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Batson turns 30 but still has growing pains

BY TOM SCHANZLE-HASKINS, UNITED STATES MAGISTRATE JUDGE

In 1986, the United States Supreme Court in *Batson v. Kentucky*, 476 U.S. 79 (1986), held that a prosecutor's exercise of race-based peremptory challenges to jurors violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The original holding of *Batson* has been substantially extended, however, the granting of a writ of certiorari in *Foster v. Chatman*, No. 14-8349, which is currently pending before the United States Supreme Court, indicates that the ruling of the Court in *Batson* still remains difficult to implement.

In her opinion in *McWinston v. Boatwright*, 649 F.3d 618 (7th Cir., 2011), Chief Judge Diane Wood succinctly reviewed the Supreme Court's efforts to eliminate discrimination in jury selection as follows:

> For more than 130 years, federal courts have held that discrimination in jury selection

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Summary judgment motion practice in the Northern District of Illinois

BY GINA CALABRO

Last quarter's Federal Civil Practice Section Council newsletter featured an article which focused attention on the local rules of the Central and Southern Districts of Illinois governing motions for summary judgment. This quarter, we turn our attention to the Northern District of Illinois' local rules on the subject.

Local Rule 56.1 embodies the Northern District's rules on motion for summary judgment. And make no mistake, they are *rules*, not guidelines. Indeed, the Local Rules have the force of law. *See e.g., Grassi v. Information Sources, Inc.,* 63 F.3d 596, 602 (7th Cir. 1995) (citations omitted).

For district court and magistrate judges overseeing cases in the Northern

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offends the Equal Protection Clause. See, e.g., *Smith v. Texas*, 311 U.S. 128, 130–32, 61 S.Ct. 164, 85 L.Ed. 84 (1940); *Norris v. Alabama*, 294 U.S. 587, 599, 55 S.Ct. 579, 79 L.Ed. 1074 (1935); *Neal v. Delaware*, 103 U.S. 370, 397–98, 26 L.Ed. 567 (1881). Early cases focused on the systemic exclusion of racial minorities from juries through state statutes, e.g., *Strauder v. West Virginia*, 100 U.S. 303, 25 L.Ed. 664 (1880); later, attention turned to the race-based use of peremptory challenges by prosecutors. *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). More recently, the constitutional prohibition on discrimination in jury selection has been extended beyond race to gender. Moreover, the fact that society as a whole has an interest in the integrity of the jury system has been acknowledged. The anti-discrimination principle is thus not just a privilege of the criminal defendant; it constrains prosecutors, criminal defense lawyers, and civil litigants alike. Intentional discrimination by any participant in the justice system undermines the rule of law and, by so doing, harms the parties, the people called for jury duty, and the public as a whole. See *J.E.B. v. Alabama*, 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994) (applying *Batson* to gender-based peremptory strikes); *Georgia v. McCollum*, 505 U.S. 42, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992) (applying *Batson* to criminal defense counsel); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991) (applying *Batson* to civil litigants); *Powers v. Ohio*, 499 U.S. 400, 405–07, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991) (describing the harms of discrimination in juror selection); *Batson*, 476 U.S. at 86–88, 106 S.Ct. 1712. As this case illustrates, however, discrimination in the selection of jurors has not yet been eradicated.

While a litigant is not entitled to a jury composed of members of his or her race or gender, *Nehan v. J.B. Hunt Transportation, Inc.*, 179 Fed.Appx. 954 (7th Cir., 2006) (see also *U.S. v. Nururdin*, 8 F.3d 1187, 1189-90 (7th Cir., 1993), discrimination in the exercise of peremptory challenges when selecting jurors is unconstitutional.

Expansion of the coverage of *Batson*

In *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), the Supreme Court applied *Batson* to civil litigants as well as criminal defendants. In *J.E.B. v. Alabama*, 511 U.S. 127, 129 (1994), the Supreme Court held that gender, like race, is an unconstitutional basis for exercising peremptory challenges. In *Powers v. Ohio*, 499 U.S. 400, 402 (1991), the Supreme Court held that a litigant may object to race-based exclusions of jurors effected through peremptory challenges whether or not the objecting party and the excluded juror share the same race.

Courts have, however, declined to expand the application of *Batson* to apply to disparate impact as a basis for sustaining a *Batson* challenge. In rejecting a *Batson* challenge suggesting that the proffered explanation for the strike, bias against law enforcement, is not race-neutral because African-Americans are disproportionately affected by negative interactions with law enforcement, the Seventh Circuit recently noted that defendant must show discriminatory intent because disparate impact does not violate *Batson*. *U.S. v. J.B. Brown, Jr.*, 809 F.3d 371, 375-376 (7th Cir., 2016). See *Hernandez v. New York*, 500 U.S.

