Courtroom  
Free

**SEPTEMBER 9, 2014**

- 1:00 p.m. Federal Rules of Evidence Program  
Greenberg Traurig  
77 West Wacker Drive, Chicago  
\$100 members/\$125 nonmembers/free to students  
*(Reception to follow)*



J U D G E  
**Sara Ellis**

*By Ron Safer \**

**S**ara Ellis is a proud addition to the federal bench in the Northern District of Illinois. Judge Ellis comes by her passion for public service naturally. Her father is a doctor devoted to the well-being of others, and her parents always emphasized the need to give back to the community. Her parents instilled something else in Judge Ellis from an early age: The importance of education. While Judge Ellis was in college, her mother returned to school to get her Ph.D. in philosophy.

Although Judge Ellis began life outside the United States – she was born in London, Ontario just weeks after her parents moved from Jamaica – she grew up in the Midwest – Elkhart, Indiana. After graduating from Indiana University, she received her law degree from Loyola University. Her association with Loyola and her commitment to education continues to this day, as she teaches criminal procedure at the law school. David Yellen, dean of the Loyola School of Law, praises Judge Ellis as “a highly respected and talented lawyer who brings to the federal bench integrity and experience.”

Judge Ellis began her career in public service at the Federal Defender Program as a law student, where she continued after graduating from law school. She brought a special level of commitment to that job that won her the respect not only of colleagues, but also of prosecutors and judges. She represented her clients zealously, effectively combining empathy with powerful advocacy. She saw her clients as people who were much more than the crime of which they were accused, and she helped judges and juries share that vision. Carol Brook, Executive Director of the Federal Defender Program in Chicago, states, “All of us who had the opportunity to work with Judge Ellis when she was a Staff Attorney at the Federal Defender Program know that she will be an outstanding judge who will preside over her cases with both fairness and compassion.” In 2000, Judge Ellis moved to the white collar criminal boutique firm of Stetler, Duffy and Rotert, Ltd., where she continued to

represent criminal defendants.

In 2004, Judge Ellis returned to public service as an Assistant Corporation Counsel. For the next three years, she passionately represented the City of Chicago in a broad variety of civil litigation, including complex civil rights cases. Her broad perspective on our justice system helped shape the City’s policies and avoid costly litigation.

In 2008, Judge Ellis joined the law firm of Schiff Hardin LLP. She worked on a broad range of civil and criminal litigation, representing clients with the same passion and excellence she displayed in the public sector. She was more than simply a working attorney. She was a dedicated mentor to the lawyers at the firm, especially younger attorneys seeking to find an appropriate work/life balance. Those lawyers took note of how Judge Ellis was able to work tirelessly for her clients yet also remain devoted to and spend time with her family. Judge Patricia Brown Holmes, a member of Schiff’s Executive Committee, stated that “Sara is a passionate and caring lawyer who always took to heart her client’s cause. She has been and continues to be a role model to many women who want to continue their legal careers while spending important quality time raising young children. Sara worked a reduced hours schedule but managed to be involved on important matters and to complete her work well and in an efficient manner.”

Judge Ellis brings uncommon trial experience to the bench. But she brings with her something even more valuable: The passion for justice she has exemplified throughout her career. That passion is rooted in her upbringing, where she was taught to treat everyone with respect. It is how she has lived her life. And she brings that outlook with her as she starts this new chapter of public service.

*\*Ron Safer is the Managing Partner of Schiff Hardin LLP.*



J U D G E  
**Andrea Wood**

*By Jonathan Polish \**

**A**ndrea insists that only recently could she envision herself as a federal judge. Perhaps. But her elevation hardly came as a surprise to the rest of us, who worked with her at the SEC in Chicago. Senator Richard Durbin called it a “no-brainer” given her “amazing track record of excellence.” She attended the University of Chicago, then Yale Law School, where she served as an editor of the Yale Law Journal. Upon graduation, she returned to Chicago and clerked for now-Chief Judge Diane Wood in the Seventh Circuit Court of Appeals. Judge Wood saw greatness in Andrea, as she shared at Andrea’s swearing-in: “Andrea Wood is the kind of person that we want on the District Court. She’s unflappable, she’s not going to be worried about things that go on in the courtroom, and yet she’ll keep a firm hand over it.”

