September 2013 Vol. 12, No. 1

ILLINOIS STATE BAR ASSOCIATION

Federal Civil Practice

The newsletter of the Illinois State Bar Association's Section on Federal Civil Practice

Iain Johnston: Our new Federal Magistrate Judge

By Eugene G. Doherty

The judges of the U.S. District Court have selected Iain D. Johnston to succeed P. Michael Mahoney as Magistrate Judge in the Western Division of the U.S. District Court for the Northern Division of Illinois. I had the pleasure to get to know Iain when he and I served as clerks to then Appellate Court Justice Philip G. Reinhard. I took a liking to Iain right away because, like me, he was a fan of a program which was new to airways in the those days: The Simpsons. For those of you who agree that this is a sufficient measure of a person's character, you can skip the rest of this article. Some of you, though, may be interested to know more about our incoming magis-

Continued on page 2

Emergency motions... is there really a fire?

By Lisle A. Stalter

It seems that there is a proliferation of "emergency" motions. In the last year or so, I have had three different "emergencies" where notice is received late the afternoon before (or once even during the night after the office has closed) that an emergency motion is being filed and set for hearing the next morning. Interestingly, the judge did not find any of these emergencies. A review of the rules applicable to emergency motions may be useful.

The Rules of Federal Procedure do not specifically address emergency motions. The Rules do provide that a court may establish regular times for hearings on motions and may adopt its own rules of practice. Fed. R. Civ. P. 78 and 83. Additionally, judges may regulate practice in their courtrooms as long as it is consistent with federal law, rules adopted under federal law and the district's local rules. Fed. R. Civ. P. 83.

What is an Emergency?

Of the three District Courts in Illinois, only the Northern District has adopted a specific rule addressing emergency matters. The Southern District judges refer to the process of emergency motions in their case management procedures while there are no written rules or procedures from the judges of the Central District.

The Northern District

Local Rule 77.2 defines what an emergency matter is … one that delay of the regular process would cause *serious and irreparable harm* to one or more parties. NDIL-R 77.2(a)(3) (emphasis added). In the Northern District, under the general rules a motion can be brought before the court with as little as three days notice. NDIL-LR 5.3(a)(1) (personal service of notice may be provided "no later than 4:00 p.m. of the second business day preceding the date of presentment"). To establish that the delay of the regular process (three days) would cause serious and irreparable harm can be a bit of a hurdle.

About 60% of the Northern District Judges have adopted their own case management procedures addressing how emergency motions are to be handled. Most of the judges follow the language of Local Rule 77.2 and simply require that the delay would cause serious harm to one or more of the parties (Judges Castillo, Chang, Coleman, Der-Yeghiayan, Dow, Feinerman, Kendall, Lee, St. Eve and Tharp). However, there are a number of judges who include additional crite-

Continued on page 3

INSIDE

***(Notice to librarians:** The following issues were published in Volume 43 of this newsletter during the fiscal year ending June 30, 2013: September, No. 1; December, No. 2; March, No. 3; June, No. 4.).*

If you're getting this newsletter by postal mail and would prefer electronic delivery, just send an e-mail to Ann Boucher at aboucher@isba.org

Iain Johnston: Our new Federal Magistrate Judge

Continued from page 1

trate judge.

Iain is no stranger to Rockford, as he is a cum laude graduate of Rockford College. While enrolled there he was an instructor in the college's youth soccer camps during the summer. After graduation, Iain attended The John Marshall Law School, from which he graduated cum laude in 1990.

After graduating from law school, Iain worked as a chambers law clerk in Judge Reinhard's Rockford office. His service as a law clerk extended to Judge Reinhard's time as U.S. District Court Judge. Iain says that learned a great deal from Judge Reinhard about being an effective judge. "I learned an understanding of the judge's role from him," Iain told me, "including the importance of allowing the attorneys to develop their case." He also learned the importance of thoroughness, including something as simple as "reading the whole case" when one is cited for authority. During the time he clerked for Judge Reinhard, Iain also served as a coach for the Boylan High School junior varsity soccer team.

