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May 5, 2010

By Hand

Hon. John Koeltl
United States District Court
Southern District of New York
500 Pearl Street
New York, NY 10007-1312

New York County Lawyers' Association
Committee on the Federal Courts

Dear Judge Koeltl:

We enclose for your consideration the Report by the Federal Courts Committee of the New York County Lawyers' Association commenting on the Proposals for the 2010 Duke Conference Regarding the Federal Rules of Civil Procedure by the Federal Courts Committee of the Association of the Bar of the City of New York.

Respectfully,

Gregg H. Kanter
Committee Chair

[Enclosure]

cc: Wendy Schwartz (by email)

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Comments on the Proposals for the 2010 Duke Conference Regarding the Federal Rules of Civil Procedure by the Federal Courts Committee of the Association of the Bar of the City of New York

Federal Courts Committee
New York County Lawyers' Association

May 4, 2010

The Federal Courts Committee of the New York County Lawyers' Association appreciates the opportunity to comment on the Proposals for the 2010 Duke Conference Regarding the Federal Rules of Civil Procedure by the Federal Courts Committee of the Association of the Bar of the City of New York (the "New York City Bar Proposals"), attached hereto.[1] We recognize the thought and effort that have gone into the New York City Bar Proposals and generally agree with many of the recommendations. We note below our general agreement with those recommendations and comment in more detail on other recommendations that we find problematic.

Pleadings and Dispositive Motions

We believe that the recommended new motion for summary adjudication (the "Summary Adjudication" motion) would not contribute to the efficient and timely resolution of cases. The types of issues that lend themselves to resolution prior to discovery on the merits can already be decided on a motion to dismiss for failure to state a claim under Rule 12(b)(6) or for judgment on the pleadings under Rule 12(c). In addition, if it were desirable in a particular case, a court can already in its discretion order that summary judgment motions be briefed after only limited discovery has taken place. *E.g.*, *Nader v. Blair*, 549 F.3d 953 (4th Cir. 2008). There is no reason to believe that a summary judgment procedure with a seemingly arbitrary 14 hours of deposition time makes sense for all cases, no matter what their subject matter, no matter how complex, and no matter what parties are involved.

In addition, the assertion that motions under Rule 12(b)(6) are granted rarely is inconsistent with our experience in diverse types of federal civil litigation, including securities, antitrust and others. Indeed, recent data show that motions to dismiss are granted in over 35 percent of all cases, including 47 percent of antitrust cases, 40 percent of personal injury cases, and 68 percent of patent cases.[2] While we recognize

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[1] The opinions expressed herein are solely those of the New York County Lawyers' Association's Federal Courts Committee.

[2] *See* Report of the Statistics Division of the Administrative Office of the United States Courts (Feb. 2010) (available at http://www.uscourts.gov/rules?Motions%20to%Dismiss.pdf); Draft Report of the New York State Bar Association's Special Committee on Standards for Pleading in Federal Litigation, Apr. 2010, at 18 (providing percentages calculated from the Statistics Division data).

that the New York City Bar Proposals do not address pleading standards, we believe that the heightened pleading standards already imposed by the Supreme Court make the recommended Summary Adjudication motion unnecessary. Perversely, the existence of a Summary Adjudication motion could, in some cases, actually discourage courts from granting 12(b)(6) motions, on the theory that courts should routinely permit cases to proceed to the Summary Adjudication stage with its limited discovery rights.

The proposed Summary Adjudication motion could also exacerbate delays in resolving cases, because the proposed stay of all discovery pending resolution of a 12(b)(6) motion would give defendants an incentive to file motions to dismiss regardless of their merits. Again, if a stay of discovery is desirable, the District Courts already possess ample discretion to impose such a stay. There is no reason to believe that a stay makes sense in all cases, particularly those where it is apparent from the outset that factual issues pervade the case. In this regard, we note that at least some courts that imposed a mandatory stay of discovery pending motions to dismiss have departed from that regime. The Commercial Division of the New York Supreme Court previously adhered to a blanket rule in which discovery was stayed during the pendency of a CPLR 3211 motion. However, that Court now largely issues such stays on a case-by-case basis.[3]

Similarly, the stay of all but limited discovery upon filing of a Summary Adjudication motion would also give defendants an incentive to file such motions regardless of the merits, particularly because the scope of the stay would be determined by the scope of the motion. Except in rare cases where the relevant facts are unusually simple and the plaintiff's claims are exceptionally strong, we do not believe that plaintiffs would have an incentive to use the new type of motion. And in those exceptionally strong cases, plaintiffs could, under existing rules, already file a quick motion for summary judgment, meaning that the proposed new summary resolution motion would not meaningfully benefit even those plaintiffs with strong cases.

The proposed new motion would also exacerbate delays because a failed motion for Summary Adjudication presumably would not bar a subsequent motion for summary judgment under Rule 56 after completion of full discovery. In addition, it is likely that parties will seek to re-depose those witnesses who were initially deposed prior to the proposed summary resolution motion. Even if the witnesses' counsel attempt to shut down such re-depositions, the party seeking re-deposition could argue that it should be allowed a further opportunity for deposition in light of facts adduced in the full discovery process that were not available in the limited discovery process prior to the summary resolution motion.

The recommendation to require "a strict timetable for briefing and decision" would not prevent the proposed new motion from increasing delays, because the time that the parties' lawyers take to draft their briefs is not a major contributor to delays. The time that overburdened District Courts take to decide motions is, on the other hand, a very large factor in delays in Federal civil litigation. Deadlines for judges to decide motions are unenforceable and unrealistic and would not prevent the increased delays resulting from the new type of motion.

In cases where a partial Summary Adjudication was granted, the preclusion of further discovery on the summarily adjudicated issues would either artificially limit discovery into the remaining issues in the

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[3] *See* Letter from Barry Kamins, then-President of the Association of the Bar of the City of New York, to then-Chief Judge Judith Kaye, Apr. 27, 2007 (avail. at http://www.nycbar.org/pdf/report/Judith_Kaye042707.pdf).

case, or fail to meaningfully reduce the burdens of discovery. The facts relevant to various issues in a complex case cannot be neatly separated from each other; many facts are relevant to multiple issues. Thus, if full merits discovery were permitted on the issues remaining after Summary Adjudication, the discovery would likely not be significantly limited in complex cases. On the other hand, if the discovery were significantly limited, the party that opposed Summary Adjudication – usually the plaintiff – would be prevented from gaining full discovery into the merits of the remaining issues.