Following her clerkship, Andrea practiced at Kirkland & Ellis. Even in that intense environment her work ethic and intellectual acumen stood out. A few years later, Andrea began in the Enforcement Division of the United States Securities and Exchange Commission, where she rapidly rose to senior trial counsel, tenaciously prosecuting securities fraud in federal courts nationwide. Her hard work and commitment earned her the Division’s prestigious Director’s Award, among other honors. For me, having Andrea as a colleague was itself rewarding. As the judges within the Northern District of Illinois will soon learn, having Andrea as a coworker forces you to bring your A-game. As Senator Durbin observed, “Andrea Wood has always demonstrated a top-notch intellect, which was a factor that greatly impressed our bipartisan panel that chose her as a nominee.”

Andrea’s father lived a long life, during which he saw dramatic changes sweep this nation. He would have found Andrea’s elevation to the bench unremarkable since, well, Andrea is Andrea. And as Senator Durbin noted at her swearing-in, “big things were always in her future.” But at the same time, he would have considered Andrea’s transformation to Judge Andrea Wood to be a remarkable occurrence. For nothing about the world into which Carl Wood was born foreshadowed his eventual distinction as the father of a federal judge. He grew up in the Appalachian town of Big Stone Gap, Virginia. He graduated from its segregated school system only to enlist in America’s segregated military. As a medic, he encountered injured white soldiers who would sooner die – literally die – than be saved by a medic of color. Such racism only stoked Carl Wood’s ambition and determination. After honorably serving his country, he attended the University of Michigan. Upon graduation, he set down roots in St. Louis, Missouri, and – along with his wife, Margaret Wood – raised three daughters.

Carl Wood lived to witness the election of America’s first African-American president. Virginia’s electoral votes contributed to President Barack Obama’s election. Had he lived to see that very same President nominate his daughter to be a federal judge, Carl Wood would have beamed with pride at her swearing-in. His spirit was present and accounted for at the ceremony. And his legacy will – God willing – remain a vital part of the federal judiciary for years to come.

*\*Jonathan Polish is Senior Trial Counsel with the United States Securities and Exchange Commission, Enforcement Division, Chicago Regional Office. He is a graduate of the University of Michigan Law School and serves as an Adjunct Professor in International Securities Law at Northwestern University School of Law. Before coming to the SEC, he was a litigation partner at Sachnoff & Weaver, Ltd. and at Reed Smith.*



# A Tribute *to* Arlander Keys

ON HIS RETIREMENT FROM THE BENCH

By Jeffrey Cole\*

**A**fter 18 years of distinguished service as a United States Magistrate Judge in Chicago, Arlander Keys will be leaving the Bench on May 30, 2014 to spend more time with his family. He will be sorely missed by his colleagues and by the Bar.

A little more than a year ago, Al wrote a memorial for his beloved friend, Judge William Hibbler of the Northern District of Illinois, who passed away on March 19, 2012. *Judge William J. Hibbler: In Memoriam*, The Circuit Rider 2 (May 2012). The parallels between Judge Hibbler's life and Judge Keys's are extraordinary. Both grew up in the South in the mid 1940s: Al in Mississippi, Judge Hibbler in Alabama. It was a profoundly different time in our Country than it is today. African Americans were discriminated against in every facet of their lives. Only in the cotton fields was there a kind of cruel and perverse equality: children and adults alike were expected to pick at least 100 lbs. of cotton a day. And so, as a 6 year old child, Al, (like Bill Hibbler), labored in the cotton fields from sunup to sundown.