After leaving his clerkship, Iain went to work for the office of the Illinois Attorney General. He ultimately achieved the rank of Unit Supervisor of the Civil Prosecutions Unit. He left the AG's office for the private practice of law, often being retained by public entities to represent them in defense of federal civil rights and other litigation. He ultimately co-founded his own firm, Johnston & Greene, which is where he worked as of the time of his appointment to the bench. The breadth of experience Iain has achieved is impressive: he has successfully achieved a multi-million dollar verdict for the plaintiff, and he has successfully defended cases ranging from challenges to creation of a TIF district to claims of racial profiling. He also authored the chapter on sentencing in Ralph Reubner's Illinois Criminal Procedure (4th Ed. 2004), as well as other legal articles; a number of his publications have been cited by courts of both Illinois and other jurisdictions. It is also worth noting that serving as Magistrate Judge will not be Iain's first judicial experience; he has served as a part-time administrative law judge during his time in private practice. Iain is acutely aware that he has "big shoes to fill" in following Judge Mahoney, before whom he has had the opportunity to practice in a number of cases. "Judge Mahoney impressed me with how he is able to give each case on his call all the time it needs, and yet manages to keep the call moving at a steady pace. His efficiency is something I hope I will be able to continue." Practicing in Judge Mahoney's courtroom has also given Iain reason to look forward to working in Rockford on a regular basis. He told me that he has "always been impressed by the degree of professionalism and collegiality in the Rockford bar," and he is looking forward to the chance to become a permanent part of it.

Finally, if you don't have the chance to see our new magistrate judge in court, you may well see him out on a local running or biking path. He is an avid cyclist and runner, having completed 30 marathons. ■

FEDERAL CIVIL PRACTICE

Published at least four times per year.

Annual subscription rate for ISBA members: $25.

To subscribe, visit www.isba.org or call 217-525-1760

OFFICE
Illinois Bar Center
424 S. Second Street
Springfield, IL 62701
Phones: 217-525-1760 OR 800-252-8908
www.isba.org

CO-EDITORS
Regina W. Calabro
3500 Three First National Plaza
Chicago, IL 60602

Ambrose V. McCall
416 Main St., Ste. 600
Peoria, IL

MANAGING EDITOR/ PRODUCTION
Katie Underwood
kunderwood@isba.org

Postmaster: Please send address changes to the Illinois State Bar Association, 424 S. 2nd St., Springfield, IL 62701-1779.

Emergency motions... is there really a fire?

Continued from page 1

ria to what constitutes an emergency. Some judges require that the circumstances of the emergency could not have reasonably been anticipated (Judge Cole) or arise from unseen circumstances (Judges Cox, Johnston and Kim). And, there are a handful of judges that have a higher standard, in addition to being unforeseen, the matter must arise suddenly and unexpectedly and require immediate action in order to avoid serious or irreparable harm (Judges Brown, Gilbert, Keys, Mason, Schenkier and Valdez). The rest of the judges do not address what constitutes an emergency but only set forth procedural requirements.

The Central and Southern Districts

Neither the Central District nor the Southern District has a specific rule addressing emergency motions similar to the Northern District's rule. As such, there is no definition of emergency motion and the issue is left to the determination of the parties, of course with the agreement of the judge.

Other guidance

It is not too surprising that there is relatively little guidance from the courts on what constitutes an emergency. Maybe a comparison of two cases, unreported of course, will help in the analysis of what is an emergency.