The proposed new motion could also result in unfair outcomes in cases where partial Summary Adjudication was granted, but subsequent discovery on the remaining issues uncovered evidence that the partial Summary Adjudication was erroneous.

Discovery

Recommendation No. 1:

We agree that increased judicial supervision of discovery is desirable. We believe, however, that it is unrealistic to expect District Judges or even Magistrate Judges to engage in detailed review of the initial discovery requests in complex cases, where there are often hundreds of document request categories. We also believe that if the Rules are revised to require judicial review of discovery requests, there should also be a mechanism to better ensure that the parties receiving the judicially reviewed requests fully comply with them and do not interpose further boilerplate objections to delay and limit their production of responsive documents.

Recommendation No. 2:

As discussed above, we do not believe that there should be an automatic stay of discovery upon filing of a motion to dismiss or the proposed new motion for Summary Adjudication. We also believe that there is no realistic and enforceable way to ensure that these motions are decided promptly.

While we agree that there should be protections to ensure that these motions are not abused, we do not believe that the proposal to expedite discovery if a Summary Adjudication motion or motion to dismiss is denied is sufficient in that regard. We would suggest that if the New York City Bar Proposals' recommendation regarding a discovery stay were adopted, the courts should be encouraged to grant sanctions against a party who files a baseless motion to dismiss or for Summary Adjudication. Such sanctions could include the costs of opposing the motion or a court-ordered presumption in favor of the non-moving party with respect to relevant issues.

Recommendations No. 3 and 4:

We generally agree with these recommendations regarding uniform definitions and instructions and limits on initial interrogatories.

Electronic Discovery

We generally agree with these recommendations on (i) preservation and (ii) more emphasis on cost-shifting, but we add a caveat that consideration should include a sensitivity towards the parties' financial wherewithal. In addition, we urge that any cost-shifting be imposed pursuant to clear standards.

Judicial Management of Process

Recommendations No. 1 and 2:

We generally agree with these recommendations on (i) one-case, one-judge civil assignment and (ii) mandatory initial pre-trial conference followed by periodic conferences.

Recommendation No. 3:

We strongly disagree with this recommendation. Although the Courts and the public have an interest in prompt resolution of private federal civil litigation, the interests of the parties with respect to timing are far more important. We do not believe that there is any good reason for establishing a rule against granting extensions that are requested by all parties in a case without a showing of good cause. The proposal fails to take into account the challenging realities of practice, including small-firm practices, competing case loads, and even clients who perhaps cannot pay sufficiently to keep pace with the expedited case schedule, but who nevertheless deserve their chance at justice. We also believe that this recommendation fails to take into account the widely varying case loads and case-management practices of different District Courts. The Rules already empower a particular judge or District to enforce short schedules and to discourage or deny extensions, as many do.

Settlement

We generally agree with these recommendations to raise the profile of settlement.

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NEW YORK
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Proposals for the 2010 Duke Conference Regarding the Federal Rules of Civil Procedure

Federal Courts Committee
The Association of the Bar of the City of New York

April 2010

Introduction

As a fundamental principle guiding the adjudication of civil cases in federal courts, Rule 1 of the Federal Rules of Civil Procedure (the "FRCP") states that the rules should be construed and administered "to secure the just, speedy and inexpensive determination of any action." This mandate, however, may now be an empty promise. Civil litigation has become too cumbersome, expensive and time consuming, and the exponential growth of electronically stored information ("ESI") over the past decade has simply added strains to an already overburdened system.

In an effort to address the issues that arise when practicing in federal courts, the Federal Courts Committee of the New York City Bar Association (the "Association"), on behalf of the Association, engaged in a six-month process whereby the committee examined the issues and developed a number of recommendations to improve the federal civil litigation system. The Committee is comprised of federal practitioners with backgrounds as in house counsel, government attorneys and representing both plaintiffs and defendants. The Committee also liaised with a representative of the Federal Courts Committee of the New York County Lawyers' Association ("NYCLA"), and these proposals include consideration of comments from the NYCLA Committee.

Some recommendations are aspirational, as they propose significant change for the purpose of highlighting the need for change in that particular area, while recognizing that such drastic change may not be feasible in the near future. However, the overarching goal of the recommendations is to encourage a more expedient resolution of cases without unnecessary expense to participants. The Association's recommendations thus endeavor to balance changes designed to improve the exchange of information for resolving disputes in a more cost-effective manner, with the realities associated with practicing in an adversarial system.

Executive Summary

1. Pleadings and Dispositive Motions

We propose that consideration be given to amending the FRCP to establish a new motion (a "Summary Adjudication Motion") that will permit the court to control the scope of discovery and the breadth of the claims, counterclaims, and defenses by deciding substantive issues after the filing of the complaint and before summary judgment. The existing dispositive motion structure does little to curb the expense and length of litigation. If a Rule 12(b)(6) motion is granted, it is often accompanied by permission to re-plead; and Rule 56 motions are usually made after the parties have borne the burden of costly and time-consuming discovery. We believe that a Summary Adjudication Motion fills this gap.

We propose that the Summary Adjudication Motion be available to plaintiffs and defendants alike. For a defendant, the proposed new motion is to be available by election in lieu of a Rule 12(b)(6) motion. For a plaintiff, the Summary Adjudication is to be available (i) if a defendant answers the complaint or makes and loses a Rule 12(b)(6) motion; or (ii) as a cross-motion if a defendant elects to move for Summary Adjudication. In each instance, the Summary Adjudication Motion follows enhanced initial disclosures and no more than 14 hours of deposition from each side. We believe that this new motion will help to streamline the adjudicative process.

