District Western NEWS

NEWSLETTER OF THE

WESTERN DISTRICT OF WISCONSIN BAR ASSOCIATION

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Dean Eisenberg: Federal Judiciary Must Protect Constitutional Rights Threatened by Hasty But Popular Legislation

by Paul L. Barnett

(Editor's note: Sadly, Dean Eisenberg succumbed to two heart attacks and died on June 4, 2002. His unabashed liberalism and zealous advocacy on behalf of unpopular clients like inmates and people on the fringes of society impressed all, including those whose political views differed markedly. Governor Scott McCallum, who appointed him as co-chair of a government ethics reform task force, called Dean Eisenberg's "an important and powerful voice[.]" Dean Eisenberg argued over 300 cases to state and federal appellate courts, including the U.S. Supreme Court. Chief Justice Shirley Abrahamson described him as "a remarkable lawyer" and a "role model" for lawyers and law students alike. The Board of Directors has authorized a donation to a pro bono fund being created in Dean Eisenberg's honor through Marquette University Law School.)

Marquette University Law School Dean Howard Eisenberg addressed the WDBA at its annual luncheon on April 25, 2002. The subject of his presentation was "Can the Bill of Rights Survive the War on Crime, the War on Drugs and the War on Terrorism?" His answer is "yes," but only if the federal judiciary remains strong and independent.

Federal, and to a lesser extent state, legislation is passed more hastily, and with wider interpretive gaps, than ever before, Dean Eisenberg argues. Some of it is simply "mean spirited." Regardless, these new laws pose increasingly greater threats to individual liberties.

"[T]he political pressures on the President and Congress have caused a serious breakdown in our traditional notions of separation of powers as those branches of government have increasingly abdicated their responsibilities and have left it to the judicial branch to sort out the meaning, scope, and purpose of laws passed by Congress," he explained.

This abdication of responsibility manifests itself in "intentionally ambiguous, vague, overly broad" legislation that "omits crucial provisions about which there was disagreement." Joining Justice Antonin Scalia, Dean Eisenberg maintains that legislative history is an unreliable source for interpretation of these laws, providing "false clues" about intent because much of the history is created specifically to provide evidentiary support for a particular construction that lacked a majority. To illustrate, he cited President Clinton's bill-signing statement that the Antiterrorism and Effective Death Penalty Act of 1996 did not restrict the availability of federal *habeas corpus*, although the Act's very language in fact accomplished that result.

Dean Eisenberg also challenged the increasingly common practice of passing "Christmas tree legislation," in which proposals on remotely related or unrelated subjects are cobbled together into a single bill rather than being considered separately on their merits. This practice is evidenced by the present tendency of Congress "to tie everything to crime, drug dealing or terrorism." Ironically, however, he acknowledged that the Wisconsin State Public Defender system, which he headed from 1972-1978, was created in this very way because it lacked sufficient support to pass on its own.

He also criticized congressional willingness to "move swiftly" to pass almost any law where a perceived "need" is identified, offering up the example of an amendment

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Annual Meeting . . .

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to the criminal code that creates a special category for people with wooden legs and glass eyes simply because one such person somewhere is a mugging victim.

According to Dean Eisenberg, these two practices (passing Christmas tree bills and crafting laws that react to one-time events) are now in their heyday, given the USA Patriot Act passed in the wake of the September 11 attacks. The 350-page bill became law only five weeks afterward, and many who voted for it admitted they had not read it. Dean Eisenberg argues that the Act reduces the judiciary's oversight role while simultaneously shifting to the courts the responsibility of figuring out what it means.

"[I]t borders on legislative malpractice for Congress to pass legislation that is poorly drafted, facially ambiguous, and demonstrates a marked lack of familiarity with the substantive area of the law it is treating. This problem [is] much more severe when it comes to criminal justice and civil liberties legislation[.]"

Mean spirited laws spawn their own difficulties. "Legislation passed in anger is likely to be problematic," Dean Eisenberg observed. For instance, the Prison Litigation Reform Act caps the fees available to a lawyer whose inmate client prevails. Besides ill will, he asks, what else would justify a lower fee award than is available to lawyers who represent welfare recipients, victims of police misconduct or government employees?