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352, (1991)(plurality opinion).

Procedure for use of *Batson* challenges

Under *Batson*, discriminatory peremptory challenges are evaluated using a three-part test. First, the opponent of the strike must make a prima facie showing that the striking party exercised the challenge because of a discriminatory reason. Second, the striking party must proceed to articulate a race or gender-neutral reason for the challenge. After the race or gender-neutral reason is stated by the striking party, the Court must determine whether the opponent of the strike has carried his burden of proving purposeful discrimination. The ultimate burden of persuasion regarding race or gender-based motivation rests with and never shifts from the opponent of the strike. *Alverio v. Sam's Warehouse Club, Inc.*, 253 F.3d 933, 939-940 (7th Cir., 2001).

Batson is not self-executing. It is the duty of the party challenging the opponent's peremptory challenge to make a *Batson* objection. The Court should wait for an objection before intervening in the process of jury selection to set aside a peremptory challenge. *Doe v. Burnham*, 6 F.3d 476, 478 (7th Cir., 1993).

The Court of Appeals cannot reverse a trial court's finding that a proffered, race-neutral reason for a strike was credible unless the District Court's finding is clearly erroneous, even if the Court of Appeals finds the reason dubious. While the striking party's explanation "need not rise to the level justifying exercise of a challenge for cause", it must be "clear and reasonably specific" and "related to the particular case to be tried". *Dunham v. Frank's Nursery & Crafts, Inc.*, 967 F.2d 1121, 1124 (7th Cir., 1992).

Problems with application of *Batson* rules

As noted above, a reviewing court gives deference to the finding of the District Court in determining whether a *Batson* violation occurred and will reverse only if the findings of the trial court are clearly erroneous. The Seventh Circuit has noted that ordinarily this deference is accorded because the trial court generally conducts the *Batson* inquiry contemporaneously with the voir dire procedure and is in the best position to witness statements of the party challenging the juror and to assess the credibility of the party exercising the challenge when they justify the exercise of their peremptory challenge under the *Batson* procedures. *Holder v. Welborn*, 60 F.3d 383, 388 (7th Cir., 1995).

The Court in *Holder*, however, conducted a de novo review because *Batson* was decided during the pendency of Holder's appeal and the *Batson* hearing was held in a habeas corpus proceeding years after the original impanelment of the jury. In *Holder*, the Court held that a prosecutor's concern that an African-American juror would harbor feelings of selective prosecution against the prosecutor's office based on the fact that the murder charges against a white suspect in the shooting death of the African-American juror's brother were dropped within two years of Holder's trial was a race-neutral justification for the exercise of a peremptory strike. In finding there was no *Batson* violation, the Court reviewed the Supreme Court's Opinion in *Batson* and noted that the Equal Protection Clause only forbids the prosecutor to challenge potential jurors solely (emphasis in original) on account of their race. *Holder v. Welborn*, Id. at 388.

The Seventh Circuit affirmed the District Court's denial of Holder's petition for habeas relief. In *Holder*, Judge Cudahy dissented. He asserted that "It is no answer, contrary to the majority's opinion, to suggest that *Batson* only prohibits strikes occurring 'solely' on the basis of race", and suggested that the case be remanded to the trial court to determine whether or not there were mixed motives in which race played an impermissible role for striking the African-American juror. *Holder v. Welborn*, *Id*. at 391.

The difficulty in applying the "sole motive" test to *Batson* challenges is illustrated by the holding of the Seventh Circuit Court in *Pettiford v. Durm*, 175 F.3d 1020, unpublished opinion (7th Cir., 1999). The Court in *Pettiford* dealt with the application of *Batson* during the trial of a civil rights complaint filed under 42 U.S.C. §1983. In that case, the plaintiff asserted that the defense had used a peremptory challenge to strike an African-American juror for racial reasons. The following is the colloquy regarding the contention that the juror was impermissibly struck on the basis of race:

> THE COURT: The record needs to reflect that there is one African-American on this jury remaining and the defendants have just struck that defendant-or that juror and they need to articulate a rational reason for that, a race neutral reason for that strike.
>
> MR. BYRON [defendants' attorney]: The reason we are striking is because we believe that she might be biased with regard to race.
>
> THE COURT: It has to be a different reason than that. Got to have an articulable reason that has to do with something other than race.
>
> MR. BYRON: I need to go back and look at our card.
>
> THE COURT: Wait a minute, just a second. Unless the plaintiff doesn't care.
>
> MR. HENDREN [plaintiff's attorney]: Your Honor, we-
>
> THE COURT: You do care?
>
> MR. HENDREN: Yes, sir.
>
> THE COURT: Okay.
>
> (Counsel conferred outside record)
>
> (At the bench)
>
> THE COURT: All right, Mr. Byron.
>
> MR. BYRON: Yes. Number one, she's not working; and number two, she has been a claims rep and has

> litigation experience.
>
> THE COURT: Do you have any comment you want to make?
>
> MR. HENDREN: Yes, your Honor. I think they already stated the reason on the record for striking her was because of her race, and these are [pretextual] reasons, neither one of which would impugn her ability to fairly judge the evidence in the case.
>
> THE COURT: Well, an articulable reason is an articulable reason, and it doesn't have to be much. And the fact that there is a history with an insurance company is enough statement to make, and so I'm going to excuse her. Thank you.

From this colloquy, it clearly appears that a motivating reason for striking the juror was the juror's race. However, the Seventh Circuit, relying upon the holding in *Holder*, found there was no *Batson* violation where both racially discriminatory and race-neutral reasons are given for the strike. The Seventh Circuit in *Pettiford* ruled that, so long as a juror is not struck *solely* (emphasis added) on account of race, no equal protection issues arise.

Although *Holder* has not specifically been reversed by the Seventh Circuit, its current vitality appears to be questionable. In *Snyder v. Louisiana*, 128 S.Ct. 1203 (2008), the Supreme Court evaluated a *Batson* challenge in a Louisiana death penalty case. In *Snyder*, the prosecutor had used peremptory strikes to eliminate African-American prospective jurors. One of the jurors struck by the prosecutor was an African-American college student. The prosecutor gave two allegedly race-neutral reasons for striking the juror. The first was that the juror looked nervous. The second reason was that the student was concerned his jury service or sequestration could interfere with his student-teaching obligations needed for his college course. The Court, however, contacted the Dean of the juror's college who indicated he would work with juror to make up lost teaching time if he missed student teaching due to the trial. The prosecutor's reason for excluding the student was that the student may have been inclined to find the defendant guilty of a lesser included offense to obviate the need for a death penalty phase of the trial in order to return to his student teaching. The Court found this reasoning "highly speculative and unlikely" in light of the offer of the college dean to work with the student to make up missed student teaching time and the short duration of the trial which was known to the prosecutor. *Snyder*, *Id*. at 128 S.Ct. 1204-1205. In reaching this conclusion, Justice Alito commented:

> In other circumstances, we have held that, once it is shown that a discriminatory intent was a substantial or motivating factor in an action taken by a state actor, the burden shifts to the party defending the action to show that this factor was not determinative. (citation omitted) We have not previously applied this rule in a *Batson* case, and we need not decide here whether that standard governs in this context.

Snyder, *Id*. at 128 S.Ct. 1212.

If the Seventh Circuit holding in *Holder* is viewed under the substantial or motivating factor test discussed above, it could create a question as to whether a racial reason for a peremptory challenge is a "substantial or motivating factor" as opposed to the "sole factor" under the test used by the *Pettiford* court.

Batson returns to the Supreme Court

The petition for writ of certiorari in *Foster v. Chatman*, No. 14-8349, was filed on January 30, 2015. The U.S. Supreme Court granted the petition for a writ of *certiorari* on May 26, 2015. The Court heard oral argument on November 2, 2015 and will issue an opinion in 2016.

Foster v. Chatman provides a look into the pretextual exercise of peremptory challenges and how they may have been used by prosecutors. Timothy Foster is an African-American man who has been on death row for the past 28 years in Georgia. He claims that the prosecutors at his trial violated *Batson* by striking four African-American prospective jurors during jury selection. Foster was tried, convicted, and sentenced to death by an all-white jury.

At trial, Foster objected to the use of four peremptory challenges by the prosecutors. The prosecutors gave seemingly race-neutral reasons for their peremptory challenges and the trial judge and reviewing courts agreed that the race-neutral reasons were sufficient. Foster, however, was able to obtain the prosecutors' notes years later through the Georgia Open Records Act. The notes revealed that the prosecutors were working from a jury list that was color coded by race, juror cards that indicated race, and a list of "definite no's" that included all the prospective African-American jurors. Foster argues that the notes reveal the prosecutors were taking race into account at every step of jury selection in violation of the Supreme Court's holding in *Batson*.

