



Association of American Law Schools

SECTION ON LITIGATION

SECTION NEWSLETTER

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Message from the Chair
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The new year will bring some exciting developments for the Litigation Section. The Section has planned what promises to be a terrific program on "The Future of Summary Judgment" for the AALS Annual Meeting in New Orleans in January 2010. The Section also will be rolling out a Litigation Section listserv and a Litigation Section website in the very near future that should well serve the pedagogical and scholarly interests of Section members.

AALS Annual Meeting Program: On Saturday morning, January 9, 2010, from 10:30 to 12:15, the Section will be offering its "Future of Summary Judgment" program. The program is co-sponsored by the Civil Procedure Section. Summary judgment, of course, has played an increasingly prominent – and often controversial -- role in federal and state civil litigation over the past forty years. Our speakers will address a range of issues relating to the future of summary judgment law and practice, including (a) whether the U.S. Supreme Court's *Ashcroft v. Iqbal* decision will impact the future role of summary judgment; (b) the recent proposed changes to Rule 56; (c) what lies ahead for summary judgment practice in class actions and other complex cases; (d) what empirical data suggests about the evolution of federal summary judgment practice since the 1970s; and (e) whether

the trans-substantive model for summary judgment remains effective or normatively preferable.

The Section has assembled an outstanding panel of summary judgment scholars for this program: Edward J. Brunet (Lewis & Clark); Stephen B. Burbank (University of Pennsylvania); Steven S. Gensler (University of Oklahoma); Linda S. Mullenix (University of Texas); Adam N. Steinman (University of Cincinnati); and Suja A. Thomas (University of Illinois). Papers generated by program speakers will be published in the *Akron Law Review*, including a paper by Steven Gensler generated in response to the program's Call for Papers. I hope you will be able to attend the program as well as the Section's business meeting that will follow immediately afterward.

Section Website and Listserv: The Litigation Section is in the process of rolling out several new communication platforms: a Section website and Section administrative and discussion listservs. The website will offer a convenient source of information about Section activities, litigation-related news, legislative and case law developments, and pedagogical and research resources for teachers and scholars in litigation-related subject areas. The Section discussion listserv will provide a forum for robust discussion about litigation teaching, scholarship and practice trend issues, as well as a vehicle for announcing upcoming conferences and circulating calls for papers. Finally, the Section administrative listserv will allow

the Section to directly communicate with members about Section business (such as planning the annual meeting program) and distribute the Section's newsletter. Section members will receive more information about these communication platforms as part of the listserv rollout.

Our Section rests at the intersection of several fields relevant to court adjudication of disputes, such as trial advocacy, civil procedure, remedies, evidence, professional responsibility and court annexed alternative dispute resolution. The Section's Annual Meeting program provides an opportunity to meet or reconnect with colleagues teaching or writing in litigation-related fields. Our new communications platforms will allow Section members to share teaching and research ideas throughout the year and take advantage of the synergies that our Section's breadth of membership has to offer.

2009 Executive Committee: Finally, I would be remiss in not acknowledging our Section's superb Executive Committee: Michael W. Martin (Fordham; Section Chair-Elect); Ettie Ward (St. Johns; Section Secretary); Kenneth Kandaras (John Marshall; Section Treasurer); Bernadette Bollas Genetin (Akron; Newsletter Editor); Edward J. Brunet (Lewis & Clark); Kenneth S. Klein (Cal Western); Scott A. Moss (Colorado); Michelle R. Slack (Seattle); and Jeffrey W. Stempel (UNLV). Executive Committee members have been actively involved in developing the section's annual meeting program, reviewing submissions for the program's Call for Papers, and assisting with the website and listserv rollout. The 2010 Executive Committee will be elected at the business meeting following the Summary Judgment program at the AALS Annual Meeting.

It has been an honor to serve as Section Chair this year. Please do not hesitate to contact me at raronovsky@swlaw.edu if you have any questions or comments about the Section or its activities. I hope you will be able to join us at the "Future of Summary Judgment" program on January 9. In the meantime, best wishes for a happy holiday season and New Year.

Litigation Section Program Papers to Be Published

Papers related to the presentations at the Litigation Section program, *The Future of Summary Judgment*, will be published in the *Akron Law Review*.

Co-Sponsor, with Section on Civil Procedure, of *Revisiting Discovery*

The Litigation Section is also a co-sponsor of the program to be presented by the Section on Civil Procedure at the AALS Annual Meeting, which is entitled, *Revisiting Discovery*. This program will be presented from 10:30 a.m. to 12:15 p.m. on Friday, January 8.