Despite these and similar legislative initiatives that threaten the rights of citizens, the constitution will "survive," according to Dean Eisenberg, only through a "fearless" judiciary. "Judges have to have the independence to apply the constitution unequivocally, even if Congress and state legislatures have given them imperfect and confusing legislation to work with," he said. Indeed, he asserts, Congress passes this kind of legislation intentionally, expecting that the courts will clean up the mess.

"Federal judges must be prepared to free suspected terrorists, suppress evidence and enjoin the application of statutes which infringe our basic liberties. . . . In the end, the Bill of Rights means what the federal judiciary says it means, not what Congress, the media, talk show radio hosts or even law professors would like it to say."

Though judges are central to this model, lawyers are not free of responsibility. Dean Eisenberg reminds practitioners that they owe a duty of "strong advocacy and persuasive argument" to assist the courts. "Zealous advocacy for our clients is the best way to prevent Congress from overrunning us all." Lawyers must also work to ensure that judicial nominees possess the "wisdom, integrity and courage to do what has to be done[.]"

In closing, Dean Eisenberg predicted that the Bill of Rights would survive despite "[t]he media frenzy and political posturing [that] make calm and reflective discussion impossible." Though judges are charged with the awesome responsibilities of following the law while trying to figure out what it means and whether Congress has overstepped its authority, he remains "confident the federal judiciary is up to it."

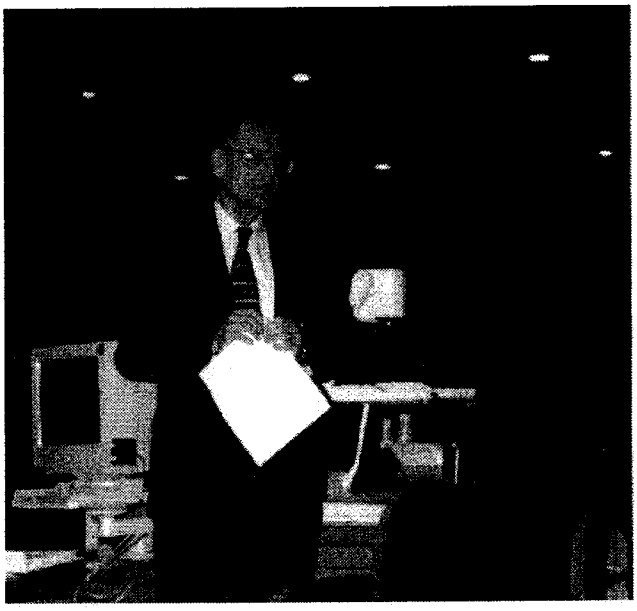
Magistrate Judge Skupniewitz Reports on the State of the Court

By: Todd G. Smith
President-Elect, WDBA

As has become a tradition, Magistrate Judge Joe Skupniewitz delivered his annual "State of the Court" report to the WDBA board of directors at the WDBA's April 25, 2002 Annual Meeting. Magistrate Skupniewitz noted that in the past year Judge Shabaz took senior status and that, accordingly, Judge Crabb took over his duties as Chief Judge. Magistrate Skupniewitz indicated that both judges are in good health and that the court did not anticipate any changes in the court's procedures as the result of these changes. Magistrate Skupniewitz also noted that a new United States Marshall, Steve Fitzgerald, took office in April but that a new U.S. Attorney had not yet been appointed to replace Peggy Lautenschlager.

Magistrate Skupniewitz announced that the court continued to be the most current district court in the federal system but that fewer civil cases were being filed than in previous years. In the year ending March 31, 2002, only 727 civil cases were filed, the lowest annual amount since the year ending June 1981. For comparison, 1075 civil cases were filed as recently as the year ending August 1996. The highest annual total was during the year ending May 1989, when 1190 civil cases were filed.

Magistrate Skupniewitz stated that civil case filings were down nationwide, but that the reduction experienced by the Western District of Wisconsin was greater than the national average. In addition, the number of trials held in the district was also down compared to past years. Magistrate Judge Skupniewitz noted that there was no significant change in criminal cases and bankruptcy filings have grown.



Clerk of Court Joseph P. Skupniewitz gives his annual "State of the Court" report to the Western District Bar Association membership.