At oral argument in the *Foster* case, the Court asked counsel for Foster to first address whether the case should be remanded to the Georgia Supreme Court to require that court to accept the review of the writ of certiorari, which they had denied. The Court then went on to hear arguments on the merits of the case. The questioning of Justice Sotomayor indicates a willingness to apply the substantial and motivating factor test discussed by Justice Alito in *Snyder*. This could implicate a change in holdings such as the Seventh Circuit's decision in *Holder* which permits a peremptory challenge if it was not "solely" motivated by race.

The following colloquy between counsel for petitioner illustrates the Court's interest in examining the reliance on one legitimate reason for striking a juror when other reasons are present:

> JUSTICE SOTOMAYOR: -- I have found some circuit courts who have a rule

on appeal or on habeas which is if they can find one legitimate reason for striking a juror --

MR. BRIGHT *(counsel for petitioner Foster)*: Yes.

JUSTICE SOTOMAYOR: -- that's enough to defeat a Batson challenge. Do you believe that's an appropriate rule? Are you suggesting a different approach to the question?

MR. BRIGHT: Well, it can't -- I -- I would suggest it -- it can't possibly be. Because this Court said in Justice Alito's opinion in Snyder v. Louisiana that where the peremptory strike was shown to have been motivated in substantial part by race, that it could not be sustained. And -- excuse me -- I -- I would suggest to you, it shouldn't even really say substantial. Because if this Court, as it said so many times, is engaged in unceasing efforts to end race discrimination in the criminal courts, then a strike that -- strikes motivated by race cannot be tolerable.

And, of course, as -- as pointed out here in the -- in the amici, this is a serious problem, not just in this case, but in other cases where people come to court with their canned reasons and just read them off. That happened in this case, where one of the reasons that was given was just taken verbatim out of a -- two of the reasons given were taken verbatim out of a reported case. So you don't have the reason for the lawyer in this case. He said my personal preference. It wasn't his personal preference. It was the personal preference of some U.S. attorney in Mississippi who gave that reason, and then it was upheld on appeal by -- by the Fifth Circuit.

It will be of interest to see what the Court does with this opportunity to revisit *Batson*. A recent and well researched article, "Foster v. Chatman: A Watershed Moment for Batson and the Peremptory Challenge?"[1] by Nancy S. Marder, Professor of Law and Director of Justice John Paul Stephens Jury Center, IIT Chicago-Kent College of Law, outlines, in detail, options open to the Supreme Court in reviewing *Foster v. Chatman*.

Professor Marder notes, in her abstract to the lengthy and well-reasoned article, that the Court could either take a minimalist approach in which it could simply find a *Batson* violation, or could tweak the *Batson* test in different ways, such as giving more weight to discriminatory effects of practices or by devising a stronger remedy. In the view of Professor Marder, the only remedy that is adequate to the task is the one that Justice Marshall suggested in his *Batson* concurrence thirty years ago, the elimination of the peremptory challenge.

Thus, though the *Batson* holding has been in effect for thirty years, the Courts and commentators still grapple with how to best implement it in the trial court. ■

1. Marder, Nancy S., Foster v. Chatman: A Watershed Moment for Batson and the Peremptory Challenge? (2015). Available at SSRN: http://ssrn.com/abstract=2681390 or http://dx.doi.org/10.2139/ssrn.2681390

7th Circuit E-Discovery Pilot Program": Mediation Program

At a time when discovery issues concerning ESI (electronically stored information) are at an all-time high, the Seventh Circuit E-Discovery Pilot Program is once again ready to help. The Program has a new mediation program, free to litigants and specializing in e-discovery issues in small cases.

The Pilot Program was formed in 2009 and led by retired judges Jim Holderman and Nan Nolan, now both with JAMS. The group of volunteer attorneys and experts in the e-discovery world developed new principles for handling e-discovery issues, drafted a model discovery plan and model case-management order, and provided exciting and timely free educational programming.

Now, the Pilot Program is offering free, trained mediators to civil cases. The mediators are Program members from the plaintiff's bar, defense bar, government, in-house and public interest sector. A mediator is assigned randomly and must run conflicts checks. Criteria for selecting cases for the program include disputes in smaller civil cases where the parties and their counsel lack the experience and resources to resolve the discovery issues themselves.

If both parties to a dispute are interested in using the program, each party must submit a Submission Form and a Mediation Agreement jointly executed by the parties.