Related AALS Section Programs

- ❖ Section on Federal Courts: *Re-examining Customary International Law and the Federal Courts*, Thursday, Jan. 7, 9:00 a.m. to 12:15 p.m.
- ❖ Section on Law and Interpretation: *Interdisciplinary Interpretation*, Friday, Jan. 8, 8:30 to 10:15 a.m.
- ❖ Section on Torts and Compensation Systems: *Richard Epstein's Legacy in Torts*, Friday, Jan. 8, 8:30 to 10:15 a.m.
- ❖ Section on Civil Procedure: *Revisiting Discovery*, Friday, Jan. 8, 10:30 a.m. to 12:15 p.m.
- ❖ Section on Evidence: *Transformative Evidence: Changes Inside the Courtroom and Outside the Courthouse*, Saturday, Jan. 9, 1:30 to 3:15 p.m.

Selected 2010 Symposia Related to Litigation

- ❖ *Civil Pleading Standards After Iqbal* – Panel Presentation on the Issue; 12th Annual Faculty Conference, The Federalist Society, Jan. 8, 2010, 1:30 to 3:15 p.m., Wyndham Riverfront, New Orleans, 710 Convention Center Blvd. (blocks away from AALS 2010

Convention); http://www.fed-soc.org/events/eventid.1927/event_detail.asp

- ❖ *Iqbal* Symposium at Penn. State -- *Reflections on Iqbal: Discerning Its Rule, Grappling with Its Implications*, Mar. 26, 2010, 8:30 a.m. to 5:00 p.m.; Lewis Katz Hall, Carlisle, Pa.; http://law.psu.edu/academics/journals/law_review/iqbal_symposium
- ❖ *Section 1983 Civil Rights Litigation Conference*, April 15-16, 2010, Chicago-Kent College of Law; http://www.kentlaw.edu/depts/cle/sec83/2010/section1983_flyer.pdf
- ❖ *The Future of Civil Litigation – Legislative and Behavioral Changes*, 12th Annual Sedona Conference on Complex Litigation; April 8-9, 2010, Royal Palms Resort & Spa, Phoenix, Ariz.; <http://www.thesedonaconference.org/conferences/20100408>

Selected, Recent Articles on Summary Judgment

The following is a list of selected, recent articles related to the Section on Litigation's program topic of summary judgment. A number of recent articles also explore the intersection of summary judgment and pleading. The list is divided roughly into two categories – general articles on summary judgment and articles devoting some discussion to interrelations between summary judgment and pleading. There is, of course, some overlap in these divisions.

Summary Judgment

Nathaniel S. Boyer, *The Tail Wagging the Dog: Local Summary Judgment Rules that Deem Facts Admitted*, 30 *Cardozo L. Rev.* 2223 (2009)

John Bronsteen, *Against Summary Judgment*, 75 *Geo. Wash. L. Rev.* 522 (2007)

Edward J. Brunet, *Summary Judgment Is Constitutional*, 93 *Iowa L. Rev.* 1625 (2008)

Keith N. Hylton, *When Should a Case Be Dismissed? The Economics of Pleading and Summary Judgment Standards*, 16 *Sup. Ct. Econ. Rev.* 39 (2008)

David Kessler, *Justices in the Jury Box: Video Evidence and Summary Judgment in Scott v. Harris*, 127 *S. Ct.* 1769, 31 *Harv. J.L. & Pub. Pol'y* 423 (2007)

Ryan A. Mitchell, *Is the Sham Affidavit Rule Itself a Sham, Designed to Give the Trial Court More Discretion at the Summary Judgment Level?*, 37 *U. Balt. L. Rev.* 255 (2008)

William E. Nelson, *Summary Judgment and the Progressive Constitution*, 93 *Iowa L. Rev.* 1653 (2008)

Leonard D. Pertnoy, *Summary Judgment in Florida: The Road Less Traveled*, 20 *St. Thomas L. Rev.* 69 (2007)

Teresa E. Ravenell, *Hammering in the Screws: Why the Court Should Look Beyond Summary Judgment When Resolving § 1983 Qualified Immunity Disputes*, 52 *Vill. L. Rev.* 135 (2007)

Joseph P. Regan, *The Competency of the Sham Affidavit as Summary Judgment Proof in Texas*, 40 *St. Mary's L.J.* 205 (2008)

Amy Price Sawyer, *You Mean My Doctor Is Not an Expert?: The Admissibility of the Medical Review Panel Opinion in Summary Judgment Proceedings*, 36 *S.U. L. Rev.* 337 (2009)

Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 *Rutgers L. Rev.* 705 (2007)

Bradley Scott Shannon, *Should Summary Judgment Be Granted?*, 58 *Am. U. L. Rev.* 85 (2008)

Bradley Scott Shannon, *Responding to Summary Judgment*, 91 *Marq. L. Rev.* 815 (2008)

Bradley Scott Shannon, *A Summary Judgment Is Not a Dismissal!*, 56 *Drake L. Rev.* 1 (2007)