2. Discovery

In an effort to minimize common (and avoidable) discovery disputes and to bring potential disputes to a head earlier, we recommend the following:

a. The parties must exchange their initial discovery requests, which should be tailored to the key issues in dispute, in advance of the Rule 16 or 26(f) conference. At the conference, the court will have the opportunity to review the requests for relevance and reasonableness.

b. A Rule 12(b)(6) motion will suspend all discovery, and a Summary Adjudication Motion will suspend post-motion discovery until the motion is decided.[1] These motions permit the court to fulfill a valuable gate keeping function and, until they are decided, the parties should be relieved of the expense of discovery.

c. The adoption of uniform definitions and instructions for discovery requests. Using common definitions and instructions avoids unnecessary disputes over matters that are, for the most part, trivial and collateral.

d. Limiting the use of interrogatories at the outset of the case to determining the identity and location of witnesses and the calculation of damages.

3. Electronic Discovery

Although the duty to preserve information arises when a party reasonably anticipates litigation, there is no bright-line rule for identifying reasonable anticipation. We recommend this guideline: the duty to preserve electronic information will still be triggered as required by the common law standard, but sanctions cannot be imposed for data lost more than one year before the receipt of a preservation demand letter or the filing of a complaint, whichever occurs first.

We propose amending the FRCP to give courts the discretion to allow for cost shifting, not only for overbroad production requests, but also for overbroad preservation demands.

4. Judicial Management of Process

Effective litigation process requires strong and consistent judicial management. To enhance the strong management that already exists, we recommend:

a. The adoption of a one-case-one-judge civil system. To provide additional resources for this system, we recommend that magistrate judges be included in the civil case assignment wheel and selected at the same time and in the same manner as district judges with the parties then being given a reasonable opportunity to

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[1] As set forth below in greater detail, the proposed new Summary Adjudication Motion is to be preceded by enhanced initial disclosures followed by a stay of further discovery once the motion is made.

opt-in or consent to the increased dispositional authority of the assigned magistrate judge.

b. Making the initial Rule 16 conference mandatory and also requiring that the court hold frequent conferences thereafter to monitor the progress of the case and deal with disputes as they arise.

c. That at a relatively early stage of the litigation the court set firm dates for completion of discovery, the filing of dispositive motions, the submission of the pre-trial order and for trial and granting extensions only for good cause.

5. Settlement

Settlement is one of the goals of the Rule 16 conference. But settlement discussions at those conferences are often fruitless due to a widespread belief that they are premature. We believe that more focus on settlement at this early stage may bring beneficial results. We therefore propose that, when defendant appears in the action, the clerk send a notice to all counsel advising of the availability of the available dispute resolution processes, that counsel then be required to send that notice to their clients and that counsel then file a statement of compliance with the clerk reflecting a return acknowledgement by the client of receipt of the notice. We believe that this notice may encourage settlement because it will better educate the litigants of the available processes for settlement and its advantages.

PLEADINGS AND DISPOSITIVE MOTIONS

During our examination of the issues affecting federal civil litigation, we focused on the manner in which pleadings standards and dispositive motions are, and could be, employed to control the scope and expense of lawsuits. Much of the current discussion surrounding pleadings and motions revolves around the federal notice-pleading standards, and in particular whether new standards should focus more on fact-based pleading or separate pleading requirements based on the nature of the claims or the scope of relief sought. The difficulties surrounding this issue – and in trying to determine how much is "enough" to open the courthouse door – have caused us to question whether it is productive to pursue this type of fundamental change.[2]

As a result, we shifted our focus from pleadings to an examination of options for motions related to the pleadings and the sustainability of a case. We therefore suggest new motion practice to enable parties to test not only the survivability of claims and defenses, but also control the scope of discovery during the ongoing course of the litigation, based on limited discovery. Such new motion practice would fill the "gap" between motions at either the early pleading stage (with no discovery) or at the summary judgment stage (after full discovery). Our recommendation on this point has been controversial within the Association and is not endorsed by all of our members. We therefore offer this proposal as a discussion point to generate further thought and dialogue on how pleadings and motions currently operate and whether broad changes (either those discussed below or others) are needed.

Recommendation: Establish a New Summary Adjudication Motion

Establish a new motion under the FRCP to expand the availability and nature of summary adjudication – for both defendants and plaintiffs alike – after the pleadings stage and prior to the summary judgment stage. The new Summary Adjudication Motion does not replicate Rule 56, as the new motion is directed primarily at adjudication of issues, rather than claims, so as to control the scope of discovery and the breadth of claims, counterclaims, and defenses throughout the litigation.

Summary of proposed rule:

1. A defendant has the following options upon the filing of a complaint:

   a. make a traditional motion to dismiss under Rule 12(b), in which case all discovery is stayed pending the resolution of that motion; ***or***

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[2] We considered supporting recent congressional and judicial efforts to shift the balance among litigations, such as the heightened pleading standards set forth in *Bell Atlantic Corp. v. Twombly* (550 U.S. 544 (2007)) and *Ashcroft v. Iqbal* (__ U.S. __, 129 S. Ct. 1937 (2009)); the Private Securities Litigation Reform Act of 1995 (Pub. L. 104-67, 109 Stat. 737 (codified as amended in scattered sections of Title 15 of the United States Code)). We also considered supporting the reversal of *Twombly* and *Iqbal* in favor of bare notice pleadings, as has been proposed in H.R. 4115, a bill to amend title 28 to restore notice pleadings in federal court, by which a federal court would only dismiss a case if "it appears beyond doubt that the plaintiff can provide no set of facts in support of the claim which would entitle the plaintiff with relief." However, we did not reach consensus – and believe there is not consensus within the legal profession – as to whether such reforms should be codified in the Federal Rules.

b. answer (including any counterclaims and affirmative defenses) and then opt to exchange enhanced initial disclosures with the plaintiff, in which case the defendant would then have the right to make a Summary Adjudication Motion

2. A plaintiff has the following options:

   a. if a defendant makes and does not succeed on a traditional Rule 12(b) motion to dismiss, or if a defendant answers, a plaintiff may opt to move for Summary Adjudication.

   b. if a defendant itself opts for Summary Adjudication, a plaintiff may cross-move for Summary Adjudication.

3. A defendant or plaintiff's option to pursue Summary Adjudication triggers enhanced initial disclosures by both sides prior to the motion itself. The initial disclosures include 14 hours of deposition of each side. The scope of the enhanced disclosures is to be determined by the court at the outset;

4. If and to the extent that a party prevails on a Summary Adjudication Motion, no further discovery takes place on the adjudicated issue(s) or claim(s), and the court's resolution of that matter is law of the case;

5. In ruling upon a Summary Adjudication Motion the court shall apply the substantive standard applicable to summary judgment motions, but shall not include the option of deferring decision pending additional discovery.