In one case, the plaintiff who was an independent contractor sales representative filed an emergency motion for preliminary and permanent injunction seeking to require the defendant, the company for which he sells products, to allow him to acquire additional sales territory from another distributor. In the underlying cause of action the plaintiff alleged that the defendant breached their contract when it reduced the size of his sales territory. *Dawson v. W. & H. Voortman, Ltd.*, 1988 EL 72335 (N.D. Ill. 1988). In denying the preliminary injunctions, the court found that the plaintiff failed to properly and sufficiently plead this as matter requiring an emergency hearing. The court noted that all elements of the underlying relief must be sufficiently pled. In this case, the plaintiff failed to plead facts to support the request for preliminary injunction. The court further went on to note that although plaintiff could refile the emergency motion it doubted that the plaintiff could establish a sufficient basis for it as the relief requested was unrelated to the allegations in the underlying complaint and that it was unlikely that plaintiff had a reasonable likelihood of success on the merits of the original claim (two of the elements necessary to establish preliminary injunction). It should be noted that the court did not discuss the rationale of treating this as an emergency. This case is noted to emphasize that it is critical to have a proper motion in the first place.

Comparatively, the court did grant an emergency temporary restraining order in the *Warner Bros., Inc. v. Rooding* case. *Warner Bros., Inc. v. Rooding*, 1989 WL 76149 (N.D. Ill. 1989). In this case, the plaintiff sought a TRO against Ron Rooding to stop him from taking an advertised, unendorsed, jump from a helicopter in a batman outfit, in conjunction with the release of the new Batman movie. Although Warner Brothers sent Rooding a cease and desist letter, as late as the day before the planned jump, Rooding would not agree to cancel the jump. Warner Brothers then filed the emergency TRO and set it for hearing the morning before the planned 1:00 p.m. jump. The court analyzed the facts under the parameters of the TRO and found that the elements were met and issued the order. As can be ascertained from the facts, the timing was critical in this matter and a delay of the regular process would have resulted in harm to Warner Brothers. In addition of meeting the requirements of emergency motions, Warner fully pled and established the underlying elements to support the grant of the TRO in its favor.

The lesson from comparing these two cases is that of key importance in pleading an emergency motion is to sufficiently plead facts to fully support the underlying relief being requested. Failure to do so will result in a denial of the emergency motion, not necessarily because it was not an emergency, but because the failure to adequately plead facts to support the relief being requested.

Proceeding with an Emergency

The Northern District

Although there are some minor variations on the process of proceeding with emergency motions, the general factor common among all judges is that the courtroom must be contacted. Some judges specifically require that the courtroom be contacted before filing the motion where a determination will be made on the emergency nature of the motion while others do not specify the timing of filing the motion but require that the courtroom be contacted for scheduling. Almost all judges who specifically address the issue or emergency motions require that reasonable efforts be made to provide opposing counsel actual notice of the motion.

At least one judge also requires a showing that a good faith effort was made to resolve the emergency with opposing counsel (Judge Lefkow).

Although the practice of law and the numerous deadlines attorneys face make motions for extensions necessary at times, the rules and the judge do not agree that this would necessarily qualify as an emergency matter. Although not dismissing such motions completely, the Local Rule 77.2 and the judges specify that motions for extension of time are unlikely to qualify as an emergency.

The Central and Southern Districts

In both Districts, the local rules set an automatic briefing schedule for motions that are filed. In addition, the rules in both of these Districts provide that the general motions, even the ones which would typically be of an emergency nature, are not to be set for hearing by the party filing the motion.

Most of the Judges in the Southern District have adopted case management procedures which provide for how to proceed with matters that require immediate attention and where the usual filing process will cause undue delay. Direct communication should be made with chambers (either the law clerk or deputy) but only with the consent or in concert with opposing counsel or *pro se* litigants (Judges Herndon, Proud and Wilkerson). Judge Murphy provides for the scheduling of a telephone conference to address urgent issues that arise. And Judges Herndon and Stiehl indicate that for a temporary restraining order the clerk's office should be advised of the need for an immediate hearing and then the courtroom should be contacted to schedule such hearing.