To the physical toll was added the more erosive emotional toll that apartheid imposed on the South's minority citizens. In a moving interview Al gave several years ago for the U.S. Courts, "Pathway to the Bench" series, <http://www.youtube.com/watch?v=IXv7anhiIBY>, he vividly recalled his grandfather instructing him not to look out the window of the car as they were driving, but to look at him instead. He didn't want anyone accusing his grandson of looking at a white woman. He also recalled the instruction from his grandfather that when a young white boy named Sonny turned 13 years old, he had to call him Mr. Sonny. But that indignity paled into insignificance when compared with the degrading spectacle of seeing his grandfather also being forced to call the boy Mr. Sonny. Foreshadowing the independence that Al would display throughout his life, he told his grandfather he wouldn't do it. That refusal would change Al's life. As a consequence, his grandparents decided to send him away to boarding school in Alabama. At that time scholastic achievement was not even a promise to the ear to young African American children. And yet, Al's grandmother told him over and over that if he got an education he could do anything he wanted in life. It was an admonition Al never forgot and which he first put to practice at boarding school.

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\*Jeffrey Cole is a United States Magistrate Judge in Chicago. He is the Editor-in-Chief of The Circuit Rider.



## A Tribute to Arlander Keys

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When Al finished high school, he – like Judge Hibbler – moved to Chicago, which he referred to as “the Promised Land.” He needed a job. After laboring in the cotton fields as a child, no job was too difficult. His first job was as a mail carrier for the U.S. Post Office. While he loved the job, he realized after about a year that it had limitations and would not get him to where he hoped to be 10 years down the road. But being unsure of the next step, he decided to enlist in the Marines, where he served for the next four years, including two tours of duty in Vietnam. He began as a private and within 2 ½ years was promoted to sergeant.

Ever mindful of his grandmother’s admonition about the importance of education, Al determined that he was going to go to college, and nothing was going to stop him. And so, upon returning to Chicago after his stint in the Marine Corps, he enrolled at DePaul University in September of 1969 and graduated 2 ½ years later. By then he decided he wanted to be a lawyer. He was accepted to DePaul College of Law and graduated in 2 ½ years. Amazingly, Al finished college and law school in 5 years. How proud his grandparents must have been.

In 1975, Al became a trial attorney for the National Labor Relations Board in Chicago. He then joined the Federal Labor Relations Authority as a Chicago regional attorney in 1980. Six years later, in 1986, Al became an Administrative Law Judge for the Department of Health and Human Services, rising to Chief Administrative Law Judge in 1988. In February 1995 Al was appointed a United States Magistrate Judge for the Northern District of Illinois.

Like everything else that Al had done in his life, he was supremely successful as a judge. Here again, the parallels between Judge Keys and Judge Hibbler are remarkable, and what Al said in his tribute to Judge Hibbler applies equally to him and sums up how Al is universally perceived: He treats

everyone with respect, regardless of their station in life. Whether on the bench or off, he is a quiet, warm, unassuming, compassionate and fair-minded man -- a true gentleman in the classic sense of the term. And in the last analysis, that is perhaps the most important and enduring judgment of all.

Al’s service to his community is not only as a judge. He has been an Adjunct Professor of Administrative Law at John Marshall since 1999. He is a former First Vice President of the Chicago chapter of the Federal Bar Association, as well as a Member of the Chicago Bar Association’s Committee on Minority Federal Jury Service. He is the First Vice President of Just The Beginning Foundation, and a member of the Seventh Circuit Bar Association, where he is a liaison for the U.S. District Court, and he is on the Advisory Committee for the Study of Rules of Practice and Internal Operating Procedures of District and Bankruptcy Courts.

Our loss of Al’s comradeship and the loss to the United States District Court for the Northern District of Illinois are tempered by the realization that he will now have uninterrupted time with Annette, his wife of 43 years, and his two sons, Anthony and Michael, and his beloved grandchildren, Ashley, Sean, Sydney, Seth and Jackson. Al leaves with our fondest wishes for continued happiness and good health and with the assurance that his example will continue to inspire us all.



# A Tribute to Mike Mahoney

ON HIS RETIREMENT FROM THE BENCH

*By Iain Johnston\**

On April 30, 2014, Magistrate Judge Michael Mahoney of the United States District Court for the Northern District of Illinois, Western Division will hang up his robe for the last time. His retirement is the capstone of a truly distinguished judicial career that began 38 years ago. On March 18, 1976, at the age of 29, Mike started as a part-time Magistrate – that was the title in those days – and was sworn in as a full-time Magistrate Judge on May 29, 1992. He retired on December 31, 2012, but was recalled until May 1, 2014.