For more information about the program, visit <www.discoverypilot.com> ■

Summary judgment motion practice in the Northern District of Illinois

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District, counsel's failure—or outright refusal—to comply with the local rules is a continuing source of frustration, as demonstrated by numerous decisions. *See e.g. Malec v. Sanford,* 191 F.R.D. 581 (N.D. Ill. 2000); *Patstone v. Reilley,* No. 12 CV 50451, 2014 U.S. Dist. LEXIS 121816, at * (N.D. Ill. Sept. 2, 2014) (Johnston, J.). For litigators practicing in the United States District Court for the Northern District of Illinois, few requirements can be more challenging—or more misunderstood—than Local Rule 56.1. For counsel unfamiliar with the Local Rules of the Northern District of Illinois, Local Rule 56.1 can be downright daunting.

The Local Rule, which can be found on the court's website, states as follows:

> **(a) Moving Party.** With each motion for summary judgment filed pursuant to Fed.R.Civ.P. 56 the moving party shall serve and file—
>
> **(1)** any affidavits and other materials referred to in Fed.R.Civ.P. 56(e);
>
> **(2)** a supporting memorandum of law; and
>
> **(3)** a statement of material facts as to which the moving party contends there is no genuine issue and that entitle the moving party to a judgment as a matter of law, and that also includes:
>
> **(A)** a description of the parties, and
>
> **(B)** all facts supporting venue and jurisdiction in this court.
>
> The statement referred to in (3) shall consist of short numbered paragraphs, including within each paragraph specific references to the affidavits, parts of the record, and other supporting materials relied upon to support the facts set forth in that paragraph. *Failure to submit such a statement constitutes grounds for denial of the motion.* Absent prior leave of Court, a movant shall not file more than 80 separately-numbered statements of undisputed material fact.
>
> If additional material facts are submitted by the opposing party pursuant to section (b), the moving party may submit a concise reply in the form prescribed in that section for a response. All material facts set forth in the statement filed pursuant to section (b)(3)(C) will be deemed admitted unless controverted by the statement of the moving party.
>
> **(b) Opposing Party.** Each party opposing a motion filed pursuant to Fed.R.Civ.P. 56 shall serve and file—
>
> **(1)** any opposing affidavits and other materials referred to in Fed.R.Civ.P. 56(e);
>
> **(2)** a supporting memorandum of law; and
>
> **(3)** a concise response to the movant's statement that shall contain:
>
> **(A)** *numbered paragraphs, each corresponding to and stating a concise summary of the paragraph to which it is directed***,** and
>
> **(B)** a response to each numbered paragraph in the moving party's statement, including, in the case of any disagreement, *specific references to the affidavits, parts of the record, and other supporting materials relied upon***,** and
>
> (C) a statement, consisting of *short numbered paragraphs*, of any additional facts that require the denial of summary judgment, including *references to the affidavits, parts of the record, and other supporting materials relied upon***.** Absent prior leave of Court, a respondent to a summary judgment motion shall not file more than *40 separately-numbered statements* of additional facts. All material facts set forth in the statement required of the moving party will be deemed to be admitted unless controverted by the statement of the opposing party.

See Local Rule 56.1 (emphasis added).

Perhaps the most important advice to offer moving parties with respect to Local Rule 56.1(a) is to prepare your 56.1(a) statement with care. Abide by the limits imposed on the number of paragraphs that may be offered. Keep in mind that "short-numbered paragraphs" mean only a sentence or two. Support each fact with admissible evidence. And do not offer legal conclusions in the statement of facts. Judges will routinely disregard—or strike—statements of fact that exceed the limitation

on numbered paragraphs, contain multiple statements of fact within each numbered paragraph or contain unsupported factual assertions or legal conclusions.

Support each response with admissible evidence. Parties frequently respond to Local Rule 56.1 statement without providing admissible evidence to support their denial. When they do, they run the risk of having their responses deemed admitted. In fact, when parties fail to counter Rule 56.1 statements with admissible evidence, judges routinely deem them admitted.

A final word of advice—carefully review your judge's website for any standing orders on motions for summary judgment. Most all district court and magistrate judges address summary judgment motions in their standing orders and quite a few impose specific requirements above and beyond those imposed by Local Rule 56.1. For example, Judge Brown's Standing Order has specific requirements on how parties' summary judgment papers should be formatted and presented. Judge Ellis' Standing Order imposes a meet and confer requirement. She also requires the parties to submit a joint statement of undisputed material facts. These are but examples. Each judge's standing orders are available on the Northern District of Illinois' website. Ignore them at your—and your client's—peril.