6. A Summary Adjudication Motion must have a strict timetable for briefing and decision, determined at the outset of the motion.

Discussion

The proposal for a new type of motion comes from the view of many (but not all) of our members that a gap presently exists between motions to dismiss under Rule 12(b)(6) and motions for summary judgment under Rule 56. In the experience of many, the existing motion structure does little to curb the cost and length of litigation. We believe that Rule 12(b)(6) motions are rarely effective in disposing of claims, in part because they are often granted with leave to re-plead and thereby provide little in the way of a gatekeeping function at the early stages of litigation, and Rule 56 motions are generally made after the parties have already incurred costly and time-consuming discovery. As such, modification of the Federal Rules may be warranted to create a new form of motion practice to be used between the pleading stage and the close of discovery. In this manner, litigants can be afforded the opportunity to move for summary adjudication of dispositive or significant case-narrowing issues in a meaningful way without incurring the costs of full discovery.

The proposed Summary Adjudication Motion is not duplicative of a Rule 56 motion, as the Summary Adjudication is intended to control the scope of discovery by adjudicating specific issues, rather than disposing of claims, counterclaims, or defenses.[3] The proposed Summary Adjudication Motion would be based upon limited discovery on specific issues followed by determination on an evidentiary record comprised of that discovery, affidavits and limited depositions. The determination would be whether the facts as developed or the legal theory presented establish a claim or defense as a matter of law. Additionally, consideration should be given to tailoring the grounds for the motion to particular kinds of actions. For example, claims involving securities fraud, trade secrets, contract or statutory interpretation could be adjudicated by identifying discrete issues or elements that must be proven; restricting discovery to those issues/elements; and then presenting only those matters for the court's early determination. Certain subject matters, such as the existence or extent of damages, or highly specialized subjects generally addressed through expert evidence, would presumptively not be subject to a Summary Adjudication Motion. Documentary discovery would focus upon undisputed writings or easily accessible materials bearing only upon the issue that is the subject of the motion.

A Summary Adjudication Motion should not substantially affect the existing procedure for a Rule 12 motion. Accordingly, we recommend an alternative approach to pre-trial motions which will give a defendant the choice between: (i) filing a Rule 12 motion to challenge the legal sufficiency of a pleading or defense, as a result of which discovery would be stayed automatically; or (ii) foregoing a Rule 12 motion in order to receive entitlement early in the litigation to limited, specific discovery, which would then be used for the dispositive or issue-narrowing Summary Adjudication Motion. The plaintiff would have a corresponding right either in response to a Summary Adjudication Motion from the defendant, or as soon as the defendant answers, or does not prevail on a Rule 12(b)(6) motion, to obtain early and targeted discovery that might narrow the issues and enable the parties to achieve a more expeditious resolution of the case, where appropriate.

Adoption of this procedure would include enhanced initial disclosures – that is, a requirement for more detailed and meaningful initial disclosures under Rule 26(a)(1). We also propose that a limited right to fourteen total hours of deposition per "side" could be used to authenticate critical documents, obtain important admissions or otherwise develop the record for the Summary Adjudication Motion. Each party should be permitted to allocate its fourteen hours among a small number of deponents.

This procedure is consistent with suggestions advanced by other commentators for a new motion procedure between the pleading and summary judgment stages. The American College of Trial Lawyers recommends for consideration a new summary procedure allowing parties to obtain determination of enumerated matters on pleadings and affidavits (or other evidence) without discovery and trial. *See Am. Coll. of Trial Lawyers Task Force on Discovery and Inst. For the Advancement of the Am. Legal System, Final Report* (2009) (the "*ACTL Final Report*"), at 6. The *ACTL Final Report* emphasizes that this determination be made "without triggering an automatic right to discovery or trial or any of the other provisions of the current procedural rules." *Id.* The *ACTL Final Report* highlights that certain matters –

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[3] Notwithstanding the Summary Adjudication Motion's focus on issue adjudication to control discovery, a court could dispose of claims and/or counterclaims in ruling on such a motion if the evidence derived from the enhanced initial disclosures so dictated.

such as contract interpretations declaratory orders and statutory remedies – are particularly well-suited to such streamlined adjudication. *Id.*

Professor Arthur R. Miller, a long-time and distinguished commentator on civil procedure, has suggested further study of a similar approach. *See Pleading and Pre-trial Motions – What Would Judge Clark Do?*, at 57 (monograph prepared for 2010 Litigation Review Conf., May 10-11, 2010; 11/4/2009 draft). Professor Miller envisions a new motion geared to decision-making based on the recent plausibility pleading standard. *Id.*, at 58 ("[P]lausibility now authorizes factual assessments and judgmental evaluations in addition to resolving legal questions. Perhaps a new procedure would be useful to address the new type of decision-making created by this shift."). Professor Miller suggests that a new motion, possibility called a "Motion to Seek Particularization of a Claim for Relief," could be used when plausibility was in issue. He likens it to the old bill of particulars and contemplates that it could entail "a modicum of discovery" and other flexibility on the question of determining plausibility. *Id.*, at 58. As such, the motion would permit determination of a claim's validity beyond a pure legal issue but short of full-blown summary judgment.

We are mindful that mechanisms currently exist in the FRCP and in judicial opinions along these lines. For example, Rules 12(c) and 12(e) authorize motions for judgment on the pleadings and for a more definite statement.[4] Similarly, summary judgment under Rule 56 allows for adjudication of "part of the claim" and authorizes the court, where summary judgment is not issued on the entire case, to make partial adjudications. Fed. R. Civ. Pro. 56(a), (b), (d).[5] In addition, courts often permit parties to present and rely upon key documents in motions to dismiss without converting the motion to one for summary judgment. Nevertheless, members of the Association expressed their experience that these provisions are little used by litigants and often not favored by the courts. Our overall sense is that the provisions have fallen into disuse. Adopting a new mechanism may reinvigorate an "interim" approach to adjudication – the objective being to encourage streamlining the adjudicative process in appropriate contexts.