Like most things relating to Judge Mahoney, his appointment involves a humorous and interesting story. As Judge Mahoney tells it, but for an alleged felon, he would never have become a judge. The whole process started when a young Mike Mahoney represented a local character who was arrested for liberating tires from a freight car leaving the Kelly Springfield tire plant. The defendant was identified by cutting edge technology for the day – video recordings – which captured the defendant throwing tires off a freight car as it slowly left the plant, clearly affecting interstate commerce. The case took him from Freeport to the Evert McKinley Dirksen Federal Building in downtown Chicago, where the case was called before Judge Prentice Marshall. Judge Marshall previously taught and mentored Mike as a law student. (In fact, the two tried a felony case together in Mike’s third year of law school.) After what seemed like a whirlwind procedure resolving the criminal charge, Judge Marshall asked Mike back to chambers to talk about the new part-time magistrate position in Freeport and encouraged him to apply. Following a selection process, Mike Mahoney was eventually sworn in by Judge J. Sam Perry, Judge Prentice Marshall and Judge Joel Flaum.

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*\*Iain Johnston is a Magistrate Judge in Rockford, Illinois.*



## A Tribute to Mike Mahoney

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As one would expect, the basic facts relating to Judge Mahoney are impressive. During his tenure, there have been eight Chief Judges of the U.S. District Court for the Northern District of Illinois. The list includes former Chief Judge James Holderman, who along with Chief Bankruptcy Judge Bruce Black and retired Bankruptcy Judge John Squires, were classmates at the University of Illinois College of Law. Over the years, Judge Mahoney has made thousands of detention determinations at bail hearings. And during his time, the Western Division courthouse moved three times, from its original location on the second floor of the old Post Office in Freeport, Illinois, to its location on Court Street in Rockford, Illinois, to its current location at the Stanley J. Roszkowski United States Courthouse.

Mike has authored, either via consent or by way of a report and recommendation, every Social Security opinion in the Western Division from March 1976 to June 2013. He also presided over the decade-long, school desegregation litigation involving School District 205 in Rockford, which is known as the “People Who Care Litigation.” Additionally, Judge Mahoney has settled over a thousand cases. Attorneys who routinely appeared before Judge Mahoney say that while his experience and legal knowledge are incredibly useful in settlement conferences, equally important are the Judge’s humor and patience. As anybody who has attended one of Judge Mahoney’s settlement conferences can attest, he possesses extraordinary facilitative and evaluative skills to bridge the litigants’ differences.

Judge Mahoney also possesses a historical perspective that few can match. He transitioned from a “Magistrate” to a “Magistrate Judge” under the Federal Magistrates Act, with its significantly expanded duties and authority. When initially appointed, he worked with Judge Prentice Marshall, followed by Judge Joel Flaum, Judge Al Kirkland, Judge John Grady, Judge Stanley Roszkowski, Judge Philip Reinhard and Judge Frederick Kapala. He can tell, with only minimal prompting, more backstories of the Stephenson County Bar Association than any living person. Further, Judge Mahoney still maintains the list of the original caseload from 1976 as well as all correspondence to him

relating to the People Who Care Litigation.

According to Judge Mahoney, the biggest change he has seen during his tenure is the use and consequences of summary judgment motions. Before the famous 1986 trilogy – *Matsushita v. Zenith*, *Anderson v. Liberty Lobby* and *Celotex v. Catrett* – summary judgment motions were the exception and rarely granted. Trials – both jury and bench – were routine. But today, summary judgment motions are routine – perhaps even in cases when they should not be filed. The consequences of summary judgment practice obviously affect the outcome of cases if granted. But when courts deny summary judgment motions, the consequences can be just as dramatic, particularly the consequences on settlement dynamics. In fact, Judge Mahoney believes that a consequence of the summary judgment trilogy is that cases are more likely to be resolved through settlement.