In the end, what does it matter? Because the court ultimately resolves such a large number of its cases on summary judgment. It provides a party with a means to achieve a judgment without a costly trial. And it provides the court an opportunity to streamline litigation and decide, based on the evidence, whether there is any material factual dispute that requires a trial.

Local Rule 56.1 helps aid the court by streamlining summary judgment proceedings and presenting the issues in an orderly fashion. *Patstone*, 2014 U.S. Dist. LEXIS 121816, at *3. And, as shown above, for a party who fails to abide by Local Rule 56.1's requirements, the consequences are dire. Failure to comply with the Local Rules may result in the court striking briefs, disregarding statements of fact, deeming statements of fact admitted and denying summary judgment. *See* Judge Alonso Standing Order, citing *Modrowski v. Pigatto*, 712 F.3d 1166, 1169 (7th Cir. 2013); *Keeton v. Morningstar, Inc.*, 667 F.3d 877, 844 (7th Cir. 2012). Take heed and draft your summary judgment papers in accordance with the Local Rules. Your client may not appreciate your talents if you do, but they will surely understand your failure to do so. ■

Recent developments in the Seventh Circuit's class action jurisprudence: Not as pro-plaintiff as they first appear

BY DANIEL THIES

The Seventh Circuit has traditionally built a reputation as one of the more pro-defendant jurisdictions for defendants in class action lawsuits. But in the past two years the Seventh Circuit has issued a spate of decisions appearing to favor class plaintiffs. The court has rejected a "heightened ascertainability" requirement for class certification,[1] endorsed a broad understanding of standing in data breach cases,[2] and abandoned its rule allowing defendants to "pick off" named plaintiffs by offering full compensation for their individual claims.[3] The court also issued a trio of decisions certifying classes in the face of non-trivial individualized issues,[4] seemingly downplaying the significance of the Supreme Court's re-emphasis on the commonality and predominance requirements in *Wal-Mart* and *Comcast.*

Upon closer examination, however, none of these decisions is as pro-plaintiff as the first glance suggests. In each of these three areas, the court's holding overshadows more nuanced reasoning that may not always play in plaintiffs' favor. Although these cases may indeed make the Seventh Circuit's jurisprudence slightly more pro-plaintiff than it was in earlier days, they do not represent a significant lurch in that direction.

Heightened Ascertainability: *Mullins v. Direct Digital* involved the requirement implicit in Rule 23 that the members of a class be "ascertainable." That has always meant at least that a class must be defined clearly based on "objective" rather than "subjective" factors. *Id.* at 659-60. For example, a class cannot be defined by its mental state. Some federal circuits had gone further and imposed a "heightened" requirement that there also be "a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition." *Id.* at 662 (citing *Byrd v. Aaron's Inc.*, 784 F.3d 154, 161-71 (3d Cir. 2015)). The Seventh Circuit squarely rejected this heightened requirement in *Mullins*, holding that even a class of individual purchasers of a consumer product whose identities are not recorded in a database and do not possess receipts can be certified and ascertained through "self-identification by affidavit."

But the court's reasoning suggests that this rejection of a "heightened" ascertainability requirement may have little practical consequence. The court rejected the heightened requirement in part because the interests of reliability and administrative feasibility are "already adequately protected by [Rule 23's] explicit requirements." *Id.* at 662. The court noted in particular the superiority requirement of Rule 23(b)(3), which requires that a class action be "superior to other available methods for fairly and efficiently adjudicating the controversy." This standard neatly bakes in something like the "administrative feasibility" required by heightened ascertainability, making the latter requirement unnecessary.

The Seventh Circuit explained that doing away with heightened ascertainability was still significant because it forces trial courts to examine administrative inconvenience in a comparative context. Put differently: Is the class action *more* administratively inconvenient than other possible methods of adjudication? If not, then certification may be appropriate. According to the Seventh Circuit, this means trial judges will need to tolerate some level of administrative inconvenience if alternatives are worse.

But is this standard really any different than the heightened ascertainability requirement as it exists in other circuits? After all, *feasible* is a near-synonym for *possible*, suggesting that the heightened ascertainability requirement too allows certification if judicial management of the class is possible. *Mullins* may thus simply shift some of the action from ascertainability to superiority, but it is not obvious that this change will make much difference in the vast majority of cases where ascertainability is an issue.