The Central District Rules does provide that emergency oral motions addressing discovery issues can be addressed at the discretion of the presiding judge and that the hearing will be via telephone conference. CDIL-LR 37.3(B). For emergency issues that are not

related to discovery, there is no other specific guidance from the judges in the Central District on how to proceed with a matter that requires immediate attention. Ideally most of these issues can be worked out with opposing counsel. But, even so, emergencies do arise and presumptively following a practice similar to that set forth in the Southern District would be sufficient … contact the clerk's office or the judges' chambers for scheduling such a matter.

Another Option

Creative attorneys may be able to use the various elements of Rule 16 of the Federal Rules of Civil Procedure to set up a process for addressing emergency matters. Under subsection (c)(2)(L) the court can adopt special procedures for managing potentially difficult cases. F. R. Civ. P. 16(c)(2)(L). Additionally, under subsection (c)(2)(P) the court may take appropriate action to facilitate the just, speedy, and inexpensive disposition of the case. F. R. Civ. P. 16(c)(2)(P). This may be as simple as setting forth the procedure for bringing an emergency matter to the court. However, before entering such an order, the court will probably want to know what potential emergency issues are contemplated and most likely will attempt to see if there is a way to avoid the emergency. Of course, if it is a true emergency, the situation is one that could not have been foreseen otherwise it could be addressed in the regular motion practice or the scheduling order.

Conclusion

Emergencies that need the court's involvement do arise from time to time in the practice of law. If such is the case be sure to follow the process established by the court and the particular judge to whom the case is assigned. But, keep in mind that to be able to be given relief on an emergency motion, the underlying relief requested *must* be sufficiently pled for the court to grant the relief. ■

Lisle Stalter is a principal Assistant State's Attorney in the Civil Trial Division of the Lake County State's Attorney's Office. The comments in this article are solely those of the author and are not to be attributed to the office. The author would like to express a special thank you to Ambrose McCall for his comments on the other options and practice in the Central District.

The Forum-Defendant rule bars removal of citation action

By Ambrose V. McCall

I. The Forum-Defendant Rule And Its Place Within The Framework of Removal

Now that attorneys have found their misplaced maps stuffed inside their vehicles after various summer adventures, they might want to review the nonjurisdictional territories of removal. Illinois practitioners in federal court frequently confront issues related to removal of actions from state court to federal court. As lawyers, we are trained to focus on jurisdictional issues, which at times may narrow our view of the statutory challenges one can make to removal. One such bar is the forum-defendant rule, which precludes a party from removing an action to federal court when a properly joined and served defendant "is a citizen of the State in which such action is brought." 28 U.S.C. §1441(b)(2). That challenge is nonjurisdictional, and must be raised within 30 days of the service of a notice of removal. 28 U.S.C. §1447(c); *see also Rubalcava v. Rock Island County,* ___F.Supp.2d___, 2013 WL 3943253 at *2 (C.D. Ill. July 30, 2013)("In essence, statutory defects look to how the case made it to federal court, while jurisdictional defects concern whether it should be in federal court in the first place.").

II. Seventh Circuit Finds Subject Matter Jurisdiction Exists Over Citation Action

In *GE Betz, Inc. v. Zee Co.,* 718 F.3d 615 (7th Cir. 2013), the Seventh Circuit decided a number of legal issues, including whether a citation to discover assets respondent is a defendant for purposes of removal. The federal court component of this case occurred in Illinois, after the plaintiff obtained a multimillion dollar judgment against the defendant in a North Carolina state court. *Id.*, 617-18. Plaintiff then learned that nearly all of defendant's assets were covered by a financial arrangement with BMO Harris Bank before final judgment was entered. *Id.* at 618-19. Plaintiff next registered the North Carolina judgment in an Illinois state court in Cook County. *Id.* at 619. After plaintiff served BMO Harris Bank with a citation to discover assets, the defendant removed the state court proceeding to federal court under 28 U.S.C. §1441(b), claiming diversity jurisdiction existed. *Id.* at 620. Plaintiff objected to removal on two grounds. First, that subject matter jurisdiction barred the removal, and second, that the forum-defendant rule applied and precluded removal. *Id.*