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[4] Rule 12(c) provides: "Motion for Judgment on the Pleadings. After the pleadings are closed -- but early enough not to delay trial -- a party may move for judgment on the pleadings."

Rule 12(e), in pertinent part, provides: "Motion for a More Definite Statement. A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired."

[5] Under Rule 56(d), for example, the court is authorized to determine what material facts are not genuinely at issue based on the pleadings and evidence before it. That rule then authorizes the court to "issue an order specifying what facts – including items of damages or other relief – are not genuinely at issue," after which the facts so specified "must be treated as established in the action." The court is also authorized to grant "interlocutory summary judgment" on liability alone, even where an issue remains on the amount of damages. Fed. R. Civ. Pro. 56(d)(2).

DISCOVERY

It has become commonplace in much of our experience that discovery – and some litigants' desire to discover every last fact potentially relevant to a dispute – can cause the cost of litigation to balloon exponentially and can unnecessarily prolong a case. The recommendations below are designed to minimize common (and avoidable) discovery disputes; to bring potential disputes to a head earlier, with more active judicial management; and to dovetail with the recommendations concerning judicial management of process, electronic discovery and pleadings and motion practice.

Recommendation No. 1: Earlier Exchange of Proposed Discovery Schedule and Discovery Requests

In connection with a Rule 26(f) and/or 16(b) conference, the parties should exchange in advance, and then submit to the court, not only their proposed schedule, but also their initial discovery requests for facilitating at least a broad discussion about relevance and reasonableness. The initial discovery requests should be tailored to the key issues in dispute, rather than designed to turn over every rock, and the requirement of discussing the reasonableness of such proposed discovery with the court should encourage the parties to self-regulate the breadth of their demands and ensure that the discovery sought, and its concomitant burdens and costs, is proportionate to the matters in dispute. We note that this proposal is specifically intended to forestall the service of voluminous discovery requests, even in complex cases, by encouraging the parties to make their requests streamlined and digestible by the court as well as each other.

We recognize that parties do not always have sufficient information at the outset of a case to know the universe of material that might be relevant or necessary, and if the initial discovery shows that follow-up requests are warranted, the parties may issue additional discovery requests over time. But taking discovery in stages of importance and utility should assist in our overall objective of reducing litigation costs and delays, and focusing on the most salient issues and defenses first. In addition, forcing the parties to discuss the discovery particulars at an early conference with the court should promote the more active judicial management that we urge elsewhere in this report, and should enable the parties to get quick rulings from the bench on the reasonable scope of discovery rather than engaging in a protracted exchange of letters or avoidable motion practice.

Recommendation No. 2: Stay Full Discovery upon a Motion to Dismiss or Summary Adjudication

A motion to dismiss or summary adjudication should operate to stay full discovery absent a contrary court order based on a showing of good cause. While we recognize that a stay of discovery might appear to provide an incentive for a non-meritorious motion just to delay the case, the essence of a motion to dismiss or a motion for summary adjudication is the contention that there is insufficient legal or factual basis for the case to move forward. In that context, we do not believe that the parties should continue to bear the burdens and costs of discovery while the court resolves that gatekeeping motion. However, as we have noted above in the context of discussing the procedures for such motions, protections need to be built in to ensure that those motions are not abused and that they are decided promptly. For example, if a motion to dismiss or summary adjudication is denied, it should be mandated that discovery proceed on an expedited basis, absent a showing of good cause. This type of alternative regimen would help keep a case on track toward resolution while still permitting parties to make a

motion to dismiss or summary adjudication in an effort to dispose with certain matters in a more expedient manner.

Recommendation No. 3: Adopt Uniform Definitions and Discovery Request Instructions

Uniform definitions and instructions for discovery requests should be adopted, similar to those embodied in the Joint Southern and Eastern District of New York Local Civil Rule 26.3. Many basic definitions and instructions are (or should be) substantially similar, regardless of the subject matter of the case. Using common definitions and instructions avoids unnecessary disputes over matters that tend to cause disagreement about typically trivial and collateral issues.

Recommendation No. 4: Limit the Use of Interrogatories

The rule on interrogatories should be modified to limit their use, at the outset of a case, to determining the identity and location of witnesses and documents, and the basis for the calculation of damages. Experience has shown that interrogatories are tremendously burdensome to respond to, but until discovery is well underway or near completion, they rarely lead to useful information. The costs and burdens associated with answering them generally outweigh their marginal utility. What is more, most of the information typically sought by interrogatories at early stages of discovery largely duplicates the information sought by document requests and depositions, which are generally more efficient means of obtaining needed information. Therefore, interrogatories are generally not only burdensome but cumulative. The use of interrogatories to elicit contentions and narrow areas of disagreement can be effective, but typically not until later in the discovery process.

For well over 20 years, the United States District Court for the Southern District of New York has, by local rule, limited the use of interrogatories to these circumstances.[6] Even though this court handles some of the most complex cases in the country, the practicing bar has not found itself hamstrung or unable efficiently to elicit relevant information because of this limitation. And the restrictions on the use of interrogatories have materially reduced discovery disputes concerning the propriety and burden of such discovery demands.

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[6] SDNY Local Civil Rule 33.3 provides:

(a) Unless otherwise ordered by the court, at the commencement of discovery, interrogatories will be restricted to those seeking names of witnesses with knowledge of information relevant to the subject matter of the action, the computation of each category of damage alleged, and the existence, custodian, location and general description of relevant documents, including pertinent insurance agreements, and other physical evidence, or information of a similar nature.

(b) During discovery, interrogatories other than those seeking information described in paragraph (a) above may only be served (1) if they are a more practical method of obtaining the information sought than a request for production or a deposition, or (2) if ordered by the court.

(c) At the conclusion of other discovery, and at least 30 days prior to the discovery cut-off date, interrogatories seeking the claims and contentions of the opposing party may be served unless the court has ordered otherwise.

We believe that adopting such limitations nationwide will help focus the use of interrogatories where they are most effective and eliminate the expense and burden of applying the device in circumstances where it is far less effective.