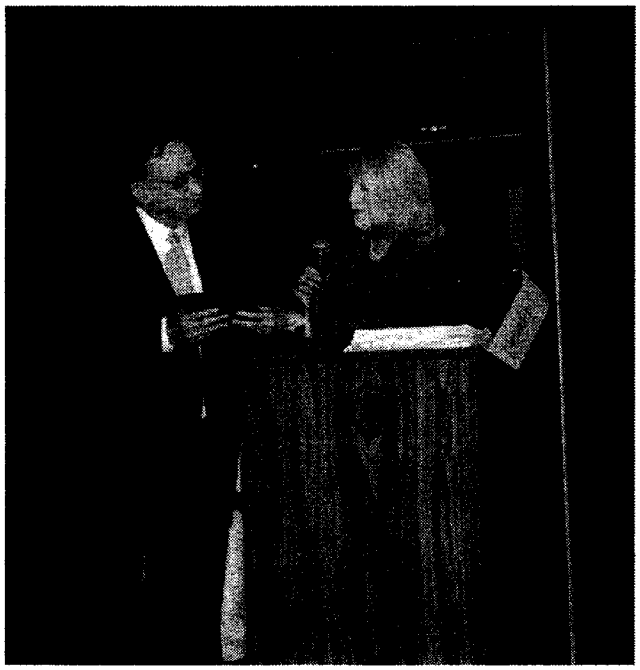
Magistrate Skupniewitz informed the WDBA that the court's electronic filing project had been put on hold because the only electronic filing vendor servicing the court and the bar had gone out of business. Magistrate Skupniewitz noted that the court continues to explore other electronic filing options, such as an email-based system, and is committed to the concept of electronic filing.

Finally, Magistrate Skupniewitz noted that attorneys will notice some changes at the courthouse designed to increase security. In particular, the revolving door in the front of the courthouse will be re-opened and will be the primary entrance to the courthouse for attorneys, litigants and the public. New advanced screening equipment will be installed to further increase security, and aesthetically-pleasing barriers will be installed outside to prevent vehicles from getting too close to the building.

Term Ends on Mixed Emotions

by Tom Bertz, Past President

It certainly has been a privilege and a pleasure to serve as your President for the past year. This year has seen a lot of events, mostly tragic on the national and the international scene. However, we look forward to the coming year with great hope and optimism. The impact of September 11, 2001 has not yet been fully felt and although our organization did not receive a direct blow from the tragedy, we all know someone who has suffered from the calamity.



New WDBA President Leslie Herje presents outgoing president Tom Bertz with a plaque honoring his service as president.

Despite the events that centered our attention to the national and international scene, the Western District of Wisconsin Bar Association has had a solid year in 2001 and 2002. Internally, as you know, we have strengthened the organization with new members for the Board of Governors and Committee Chairs. Even our membership has increased to nearly 300, approximately 60 over our membership from last year and this is in part due to the great efforts of our Membership Committee headed by Jeff Simmons. It is with the solid membership base that we can reach forward in creating a greater presence of the organization in the Western District.

Other internal changes and traditions which we have established this year are that the Communications Committee will be chaired by the immediate past president and the second past president. In addition, each member of the Board of Governors has been given a responsibility either to write an article for the *Newsletter* or see to it that an article has been written. I also believe that the *Newsletter* will again serve as an educational tool for our members. We are publishing the *Newsletter* on a regular basis and I want to thank those who worked on the Communication Committee and those who contributed to the success of the *Newsletter.*

Externally, the association's presence has never been stronger. The Court has asked that members of WDBA serve on several committees. One of the four committees was the Court ADR Committee which is headed by Jim Troupis who also serves as our ADR Chair. Todd Smith, our President Elect, and Ted Long were appointed to the Court's Electronic Filing Committee. I wish to thank them for serving on that Committee and in particular Todd Smith who authored the article in the November, 2001 *Wisconsin Lawyer* regarding e-filing in the Western District.