Elizabeth Skey, *The Private Securities Fraud Claim: What Has Dura's Effect Been on the Standard for Loss Causation at Summary Judgment*, 49 Santa Clara L. Rev. 565 (2009)

Adam N. Steinman, *An Ounce of Prevention: Solving Some Unforeseen Problems with the Proposed Amendments to Rule 56 and the Federal Summary Judgment Process*, 103 Nw. U. L. Rev. Colloquy 230 (2008)

Adam N. Steinman, *What Is the Erie Doctrine? (and What Does it Mean for the Contemporary Politics of Judicial Federalism?)*, 84 Notre Dame L. Rev. 245 (2008)

Suja A. Thomas, *The Unconstitutionality of Summary Judgment: A Status Report*, 93 Iowa L. Rev. 1613 (2008)

Suja A. Thomas, *Why Summary Judgment Is Still Unconstitutional*, 93 Iowa L. Rev. 1667 (2008)

Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 Va. L. Rev. 139 (2007)

Daniel E. Wanat, *Infringement of Musical Works and the Appropriateness of Summary Judgment Under the Federal Rules of Civil Procedure, Rule 56(c)*, 39 U. Mem. L. Rev. 1037 (2009)

Summary Judgment and/or Pleading

Jason Bartlett, *Into the Wild: The Uneven and Self-Defeating Effects of Bell Atlantic v. Twombly*, 24 St. John's J. Legal Comment. 73 (2009)

Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 Iowa L. Rev. 873 (2009)

Roy L. Brooks, *Conley and Twombly: A Critical Race Theory Perspective*, 52 How. L.J. 31 (2008)

Edward J. Brunet, *Antitrust Summary Judgment and the Quick Look Approach*, 62 SMU L. Rev. 493 (2009)

Stephen B. Burbank, *Pleading and the Dilemma of "General Rules,"* 2009 Wisc. L. Rev. 535 (2009)

Edward D. Cavanagh, *Twombly: The Demise of Notice Pleading, the Triumph of Milton Handler, and the Uncertain Future of Private Antitrust Enforcement*, 28 Rev. Litig. 1 (2008)

Benjamin W. Cheesbro, *A Pirate's Treasure?: Heightened Pleadings Standards for Copyright Infringement Complaints After Bell Atlantic Corp. v. Twombly*, 16 J. Intell. Prop. L. 241 (2009)

Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 Wash. U. J.L. & Pol'y (2007)

Andrew I. Gavil, *Civil Rights and Civil Procedure: The Legacy of Conley v. Gibson*, 52 How. L.J. 1 (2008)

Lee Goldman, *Trouble for Private Enforcement of the Sherman Act: Twombly, Pleading Standards, and the Oligopoly Problem*, 2008 B.Y.U. L. Rev. 1057 (2008)

Kendall W. Hannon, *Much Ado About Twombly? A Study on the Impact of Bell Atlantic Corp. v. Twombly on 12(b)(6) Motions*, 83 Notre Dame L. Rev. 1811 (2008)

Lonny S. Hoffman, *Burn Up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About the Power of Pleading*, 88 B.U. L. Rev. 1217 (2008)

Geoffrey P. Miller, *Pleading After Tellabs*, 2009 Wisc. L. Rev. 507 (2009)

William H. Page, *Twombly and Communication: The Emerging Definition of Concerted Action Under the New Pleading Standards*, 5 J. Competition L. & Econ. 439 (2009)

Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. Ill. L. Rev. 1011 (2009)

Douglas G. Smith, *The Twombly Revolution?*, 36 Pepp. L. Rev. 1063 (2009)

A. Benjamin Spenser, *Pleading Civil Rights Claims in the Post-Conley Era*, 52 How. L.J. 99 (2008)

A. Benjamin Spenser, *Plausibility Pleading*, 49 B.C. L. Rev. 431 (2008)

Suja A. Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 Minn. L. Rev. 1851 (2008)

Ettie Ward, *The After-Shocks of Twombly: Will We "Notice" Pleading Changes?*, 82 St. John's L. Rev. 893 (2008)

Congressional Initiatives

Notice Pleading Restoration Act. In July 2009, Senator Specter introduced S. 1504, entitled "the Notice Pleading Restoration Act of 2009," which would restore the pleadings standards of *Conley v. Gibson*, 355 U.S. 41 (1957). View the text: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:s1504is.txt.pdf

The Senate Judiciary Committee held a hearing on this bill on December 2, 2009, entitled "Has the Supreme Court Limited Americans' Access to Courts?". <http://judiciary.senate.gov/hearings/hearing.cfm?id=4189>

On November 19, 2009, Representative Jerrold Nadler, D-NY, introduced H.R. 4115, entitled "**Open Access to Courts Act of 2009**," and which would also provide for restoration of notice pleading in federal courts. The text is available here: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h4115ih.txt.pdf