ELECTRONIC DISCOVERY

The exponential growth of ESI over the past decade has transformed the nature of discovery and placed great strains on the courts and litigants alike. Electronic discovery is one of the most significant sources of expense for parties engaged in federal litigation and has presented a new set of problems related to uncertainty, delay and ever-increasing costs. Judges struggle to adapt and apply rules created in a world of paper documents to the new world of ESI. Managing the discovery of ESI – preserving, collecting, processing, analyzing, reviewing and producing data – often greatly taxes client resources and results in sizeable charges to client, tending to make litigation cost prohibitive. Although expensive electronic discovery is not always required, there are enough cases where extremely high and disproportionate costs create real concern. As the volume of ESI increases and parties become more reliant on ESI, this issue becomes more widespread.

The problem was addressed in 2009 by the Joint Committee on Electronic Discovery of the Association of the Bar of the City of New York. Its report, entitled *Explosion of Electronic Discovery in All Areas of Litigation Necessitates Changes in CPLR*, highlighted that 92 percent of new corporate information is now kept electronically, 60 percent of business information is stored within corporate e-mail systems, and individual users generate massive quantities of ESI each year through home computers, cell phones, flash drives, and personal digital assistants.

In recent years, attempts to deal with the consequences of ever-growing electronic data have focused on modification of the discovery rules to limit the scope and rein in the costs of federal litigation. In addition to closer judicial management of the discovery process using existing FRCP provisions, we propose the following recommendations, which are an attempt to recognize the necessity for proportionate electronic discovery, with an eye toward focusing on the merits of the case, rather than on ancillary electronic discovery issues and "discovery about discovery."

Recommendation No. 1: Clarify Parties' Obligation to Preserve ESI

The duty under common law to preserve information potentially relevant to a litigation that arises under common law is triggered when a party becomes aware that materials in its possession, custody or control may be relevant to an actual or reasonably anticipated litigation. There is no bright-line rule for identifying reasonable anticipation, and courts have generally addressed this issue in broad terms.[7] The vagueness of the "I know it when I see it" standard surrounding pre-litigation preservation

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[7] *See Zubulake v. UBS Warburg*, LLC, 220 F.R.D. 212, 216 (S.D.N.Y. 2003) ("*Zubulake IV*") ("The obligation to preserve evidence arises when the party has notice that the evidence is relevant to the litigation or when a party should have known that the evidence may be relevant in future litigation.") (quoting *Fujitsu Ltd. v. Federal Express Corp.*, 247 F.3d 433, 436 (2d Cir. 2001)); *Pension Committee of the University of Montreal Pension Plan v. Banc of America*, No. 05-Civ. 9016 (SAS), 2010 WL 184312, at *4 (S.D.N.Y. Jan. 15, 2010) ("It is well established that the duty to preserve evidence arises when a party reasonably anticipates litigation"); *see also Silvestri v. General Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001) ("The duty to preserve material evidence arises not only during the course of litigation but also extends to that period before

duties creates great uncertainty for litigants,[8] and forces courts to assess the conduct when the once-fluid issues have long since crystallized.[9]

Under this recommendation, the duty to preserve would still arise upon the reasonable anticipation of litigation. However, a party could not be sanctioned for the loss of data occurring more than one year prior to the receipt of: (i) a preservation demand letter; or (ii) the filing of a complaint, whichever occurs first. Where a preservation notice is the trigger, the duty should expire if the demand is not renewed or litigation does not commence within six months or some other specific period of time. By adhering to these standards in good faith, litigants would be protected from sanctions, including being eligible for Rule 37(e) safe harbor protection. We note that this does not mean that a party may destroy particular information once these deadlines expire. Parties should then be expected to act within their standard document retention policies, and not single out potential litigation-relevant material for destruction.

This recommendation provides clearer guidelines for courts in assessing discovery conduct and creates greater certainty for parties in this risk-fraught area of the law. This ties in with the broader concern of controlling litigation costs and allows litigants to assess the costs and burdens associated with litigation.

The Association considered moving away from the still-vague concept of "reasonable anticipation of litigation" as a trigger for the duty to preserve. However, the recommendation reflects a balance between: (i) the need for greater certainty and cost control on one side; and (ii) on the other side of the equation, the concerns that a culpable party may hasten to destroy evidence before the injured party brings a valid claim or otherwise "cherry pick" to retain only positive information after the duty expires but a lawsuit might still be filed. To counter the possibility of the abusive proliferation of pro forma preservation demand letters, the Association recommends preservation demands must be specific to be considered a sufficient preservation trigger.

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the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation."). *See also The Sedona Conference Commentary on Legal Holds: The Trigger & The Process*, August 2007 (Public Comment Version), Guideline 4, which states: "The determination of whether litigation is reasonably anticipated should be based on a good faith and reasonable evaluation of the relevant fact and circumstances."

[8] *See, e.g., Phillip M. Adams & Assocs., L.L.C., v. Dell, Inc.*, No. 1:05-CV-64 TS, 2009 WL 910801, at *12-13 (D. Utah Mar. 30, 2009) (awarding spoliation sanctions after finding that defendants' duty to preserve attached when industry became sensitized to product flaws, some six years before party learned of plaintiffs' specific claims); *Pension Committee*, 2010 WL 184312 at *9 (finding that the multiple plaintiffs' duty to preserve attached in the spring before counsel was retained in fall 2003).

[9] *Pension Committee*, 2010 WL 184312 at *7, *2 (the court has a "gut reaction" in assessing discovery conduct and an assessment of negligence in the context of discovery conduct "is a judgment call that must be made by a court reviewing the conduct through the backward lens known as hindsight. It is also a call that cannot be measured with exactitude and might be called differently by a different judge.").

Recommendation No. 2: Include Detailed Cost Shifting Standards in the FRCP

The wider use of ESI discovery cost shifting by courts has the potential to encourage parties to engage in more reasonable discovery conduct. Although the FRCP already encompass cost shifting,[10] the provisions appear to be under-used and provide only limited guidance to a court seeking to assess cost shifting requests. We propose revising the rules to incorporate current common law standards.[11] Cost shifting should be available not only for overbroad production requests, including review, but also for overbroad preservation demands.

We recommend amending the FRCP to incorporate more detailed cost shifting standards. This will provide an additional economic incentive to cooperate in good faith and reach agreement on discovery issues while keeping ESI discovery requests and responses proportionate. The Association considered mandatory cost shifting but felt that affording discretion will allow courts to tailor an appropriate solution, taking into account economic means of the requesting and requested parties.