Also serving on one of the Court Committees were Lynn Stathas, Tony Tomaselli and Paul Barnett who were part of the Court's Jury Selection Committee. Another one of the Court Committees was the Magistrate Judge Review Committee which I had the privilege of serving on and in which Joe Skupniewitz was

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THE PRESIDENT'S CORNER

By
Leslie K. Herje
President

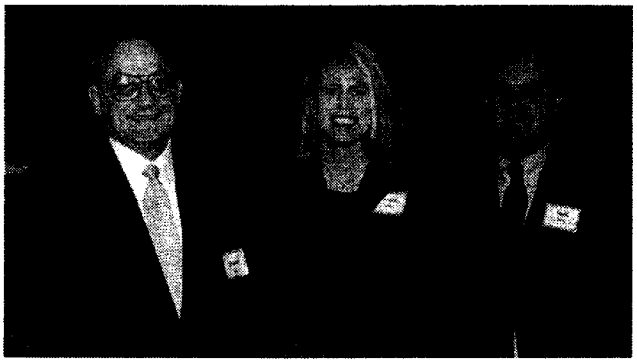
On behalf of the Western District of Wisconsin Bar Association, I wish to thank Tom Bertz for his dedication and leadership this past year. Tom has been active with the WDBA since its inception and his commitment has been extraordinary. It has been a privilege working with Tom and I look forward to his continued involvement in the WDBA this next year.

We have several new WDBA members that will serve on the Board of Governors this year: Greg Everts, Quarles & Brady; Jennifer Sloan Lattis, Wisconsin Department of Justice; Brian Hodgkiss, Anderson, Shannon, O'Brien, Rice & Bertz; and Lynn Stathas, Reinhart, Boerner, Van Duren, Norris & Rieselbach. Each of these members will either be serving a three-year term on the Board or the remainder of a term. We wish to thank Joel Aberg, Peg Lautenschlager, Joseph Wright, and Mike Modl for their service on the Board.

We also have two new Committee Chairs this year. Ted Long, Lathrop and Clark, has replaced Lynn Stathas as the Chair of the Rules, Practice & Procedure Committee. Steve Ehlke, U.S. Attorney's Office, has replaced David Jones, Heller Ehrman, as Chair of the Courthouse Facilities Committee. We wish to thank all of the Committee Chairs for their past and continued service to the WDBA.

As President of the WDBA, there are several goals I wish to accomplish over this next year. First, we will complete the project to establish and maintain a website for the WDBA. A website will provide the WDBA with an efficient and timely manner of communicating with its membership. The WDBA website will contain past newsletters, local rules, opinions and orders that may have an impact on practitioners in the district, and practice updates. If you have any suggestions for website content, please let me know.

Next, I would like to increase member participation at the Committee level. Recently, WDBA Committee work has fallen largely on the Chair. When a Committee is undertaking an issue for the WDBA, we will post a notice of the meeting and ask members of the WDBA to participate in the review of the issue under consideration. Most Committees only meet once or twice annually and I encourage members to contact Committee Chairs and volunteer an hour or two of your time this next year.



Past, president and future: from left to right, Immediate Past-President Tom Bertz (Anderson, Shannon, O'Brien, Rice & Bertz, Stevens Point), President Leslie Herje (U.S Attorneys Office), and Todd Smith (LaFollette Godfrey & Kahn, Madison).

Finally, I would like the ADR Committee to undertake a project this year to determine whether it would be useful to have members of the WDBA volunteer to mediate cases in subject areas largely unique to federal practice. This effort would include defining the areas of federal specialty, as well as defining the scope of the mediation program if a pilot project is recommended.

I look forward to working with the Board, Committee Chairs, and members of the WDBA this next year. If you are interested in serving on a standing Committee, a discrete project, or an ad-hoc Committee such as the website, please feel free to contact me or the appropriate Committee Chair.

Tom Bertz . . .

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again appointed as a part-time Magistrate Judge for another four year term.

Another tradition which was begun this year was that in addition to receiving Wisconsin CLE credits for our CLE program, we have instituted a procedure to obtain Minnesota CLE credits for those attorneys who are also members of the Minnesota Bar. So a person who attends the CLE program will be eligible to receive both Wisconsin and Minnesota CLE credits.

At our last annual meeting, a report was made with respect to our web page. We are in contact now with the State Bar to implement that program. I believe that in the coming year we will see great steps with respect to that implementation. I understand that the person at the State Bar who would be our contact person will be back in May and we should at that time begin serious strides in creating a good web page.