"Picking Off" the Named Plaintiff. In *Chapman v. First Index, Inc.*, the Seventh Circuit abandoned its longstanding practice of allowing a defendant to moot a named plaintiff's claim simply by offering him all of the relief he individually requested. This practice left plaintiff's attorneys without a named plaintiff to prosecute the suit, meaning that, at least some of the time, the suit would be over. The court stopped this practice in *Chapman*, reasoning that an "offer of judgment does not satisfy the Court's definition of mootness, because relief remains possible." *Id.* at 786. Several months after *Chapman*, the Supreme Court went the same way. *See Gomez v. Campbell-Ewald Co.*, -- S.Ct. -- (2016).[5]

But this holding too is likely to have less significance than some observers believe. Prior to *Chapman*, class action plaintiffs routinely avoided a "pick-off" simply by filing a pro forma motion for class certification with or shortly after serving the complaint. Because the motion for class certification was pending, the Seventh Circuit held that satisfying the named plaintiff's individual claim could not moot the entire case. District courts

in the Circuit recognized this stratagem and typically allowed such motions to remain on file indefinitely or strong-armed defendants into stipulating that they would not engage in a "pick off" attempt. Although an unwary plaintiff might have been the subject of a successful "pick-off," any plaintiff's lawyer had an easy way to prevent that tactic.

Predominance: The next trilogy of cases involves the application of Rule 23(b)(3)'s requirement that common issues predominate over individualized issues. In three successive cases, the Seventh Circuit reversed the district court's denial of class certification on the ground that this requirement was not met. In none of the three cases, however, did the Seventh Circuit hold that the facts of the case *required* certification. Instead, the court remanded for further consideration after determining that the district court improperly applied a bright line test, rather than carefully weighing the particular facts of each case.

IKO Roofing, for example, involved a proposed class of purchasers of allegedly defective roofing shingles. The district court denied certification based on the rule that "'commonality of damages' is essential" and the fact that each customer's experiences with the shingles would inevitably vary. 757 F.3d at 602. The Seventh Circuit held only that this approach was too absolute, given that there may be situations where the variation in damages is minor, and remanded for a determination as to whether that was the case here. The holding was thus that the district court's analysis was inadequate, not that its ultimate conclusion was necessarily wrong. Moreover, although the Seventh Circuit endorsed the idea that a district court may certify a liability-only class (leaving individualized damages issues for later), it acknowledged that such a course is inappropriate where "practical considerations . . . may make class treatment unwieldy despite the apparently common issues." *Id.* at 603. Thus, far from endorsing the certification of large classes with significant individualized damages issues, this holding suggests such a course is appropriate only where the resulting damages proceedings are limited enough to be judicially manageable.

Similarly, in *Suchanek*, the Seventh Circuit reversed what it held to be the district court's conclusion that all issues must be common, a standard that it called "too strict a test." 764 F.3d 755; *see also id.* at 756. Again, the Seventh Circuit did not hold that certification was required, and again the court only remanded for the district court to perform the weighing of individualized questions against common questions that Rule 23(b)(3) actually requires. *Id.* at 759-61.

Finally, the Seventh Circuit's holding in *McMahon* follows the same pattern. This time the Seventh Circuit held that the district court improperly applied a rule that "the existence of individual issues of causation automatically bars class certification under Rule 23(b)(3)." 807 F.3d at 875. The Seventh Circuit noted that applying such an absolute rule was particularly inappropriate in *McMahon*, since plaintiff's claims arose under the Federal Debt Collection Practices Act, a strict liability statute that imposes statutory damages even in the absence of individual causation and damages. *Id.* at 876. As in the two cases discussed above, the Seventh Circuit remanded to allow the district court to weigh whether the individualized damages questions presented sufficient practical obstacles to preclude certification. *Id.* at 876.

In sum, *IKO Roofing*, *Suchanek*, and *McMahon* do not necessarily broaden the circumstances under which the predominance requirement is satisfied. Instead, they remind district courts that they cannot take judicial shortcuts to deny certification. Rule 23(b)(3) does not present a bright line rule, but instead requires a nuanced weighing of individualized questions against common questions to determine which predominate. But this rigorous analysis is at least as likely to benefit defendants as it is plaintiffs. Indeed, more often than not defendants are the party urging the district court to delve into the facts and consider the practicalities of trying a case as a class action. Despite the pro-plaintiff outcomes, therefore, these three cases do not shift the law in plaintiffs' favor as much as it may seem at first. ■

Mr. Thies is a lawyer at Sidley Austin LLP.