Federal Courts Jurisdiction and Venue Clarification Act. Representative Lamar Smith introduced the Federal Courts Jurisdiction and Venue Clarification Act of 2009, H.R. 4113, on November 19, 2009. The bill has been referred to the House Committee on the Judiciary. The text of the bill may be accessed at the following address: http://thomas.loc.gov/home/gpoxmlc111/h4113_ih.xml

Among other provisions, the bill would:

- Clarify, for diversity purposes, the treatment of aliens who are lawfully

admitted for permanent residence status in the United States and are domiciled in a state;

- Index the amount in controversy to the Consumer Price Index for All Urban Consumers published by the Department of Labor;
- Permit plaintiffs, in state court or, within 30 days after removal of an action to federal court, to avoid diversity jurisdiction by filing a declaration providing that the plaintiff will neither seek nor accept an award of damages or entry of other relief exceeding the amount specified in 28 U.S.C. § 1332(a);
- Revise 1441(c) regarding removal when a separate and independent claim within the jurisdiction conferred by 28 U.S.C. § 1331 is joined with one or more otherwise nonremovable claims.
- Amend the general venue statute, 28 U.S.C. § 1391; the "change of venue" or transfer statute, 28 U.S.C. § 1404; and 28 U.S.C. § 1406(a).
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Supreme Court Considers Corporations and Diversity

The Supreme Court heard arguments on October 29, 2009, regarding the appropriate standard for "principal place of business" for diversity purposes. See *Hertz Corp. v. Friend*, Docket No. 08-1107. The question presented in *Hertz* is whether, for purposes of determining principal place of business for diversity jurisdiction citizenship under 28 U.S.C. § 1332, a court can disregard the location of a nationwide corporation's headquarters - i.e., its nerve center.

Supreme Court on the Collateral Final Order Doctrine

On December 8, 2009, the Supreme Court ruled in *Mohawk Industries, Inc. v. Carpenter*, that court orders requiring disclosure of attorney-client protected information are not immediately appealable under the collateral final order doctrine. Noting that the interest at issue – protection of the attorney-client privilege

– is important to further full and frank communication between attorney and client, to further compliance with the law, and in the administration of justice, the Court nevertheless concluded that the ruling would be effectively reviewable upon appeal from a final judgment. The Court noted also that parties have other options, in appropriate cases, for obtaining early review, including an appeal under 28 U.S.C. § 1292(b) and a writ of mandamus.

Federal Rules

Time Computation and Other Amendments Become Law

The time-computation amendments to various Federal Rules and statutes became effective on December 1, 2009. The Supreme Court approved the time-computation Rule amendments on March 26, 2009, and Congress took no action regarding the amended Rules. Thus, the amended appellate, bankruptcy, civil, and criminal rules became effective on December 1, 2009. For additional information, see the following address: <http://www.uscourts.gov/rules/index2.html#rules120109>

The amended Rules will govern all proceedings commenced on or after December 1, 2009, and all pending proceedings “insofar as just and practicable.”

The time computation amendments were undertaken to reduce the complexity and risk of error in computation of time under the Federal Rules. The amendments principally make changes to further a “days are days” approach to computing time under the Federal Rules. Among other changes, the amended Rules (1) eliminate the prior method of counting, which omitted intermediate weekends and holidays when the time period was short; (2) lengthen shorter time periods to account for the new “days are days” approach; (3) implement a preference for counting time periods in multiples of 7 when the time period is less than 30 days; and (4) change some time periods to make them more reasonable.

Additionally, Congress passed H.R. 1626 to amend 28 statutory deadlines to conform with the time-computation changes to various Rules. Signed into law on May 7, 2009, by President Obama, these statutory amendments also became effective on December 1, 2009. The amended statutes can be accessed at the following address:

<http://www.uscourts.gov/rules/HR1626.pdf>

In addition to the time computation changes that became effective on December 1, 2009, the amended appellate, bankruptcy, civil, and criminal rules contain other changes, unrelated to time computation. Among the other changes to the civil rules are the following:

- FRCP 15(a)(1) – shortens the time period for amending as of course when a pleader files a motion to dismiss, rather than an answer;
- FRCP 48 – permits a court to poll the jury and requires the court to do so upon request of a party;
- FRCP 62.1 and FRAP 12.1 – provides a procedure for obtaining an “indicative” ruling from the district court (to indicate the ruling the court would make if it retained jurisdiction), after a case is on appeal.

Comments, Suggestions, Submissions

Editor: Bernadette Bollas Genetin (University of Akron). If you would like to comment or to contribute to a future newsletter, contact Bernadette Bollas Genetin, University of Akron School of Law, at genetin@uakron.edu.

Notice

This newsletter is a forum for the exchange of points of view. Opinions expressed are not necessarily those of the Section on Litigation or of the Association of American Law Schools.