Our presence is well known in the Western District and we are one of possibly two district bar associations. However, the Eastern District has called upon us to help it to become organized. Chief Judge Stadtmueller has spurred the development of an organization for the Eastern District due in part to the creation of a new judgeship in the Eastern District. William Mulligan from Milwaukee has contacted us to aid that district in its organization. I sent to William Mulligan copies of the handout materials that were distributed for last year's program together with some *Newsletter* copies and other materials. That information has been disseminated to attorneys in the Eastern District and Mr. Mulligan has told me that it was extremely useful in that organization's formation. They hope to have the organization ready in the very near future and he says that the WDBA can be given a great amount of credit in the creation of the Eastern District of Wisconsin Bar Association. We look forward to working with that Bar which will also strengthen our Bar.

Another innovation we instituted this year was the launching of the Western District Open. We had a meeting last fall at the University Ridge Golf Course. The meeting was well attended due in part to the beautiful surroundings. That meeting was followed by some members with a wonderful round of golf at one of the best golf courses in the State.

Finally, I wish to mention that the great luncheon program we had with Professor Chemerinsky last year was followed with another outstanding luncheon and CLE program this year. Dean and Professor of Law, Howard B. Eisenberg, from Marquette University Law School spoke on "The War on Crime, The War on Drugs, and The War on Terrorism - Can the Bill of Rights Survive the Battles?" That was followed by the CLE program which was highlighted with the "Summary Judgment Motion Expectations and Procedures" by Chief Judge Barbara Crabb. "Trends and Intellectual Property Cases" was presented by Michelle Umberger and Joseph Leone. I would like to point out that another innovative partnership has been created with the Wisconsin Intellectual Property Law Association to present that intellectual property program. Another topic was "Prison Litigation Update - Recent 1993 Issues" with Paul Kinne and Charles Hornstra. That program was followed by a judge's panel including Chief Judge Barbara Crabb, Judge John Shabaz, and the Magistrate Judges Steve Crocker and Joe Skupniewitz. That panel was followed by a reception.

In conclusion, I want to thank you for allowing me the great opportunity to serve you for the past year. We are extremely fortunate to have the traditions of this great organization continue with the new leadership of President Leslie Herje.

Notice Pleading Is The Rule Under Federal Rule of Civil Procedure 8

By Michael J. Modl

The United States Supreme Court and the United States Court of Appeals for the Seventh Circuit have recently issued a number of decisions confirming that Rule 8 requires no more than notice pleading and that plaintiffs need not plead with particularity, unless a particular claim is governed by Rule 9. The United States Supreme Court, in Swierkiewicz v. Sorema N. A., – U.S. –, 152 L.Ed.2d 1 (2002), reversed the Second Circuit Court of Appeals regarding the pleading standard applicable to employment discrimination cases. The plaintiff in Swierkiewicz alleged that he was discriminated against on the basis of his national origin and age when he was discharged from employment.

The district court dismissed the plaintiff's complaint and the court of appeals affirmed based on Second Circuit precedent requiring employment discrimination complaints to allege facts which would constitute a *prima facie* case of employment discrimination under the McDonnell Douglas framework. The Supreme Court reversed this holding, ruling that Rule 8 does not require such particularity to satisfy the notice pleading requirements of Rule 8. The Supreme Court observed that a *prima facie* case of discrimination is an evidentiary standard and not a pleading standard.

The Swierkiewicz Court observed that there is no heightened pleading requirement for employment discrimination claims; rather, ordinary rules for assessing the sufficiency of a complaint under Rule 8 apply in the employment discrimination context. Requiring more than a short plain statement of a claim would conflict with Rule 8(a)(2). The Swierkiewicz Court commented that Rule 8's simplified pleading standard applies to all civil actions with those limited exceptions in Rule 9. The Supreme Court had declined in the past to extend exceptions to Rule 8 to other contexts and refused to do so in the context of employment discrimination cases. The Supreme Court, concluding that plaintiff's complaint provided fair notice of the plaintiff's claims, noted that if heightened pleading standards are to apply to particular types of claims, such standards must be obtained by amendments to the Federal Rules of Civil Procedure and not by judicial interpretation.