1. *Mullins v. Direct Digital, LLC*, 795 F.3d 654 (7th Cir. 2015).
2. *Remijas v. Nieman Marcus Grp., LLC*, 794 F.3d 688 (7th Cir. 2015).
3. *Champan v. First Index, Inc.*, 796 F.3d 783 (7th Cir. 2015).
4. *McMahon v. LVNV Funding, LLC*, 807 F.3d 872 (7th Cir. 2015); *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750 (7th Cir. 2014); *In re IKO Roofing Shingle Products Liab. Litig.*, 757 F.3d 599 (7th Cir. 2014).
5. The Supreme Court left open the possibility that a defendant may still be able to "pick off" a named plaintiff by depositing the full amount of the plaintiff's individual claim in an account payable to the plaintiff.

Judicial profile: Manish Shah

BY KATHRYN A. KELLY

District Judge Manish Shah has been on the bench for almost two years, after being unanimously confirmed by the Senate in April of 2014. The Standing Committee on Federal Civil Practice continues its tradition of introducing you to our new judges and brings you a profile of Judge Shah.

Judge Shah graduated from the Stanford University in 1994, and he received his law degree from the University of Chicago Law School in 1998. He served as an associate at Heller, Ehrman, White and McAullife in San Francisco from 1998 to 1999 when began his two year clerkship to Judge James Zagel on the United States Court for the Northern District of Illinois.

Following his clerkship, Judge Shah joined the United States Attorney's Office in Chicago in 2001, serving first in the General Crimes section. After serving ably in both the Narcotics and Public Corruption sections, he became Deputy Chief of General Crimes, followed by Deputy Chief of Financial Crimes and Special Prosecutions Section. He served as Chief of Criminal Appeals, ultimately being appointed to Chief of the Criminal Division.

Because Judge Shah came to the bench directly from the United States Attorney's Office, he was not on the criminal wheel until a year into his tenure. He inherited civil cases (randomly assigned from other judges) and began receiving new civil filings for a total of about 300 cases.

At two years on the bench, Judge Shah has conducted over a dozen civil trials and his criminal docket continues to grow. Understandably, the judge has found that criminal sentencing is the most difficult part of his job – a sentiment shared by many judges.

The court's docket is quite diverse, from patent cases to diversity tort cases and Title VII to Section 1983 actions, and everything in between. Surprised by the volume of prisoner litigation, the judge has become accustomed to *pro se* litigation that he had not experienced as a federal prosecutor. Judge Shah recruits pro bono counsel when necessary, including appointing settlement conference counsel. The judge generally handles his own discovery, referring only specific cases to the assigned Magistrate Judge. While he has done several settlement conferences himself, he finds that the experienced magistrate bench often provides the parties an insight that the judge who ultimately will rule on the merits may not be able to provide.

Having served on the 7th Circuit E-Discovery Pilot Program, the judge follows the Principles developed by the committee. He requires that persons with technical knowledge of any electronic discovery issue be present at hearings on ESI and conduct discussions with the other side.

Not surprisingly, the judge expects that attorneys are prepared and able to talk about the case at a status hearing. He prepares for the status hearing and expects the same from attorneys, enabling cases to move along. Judge Shah also reminds practitioners how small the legal world can become and suggests collegiality at all times.

Judge Shah has three law clerks, who mostly work on civil cases. His clerks have practiced prior to their clerkships and help the well-oiled machine of Judge Shah's chambers. Even with a full staff, the volume of cases and press of other business (like trials, discovery, and criminal matters) increases the amount of time it takes to issue a ruling on substantive, dispositive motions in civil cases.

When asked for any final tips to pass along to lawyers, Judge Shah reminds lawyers how much paper comes through chambers on the approximately 300 cases assigned to him. He reminds attorneys to consult his web page about the form the pleadings. He warns against the insertion of argument and non-responsive information in Rule 56.1 statements. He notes that while he is open to extensions of time, attorneys must give reasons for not being able to meet previously set dates. Trial dates are firm except under extenuating circumstances. In terms of civil trials, he sits eight or more jurors.

The Committee thanks Judge Shah for sharing his tips of the trade! ■

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Upcoming CLE programs

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May

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Wednesday, 05/04/16- Sangamo Club—Miranda: It's More Than Words. Presented by the Sangamon County Bar Association; co-sponsored by the ISBA. 12:30-1:30 pm.

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Thursday, 05/05/16- Friday, 05/06/16—CRO—15th Annual Environmental Law Conference. Presented by Environmental Law. Thursday- 8:45 am – 4:45 pm. Thursday reception- 4:45 – 6:00 pm. Friday – 8:30 am – 1:15 pm.

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Thursday, 05/12/16- Webinar—Introduction to Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 12:00- 1:00 pm.

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Tuesday, 05/17/16- Webinar—How to Build a Technology Plan for Your Firm. Practice Toolbox Series presented by the ISBA. 12-1 pm. ■