JUDICIAL MANAGEMENT OF PROCESS

Strong and consistent judicial management is essential to an effective litigation process. Judges now have considerable latitude to ensure this goal. Indeed, Rule 16 provides that "the court may in its discretion direct the attorneys for the parties . . . to appear . . . for such purposes as: "(1) expediting disposition of the action; (2) establishing early and continuing control so that the case will not be protracted because of lack of management; (3) discouraging wasteful pretrial activities; (4) improving the quality of the trial through more thorough preparation; and (5) facilitating the settlement."

Although the goals of Rules 1 and 16 are consistent with the aspirations of any program of reform, these goals have little chance of being realized unless the judicial officer "establish[es] early and continuing control." These recommendations are intended to improve and increase a judge's engagement with the case to ensure that the paramount objectives of cost effectiveness and speedy resolution are achieved in a consistent and universal manner.

Recommendation No. 1: Implement a One-Case, One-Judge Civil Assignment System

Strong and consistent judicial management is best achieved when one judicial officer oversees the case from its filing to its disposition. But there is now a shortage of Article III judges to carry out these responsibilities. There are currently 84 district court vacancies nationwide, and only 22

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[10] *See* Committee Notes to Rule 26(b)(2)(B) outlining "two-tier" discovery and procedures the discovery of data that is not reasonably accessible (empowering court to set conditions for discovery, including shifting some or all of the costs of production to the requesting party; a requesting party's willingness to share or cover costs of production may also be considered in determining whether discovery should be ordered).

[11] *Rowe Entertainment v. The William Morris Agency*, 205 F.R.D. 421 (S.D.N.Y. 2002); *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003) ("*Zubulake I*"); and *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280 (S.D.N.Y. 2003) ("*Zubulake III*").

nominations pending. Further, there are 31 courts with "judicial emergencies."[12] In the current climate, it is unlikely that Congress will create additional judgeships.

To fill the gap at the district court level, we recommend that magistrate judges be given enhanced ability to participate in civil case assignments. We urge that all cases, except those listed below, should be assigned to one district court judge or magistrate judge upon the filing of the initial pleading. The names of magistrate judges would be included in the civil case assignment wheel and be drawn at the time and in the same manner as a district court judge. The proportion of cases directly assigned to magistrate judges may be adjusted from time to time to balance the workload of all judicial officers.

Advantages of One-Case-One-Judge Civil System

There are significant advantages to a one-case-one-judge civil system with either a district judge or a magistrate judge randomly assigned to the case from inception through conclusion. The Eastern District of Missouri, which instituted this system in 1994, reports that the benefits include: (a) significant redistribution of the court's civil caseload, resulting in more manageable workloads for all judges; (b) consistency in rulings, from the initial scheduling order, through discovery, dispositive motions and trial; and (c) reduction in discovery disputes because the same judge who monitors attorneys' pre-trial conduct now also decides the case.

Further, an expanded judicial pool enhances the dispositional capacity of the court without cost to the taxpayers, thereby increasing the attention and oversight all judges are able to provide to all aspects of the case. This will, hopefully, lead to strong and consistent judicial management which is the goal of this recommendation.

Method of Securing Consents to the Magistrate Judge Assignment

If a case is assigned to a magistrate judge, the parties would be given a designated period of time to "opt-in" by executing a consent form. Some 17 judicial districts throughout the country use some form of direct magistrate judge assignment system. The method of securing responses to the initial magistrate judge assignment varies. In a case assigned to a magistrate judge in the Eastern District of Missouri, the plaintiff must serve the consent form on all defendants. Each party must then file the

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[12] The Judicial Conference of the United States defined a "judicial emergency" during its December 2001 session as:

> Any vacancy in a district court where weighted filings are in excess of 600 per judgeship; OR any vacancy in existence more than 18 months where weighted filings are between 430 to 600 per judgeship; OR any court with more than one authorized judgeship and only active judge; and
>
> Any vacancy in a court of appeals where adjusted filings per panel are in excess of 700; OR any vacancy in existence more than 18 months where adjusted filings are between 500 to 700 per panel.

Additional information on judicial emergencies is available at http://www.uscourts.gov/vacancies/emergencies.htm.

consent form, indicating whether they wish to consent to the assignment of the magistrate judge within twenty days after each appears in the case, whether the appearance is by filing the complaint, motion or answer. In the District of Massachusetts, the plaintiff is responsible for filing the consent form within thirty days after the date of service on the last party.

When a Party Opts Not to Consent

Whatever method of securing responses from the parties is chosen, if any party opts not to consent, the case will be randomly reassigned to a district judge. In that instance, the previously assigned magistrate judge will continue to be assigned to the case to hear matters referred by the district judge pursuant to 28 U.S.C. § 636(b) and Rule 72 of the FRCP.

Cases that Would Be Exempt from this Recommendation

A few categories of civil cases would be exempt from assignment to magistrate judges. They are: in rem proceedings because parties are continually intervening; cases in which an application for a temporary restraining order is sought because of the need for prompt action before consents have been obtained; habeas motions under 28 U.S.C. § 2255 and bankruptcy appeals to avoid having magistrate judges review the decisions of bankruptcy judges.

The Concerns that May Be Raised in Response to this Recommendation

Three questions may be raised in response to this recommendation. First, magistrate judges have a number of other significant judicial duties, including management responsibilities in criminal cases and referrals from district judges of pre-trial controversies. Therefore, a concern may be raised whether magistrate judges have the time to take on additional case-dispositive work. To address this, we propose a flexible system where the Clerk can change the case draw to reflect the workload created by a magistrate judge's criminal and other responsibilities.

Second, those district judges who are tasked with a significant case load will continue to refer pre-trial controversies to magistrate judges to hear and determine or recommend. Thus, a concern may also be raised whether this recommendation will realistically achieve the benefits of a one-judge-one-case system. However, we believe the benefits may be achieved over time. With an enhanced judicial pool and a lighter case load, district judges will have more time to devote to their civil cases. Therefore, they may be less inclined to refer pre-trial matters to magistrate judges.