The Seventh Circuit, in Alliant Energy Corp. v. Bie, 277 F.3d 916 (7th Cir. 2002), ruled that Rule 8's liberal pleading standards apply to pleading injury and standing. In Alliant, plaintiffs utility company and parent holding company commenced an action under 42 U.S.C. § 1983 against Wisconsin Public Service Commission commissioners challenging the constitutionality of Wisconsin's statutory scheme which regulates the corporate structure of utility companies.

The plaintiffs' first amended complaint alleged that certain Wisconsin statutes injured Alliant and WPL by preventing them from: (1) reincorporating outside Wisconsin; (2) selling blocks of stock to non-Wisconsin firms in order to raise capital at lower rates; and (3) diversifying their business outside the utilities sector by more than the twenty-five percent (25%) cap. Alliant, 277 F.3d at 918. The district court dismissed Alliant's complaint for lack of standing because the complaint did not spell out in adequate factual detail the injury which

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Notice Pleading . . .

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Alliant allegedly would suffer.

The court of appeals reversed the dismissal of Alliant's claims noting that, although plaintiffs may not be able to prove their allegation of injury, their complaint satisfied Rule 8's pleading requirement. The court observed that a federal court complaint need only state the nature of the claim; the details can wait for later stages such as evidentiary hearings or summary judgment motions. Id. at 919. The court observed that allegations in respect to injury and standing are no different than any other matter that may be alleged generally in a federal court complaint. Id. The Alliant court concluded that Alliant's factual allegations were adequate, at least at the pleading stage.

The United States Court of Appeals for the Seventh Circuit, in South Austin Coalition Comm. v. SBC Communications, 274 F.3d 1168 (7th Cir. 2001), considered the dismissal of a complaint at the pleading stage. The South Austin case involved a suit by customers to enjoin the merger of two (2) telephone companies on the ground that the merger would violate anti-trust laws.

The district court dismissed the plaintiffs' complaint for lack of standing. The court of appeals disagreed that the complaint should have been dismissed based upon a failure to adequately allege standing in the complaint. The Seventh Circuit cautioned that the United States Supreme Court insists that parties not add to Rule 8's general pleading requirements. The South Austin court observed that "a complaint is sufficient if any state of the world consistent with the complaint *could* support relief." South Austin, 274 F.3d at 1171 (emphasis in original). Although the South Austin court concluded that the case should not have been dismissed based upon failing to adequately plead standing, the Seventh Circuit affirmed dismissal on the merits under Rule 12(b)(6).

Finally, the Seventh Circuit, in Davis v. Ruby Foods, Inc., 269 F.3d 818 (7th Cir. 2001), considered pleading requirements of Rule 8 in a case where the plaintiff's complaint alleged too many facts rather than too few facts. In Davis, the *pro se* plaintiff brought a claim of sexual harassment under Title VII. The district court dismissed the plaintiff's complaint for failure to comply with Rule 8 pleading requirements, including a requirement that the complaint state a short plain statement of the claim and that each averment be "simple, concise and direct." The plaintiff's complaint was twenty (20) pages long and highly repetitious. The complaint included material which the court of appeals noted was charming, but irrelevant, including "[because of] the large work load that federal judges face. . . , all federal judges should have their pay by law doubled."

The Seventh Circuit noted that the question which it was to decide, which was a question of first impression in the Seventh Circuit, was "whether a district court is authorized to dismiss a complaint merely because it contains repetitious and irrelevant matter, a disposal husk around a core of proper pleading." Davis, 269 F.3d at 820. The Seventh Circuit ruled that it would not dismiss plaintiff's complaint under Rule 8 merely because of the presence of superfluous matter. Judge Posner, writing for the Seventh Circuit, observed that district court judges have better things to do with their time than to act as an editor, screening complaints for brevity and focus. The court noted that when the complaint "adequately performs the notice function prescribed for complaints by the civil rules, the presence of extraneous matter does not warrant dismissal." Id. at 821. The court further observed that there may be circumstances under which the presence of extraneous matter may support a dismissal under Rule 8, citing to a Third Circuit case where the complaint contained six hundred (600) paragraphs spanning two hundred forty (240) pages.