Judge Mahoney’s truly rich and enduring legacy extends beyond resolving cases. Each year, on St. Patrick’s Day, he broke out his green judicial robe to wear on the bench. That puckish act says more about Mike Mahoney than words could ever convey. Moreover, attorneys and staff would beat a path to his chambers to talk about all types of issues, from NBA basketball to professional career choices. He was always available to listen. In quintessential Judge Mahoney fashion, he said the aspect of the job he would miss the most was staff and people at the courthouse. Judge Mahoney’s staff included his one and only judicial assistant, Linda Winstead, and his long-time courtroom deputy, Gale Graeff. When she was not busy in the district judges’ courtrooms, Mary Lindbloom was the court reporter in his courtroom.

Beginning in May, Judge Mahoney will return to his former firm, Mahoney & Hauser, Ltd. Before being appointed a full-time Magistrate Judge, Mike practiced law with his father at that firm. When he returns to his old firm, his son, Tim, will be waiting to practice law with him, just as Mike did with his dad. Just as he’s done throughout his judicial career, Judge Mahoney will help parties try to settle their disputes through mediation. The only difference will be the venue. All his colleagues will miss him and we wish him all the best that life has to offer.



# Seventh Circuit Annual Report Summary

By Gino Agnello, Clerk  
Seventh Circuit Court of Appeals

## Statistical Report Summary for the Year 2013

Last year’s judiciary case management statistics exhibit only a few minor numerical “twist and turns” compared to 2012.

In the nations District Courts, civil case filings increased by 9.3% over last year to a total of 292,912 filings. Cases terminated were up by 1.8% and the number of pending cases rose by 12%.

In the districts of the Seventh Circuit, civil filings were up by 3.4% to a total of 23,397 cases. “Terminated” and “Pending” civil cases rose 8.5 and 9.9 % respectively.

However, criminal case filings were down almost 3% nationally compared to a gain of 3.6% in the courts of the Seventh Circuit.

U.S. Bankruptcy filings have dropped consistently since 2010 and fell again in 2013 to 1,221,091 cases. This was a decline of 12.2%. Compared to the high water mark of over 2 millions cases filed in 2005, you see a drastic decline.

In the Seventh Circuit, total Bankruptcy case filings also dropped but only by less than half of the national number to 130,748 cases or -5.5 % compared to 2012. The Bankruptcy case termination rate was up slightly to 0.3% with pending cases down 3.3% from last year.

The United States Courts of Appeal continued the steady slow moving downward trend of the last few years. Nationally, filings in the appellate area fell to a level of 2.6% lower than 2012. The Seventh Circuit Court of Appeals new case filings were almost the same as last year with only a 1.3% drop.

Examining the case type “source” of appeals we see large decreases in “Criminal”, “Other Administrative ” “Original Proceedings” and “Bankruptcy” appeals both nationally and in

the Seventh Circuit. The remaining case types did not have substantial filing percentage changes.

The median time for merit terminations in the Seventh Circuit, for all appeals and original proceedings, is 8.5 months. That is 11% faster than the national average of 9.6 months. When measuring the median time from the filing in the lower court to the last opinion or final order in the appeals court the national median time is 28.5 months. The Seventh Circuit median time with this measure is slightly longer at 28.9 months.

When comparing cases terminated after oral argument to cases terminated after submission on briefs, it was clear the Seventh Circuit hears a larger percentage of oral arguments than most of the other circuits (39%). This year, the national average of cases that go to oral argument is 19.5%.

Similarly, the Seventh Circuit’s ratio of published to unpublished opinions shows the court publishes a higher percentage of opinions than almost all the other circuits. The national average of published opinions is 11.9%, whereas the Court of Appeals for the Seventh Circuit publishes 34.7% of their opinions.

Statistics for the first half of 2014 indicate that caseload levels will continue to remain at about the same rate as 2013. In conclusion, the courts of the Seventh Circuit remain busy and productive.

### New Case Filings:

Appeals	•US -2.6%
	•7 <sup>th</sup> -1.3%
Civil	•US +9.3%
	•7 <sup>th</sup> +3.4%
Criminal	•US -3%
	•7 <sup>th</sup> +3.6%
Bankruptcy	•US -12.2%
	•7 <sup>th</sup> -5.5%



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