The third concern is whether litigants and their attorneys will be inclined to consent to a magistrate judge assignment. Although we understand that many litigants for a host of reasons, may opt not to consent, the Administrative Office of the United States Courts reports that as the bar becomes more familiar with a court's magistrate judges, the consent rate tends to increase.

In sum, we believe it makes sense to increase the dispositional ability of magistrate judges. The beneficiaries will be all participants in the civil justice system. District judges will benefit by reduced case loads. Magistrate judges will benefit by being better able to focus on case-dispositive work as primary judicial officers. Litigants will also benefit by the enhanced judicial management that will result and the public will benefit from the optimization of scarce judicial resources.

Recommendation No. 2: Mandatory Initial Pre-Trial Conference Followed by Periodic Conferences

Strong and consistent judicial management will also be enhanced by requiring that the Rule 16(a) initial pre-trial conference be mandatory, rather than discretionary as it is now. If the defendant opts to answer the complaint and forgo a motion to dismiss or, as proposed above, forgo a Summary Adjudication Motion, the conference should be held shortly after the answer is filed. If the defendant instead decides to make a Rule 12(b) motion or a Summary Adjudication Motion, or combine the two motions, the defendant should promptly advise the court and the court should then schedule the conference in advance of the filing of the motion(s) to resolve whatever procedural and discovery issues the motion(s) may raise. As noted above, we further recommend that the filing of the motion(s) should stay further full discovery pending resolution of the motion(s), absent good cause shown.

We further recommend that the court set periodic conferences following the initial conference to monitor the progress of the case and quickly resolve any disputes that arise. Frequent conferences help advance the goals of Rules 1 and 16 and may also lead to earlier settlement.

We note that the court currently has discretion to do all of these things. Our suggestion is to encourage the court to more actively use its discretion more actively to engage with the parties and affirmatively assist in moving cases toward resolution.

Recommendation No. 3: Case-Significant Deadlines Should Not Be Extended Absent Good Cause

Strong judicial management also includes setting firm dates at a relatively early stage of the case for: (a) completion of discovery; (b) filing dispositive motions; and (c) submission of the pre-trial order and for trial.

The date for filing dispositive motions should be sufficiently in advance of the trial date so that the parties do not have to prepare for trial while dispositive motions are pending. Further, if a dispositive motion is filed, it should extend the trial date and the preparation of a pre-trial order until a reasonable time after the motion is decided. That is because it is often prohibitively expensive to litigate a dispositive motion while preparing for trial.

Too often the deadlines for completion of discovery and filing dispositive motions are meaningless place-holders routinely extended by the court for the convenience of the parties. Convenience becomes a substitute for the good cause necessary to extend deadlines. As a result, the discovery process becomes an end in itself which drives up the cost of litigation and significantly delays its disposition. We recommend that extensions be granted only on a showing of good cause.

We understand that whatever standard is adopted for extensions, the district judge or magistrate judge will continue to have discretion to permit extensions in the interests of justice, and this is not intended to prevent parties from asking for extensions for any valid reason, including the schedules of counsel and competing caseloads where appropriate. But we recommend that the standard for extensions be uniform to ensure fairness and that extensions not be granted without cause, to ensure that cases move forward as expeditiously as possible. Setting firm dates forces the parties to stay on track and ensures the speedy disposition of the matter. Setting firm dates also benefits the litigants. The closer the

trial date, the more the claims tend to narrow, the more the parties opt to resolve or drop issues, and, therefore, the more efficient the overall process becomes.

In sum, we suggest that, for the benefit of all participants in the trial process, strong judicial management should include setting firm case-management dates.

SETTLEMENT

In light of the substantial costs and time delays associated with litigating in federal courts discussed throughout this report, it is not surprising that parties in federal court cases often opt for alternate dispute resolution methods, such as court-provided settlement mechanisms and private mediation. This recommendation seeks to enhance the consideration of and access to settlement and mediation in an effort to reduce unnecessary -- or unnecessarily protracted -- litigation.

Current federal court rules do not require parties to engage in meaningful settlement negotiations in the course of litigating their dispute. Although Rule 16 does include the facilitation of settlement as a goal of the case scheduling conferences ("16(b) conferences"), anecdotal evidence suggests that settlement discussions at those conferences are frequently fruitless or perfunctory due to a widespread belief (warranted or not) that such discussions are premature before discovery has commenced. Moreover, judges seldom use the power afforded them under Rule 16 to require the parties themselves to attend 16(b) conferences, even though the parties' participation may be vital to resolution.

To accommodate differing views on the optimal degree of court intervention (if any) for encouraging settlements, we recommend implementing the following rather simple measure: that in every civil action commenced in federal court, the clerk's office be required to send -- preferably electronically – a dispute-resolution notice to all counsel, shortly after defendant's initial appearance in an action. The notice, which counsel would be required to transmit promptly to their respective clients, should explain the availability and benefits of mediation and other dispute resolution processes, and describe the particular dispute resolution programs available in the district in which the case is pending. It should also require a return acknowledgment by that the client has received the notice and understands the available options.

To ensure that counsel transmit the notice to their clients, a statement of compliance with the notice transmittal requirement could be added to the Case Management Order, whether issued by the Court or submitted by counsel. If transmittal had not occurred, counsel would be obliged to take corrective action.

We believe that such notice may encourage settlements for several reasons. First, because the notice is issued by the court, and with the requirement that counsel transmit it to the client, any concern by counsel that broaching the topic of settlement (particularly early in the litigation), will cause the client to consider them "disloyal" or "weak" should be eliminated.

Second, the notice will educate parties and their attorneys about the mediation process and its advantages, particularly emphasizing how the parties' direct participation and the mediator's assistance can enable litigants to overcome obstacles that might so far have prevented resolution.

The notice proposal strikes the appropriate balance between a position for more muscular judicial intervention in settlement efforts, such as a mandatory mediation requirement, and a position against obligatory settlement initiatives along the litigation timeline, which is premised on the view that litigants are better able than the courts to determine the best time for initiating settlement negotiations.

Courts can adopt the notice proposal relatively quickly without undue cost or burden, although important details, such as the notice's content, its customization by individual districts, and clarification of the filings triggering its transmittal (particularly in cases with multiple defendants) will require further consideration.

April 2010

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