Judge Posner also cautioned defense counsel in the Davis case as follows: "[w]e also take this opportunity to advise defense counsel against moving to strike extraneous matter unless its presence in the complaint is actually prejudicial to the defense [citation omitted]. Such motions are what give 'motion practice' a deservedly bad name." Id. at 821.

The above cases make clear that, under normal circumstances, Rule 8 simply requires that a party plead adequate facts to put the opposing party on notice as to the pleader's claims. Discovery, including contention interrogatories, and motion practice can then be used to determine the bases of a party's claims.

A Lesson on Discovery: What Not to Do!

MBI Acquisition Partners v. The Chronicle Publishing Co., et al.

By Joely Urdan

In April 2002, Judge Crabb decided the defendants' emergency motion for sanctions. Though contemplating dismissal, Judge Crabb decided not to, noting that "harsh but noncapital punishment will suffice." Nonetheless, examination of the court's decision is warranted because, among other things, the plaintiff's 30(b)(6) representative[1] was fined personally $2000, the court highlighted a party's ultimate responsibility for his attorney's conduct, and the defendants made their case for sanctions by creating a complete record of the plaintiff's discovery abuses.

On March 21, 2001, the plaintiff filed suit, alleging federal securities fraud and three types of state fraud,[2] alleging that it was defrauded when purchasing MBI Publishing Co. because the defendants inflated artificially the value of the company by failing to disclose the existence of $1 million in unprocessed customer returns. Both sides agreed that the factual issues in dispute were whether the defendants had made affirmative misrepresentations and failed to disclose facts about the amount, value, and location of unprocessed customer returns, including the existence of an undisclosed warehouse where the unprocessed returns were allegedly stored.

The court's recitation of the plaintiff's discovery abuse comprises most of the first 20 pages of the opinion. The abuse consists mostly of the plaintiff's failure to produce documents responsive to the defendants' September 5, 2001 discovery requests.[3] The emergency motion came at the end of an arduous discovery process, which included: lengthy delays in the production of documents, even after a December 5, 2001 order compelling their production; the adjournment of a deposition because 200 new documents were produced during that deposition; and a rescheduled trial date and dispositive motion and expert disclosure deadlines.

Three further incidents warrant discussion: the day after the adjourned deposition based on the production of new documents, the plaintiff's Rule 30(b)(6) representative was deposed. Prior to his deposition, he had provided sworn, verified answers to the defendants' interrogatories. During his deposition, he disavowed material portions of many of those sworn interrogatory responses, claiming that he had never seen certain documents. Following his deposition, the plaintiff twice sent the defendants amended and supplemental interrogatory responses to conform them to the 30(b)(6) representative's deposition testimony.

The second incident occurred during another deposition the following day. Before that deposition, the plaintiff had agreed to provide documents that the defendants had requested regarding that deponent. However, the plaintiff's attorney never sent the list of specifically re-

quested documents to the deponent; rather, the plaintiff's attorney told him to bring his entire file. However, not all of the requested documents were kept in his file.

Finally, one of the defendants' attorneys asked one of the plaintiff's attorneys about the existence of a "general ledger." The attorney responded that no ledger existed but that the term was used loosely to refer to the company's books and records. Because the existence of a general ledger was important, the defendants' attorneys sent a letter to the plaintiff's attorney memorializing the conversation and instructed him to contact them immediately if their understanding of the conversation was incorrect. No response was received.

On January 4, 2002, the defendants filed a motion for costs and sanctions, citing additional discovery malfeasance. The court determined that the plaintiff had significantly violated its discovery obligations, fining the 30(b)(6) witness $2000 for his insufficient inquiry into his own sworn responses and taxing costs for the adjourned deposition and motion to compel. The plaintiff ultimately paid the defendants $34,000 in costs.

On March 12, the plaintiff substituted new counsel. After the substitution, the plaintiff provided more documents to the defendants. However, rather than satisfying the defendants, the production further frustrated them because it uncovered the extent to which the plaintiffs had provided grossly inadequate responses to the September 2001 discovery requests from October 2001 through March 2002.

On March 29, the defendants filed an emergency motion for sanctions, in which they sought dismissal of the case. The basis for the motion was the repeated and most recent prejudice to their defense caused by the plaintiff's discovery abuses.

While the court did not dismiss the case outright, the court imposed the following sanctions: (1) dismissal of the plaintiff's claims for punitive and treble damages; (2) allowance of additional discovery by the defendants at the plaintiff's expense; (3) additional time for the defendants in which to supplement their interrogatory responses, expert report, and summary judgment motion, limited to issues arising from the plaintiff's late disclosures; and (4) the costs of the emergency motion.

The series of decisions recounted in the latest decision is notable for several reasons. First, the court cited its ability to dismiss the case and thereby sanction the party for its lawyer's actions because it is the "the decisionmaker with the checkbook." Second, the court warned party witnesses that they are as responsible for their discovery responses as their attorneys, stating, in part:

> *Although it may have been reasonable for Straden to rely on his lawyer to draft a list of the relevant documents, it was unreasonable for him to verify the interrogatory responses without doing even a minimal investigation . . . That Straden would verify the accuracy of these critical responses without even looking at the relevant documents is amazing; plaintiff's excuse that the documents were in another city is as irrelevant as it is weak. Before falsely pledging his word, Straden had the options of having the documents sent to him or traveling to his lawyer's office to review the documents.*

Third, the plaintiff's pattern of abuse warranted the harsh sanction, although its recent about-face saved it from dismissal. The court noted:

> *So why not dismiss this case? At this juncture it*

would be more efficient to unplug plaintiff's law suit; it might even be an act of mercy. But I will give plaintiff one last chance to redeem itself in light of its recent showing that it wants its case to be taken seriously.

Finally, the letter played a critical role in establishing the defendants' version of events. While service of requests and responses are easy to document, the defendants had the foresight to document the plaintiff's critical denial about the existence of a general ledger. The written record of that conversation, coupled with the eventual production of the general ledger, was central to establishing the defendants' claim of prejudice.

[1] Under Fed. R. Civ. P. 30(b)(6), a corporation or government agency subpoenaed for deposition shall designate an officer to testify on its behalf.

[2] All facts are derived from the court's April 16, 2002 Opinion and Order.

[3] For a detailed discussion of the facts, see *MBI Acquisition Partners v. The Chronicle Publ. Co.*, No. 01-C-177-C, slip op. at 2-20 (W.D. Wis. Apr. 16, 2002).

Judge Crabb Revises Summary Judgment Procedures

Judge Crabb has revised her procedures to be followed on motions for summary judgment. The new procedures eliminate the need to prepare and file proposed conclusions of law. In addition, the Court further refined its requirements for proposed findings of fact and emphasizes that each fact must be supported by admissible evidence.

As with the prior procedures, a party opposing a motion must proffer evidence to dispute a proposed finding of fact or the Court will conclude that the fact is undisputed. The revised procedures also include a table that sets forth deadlines for each party when a defendant moves for summary judgment, and when both the plaintiff and defendant move for summary judgment. Judge Shabaz has not revised his summary judgment procedures.

Copies of the revised procedures are available on the district court's website which is located at www.wiwd.uscourts.gov.

Bankruptcy Judge Applicant Sought

The United States Court of Appeals for the Seventh Circuit seeks applicants for a bankruptcy judgeship in the United States District Court for the Eastern District of Wisconsin in Milwaukee. Applications may be obtained from the Clerk of the Seventh Circuit Court of Appeals or by accessing its website on the Internet at www.ca7.uscourts.gov. Applications must be received by July 1, 2002, and should be sent to:

Collins T. Fitzpatrick
Circuit Executive
Judicial Counsel of the Seventh Circuit
2780 U.S. Courthouse
219 South Dearborn Street
Chicago, Illinois 60604

The term of office is 14 years. The current annual salary is $138,000.

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MISSION STATEMENT

It is the mission of the Western District of Wisconsin Bar Association to promote the just, speedy, respectful and efficient determination of every action filed in the District Court: by acting as an effective liaison among the District Court, federal practitioners, litigants and the public; by encouraging, fostering and supporting educational opportunities that improve the practice of law in this District; and by serving the needs of the District Court, federal practitioners, litigants and the public.