The facts on corporate citizenship revealed that BMO Harris Bank is a Delaware corporation, with its principal place of business in Illinois. *Id.* at 619. Plaintiff served BMO Harris Bank with a citation to discover defendant's assets and thereby froze all of defendant's property held within the possession of BMO Harris Bank. *Id., citing* 735 ILCS 5/2-1402. The procedural history reveals that when BMO Harris Bank moved to quash the citation in Cook County Circuit Court, defendant filed a notice of removal and alleged that removal was proper based on diversity jurisdiction under 28 U.S.C. §1441(b). *Id.* at 620. Defendant alleged that plaintiff was a Pennsylvania corporation, principally located in Pennsylvania, and was a citizen of Pennsylvania. *Id.* Defendant identified itself as a Tennessee corporation, with its principal place of business in Tennessee, making it a Tennessee citizen. *Id.* Defendant further alleged that the amount in controversy, $7,604,083, exceeded the diversity jurisdictional amount of $75,000. *Id.*

BMO Harris Bank neither joined in nor consented to defendant's notice of removal. In federal district court, plaintiff made an oral motion to remand the case back to Cook County Circuit Court based on improper removal. Prior to a hearing, plaintiff filed a written memorandum that solely discussed the lack of subject matter jurisdiction and did not raise the forum-defendant rule, which is a statutory defect. *Id., citing Hurley v. Motor Coach Indus., Inc.,* 222 F.3d 377, 378-80 (7th Cir. 2000). The district court orally denied plaintiff's motion to remand and found defendant's removal proper after finding the citation proceeding constituted "an independent proceeding," rather than an ancillary proceeding. The district court found that it had subject matter jurisdiction over the case

as long as diversity requirements were satisfied. *Id.* As a result, if BMO Harris Bank was properly characterized as a defendant, then the forum-defendant rule would apply.

Plaintiff moved the district court to reconsider, and urged that BMO Harris Bank was "the true party in interest" in the case. If the bank qualified as a defendant with Illinois citizenship, the forum-defendant rule would apply. *Id.* at 620-21. The district court denied the motion to reconsider and found that BMO Harris Bank was not a defendant. Upon deciding that the federal court citation case was sufficiently distinct from the North Carolina state court proceeding, and that diversity jurisdiction requirements were met, the district court found that it had subject matter jurisdiction. According to the district court, the defendant was the only party in interest besides plaintiff, and their citizenship and amount in controversy established diversity jurisdiction. *Id.* The Seventh Circuit noted that the district court did not consider the somewhat probable likelihood that the defendant would default and prove unable to satisfy its debt obligations to BMO Harris Bank, thereby undermining the district court's conclusion that the bank was a non-party. *Id.*

A denial of a motion to remand requires an initial determination of subject matter jurisdiction, *Id.* at 622, *citing Schur v. L.A. Weight Loss Ctrs., Inc.*, 577 F.3d 752, 758 (7th Cir. 2009), which is reviewed under a de novo standard. *Id.* The Seventh Circuit first examined plaintiff's subject matter jurisdiction argument. *Id.* Plaintiff urged that under 28 U.S.C. §1441(a), the Cook County Circuit Court proceeding was not a "civil action brought in a State court of which the district courts of the United States have original jurisdiction," and therefore did not qualify for removal. The Seventh Circuit underscored its long-standing interpretation of 28 U.S.C. §1441(a) as only permitting removal of what it categorizes as "independent suits" rather than "ancillary or supplemental proceedings." *Id.* at 622-23, *citing Travelers Property Cas. v. Good*, 689 F.3d 714, 724 (7th Cir. 2012). The cited policy of only allowing removal of "independent suits" has a long history. *Id.* at 623, *citing Barrow v. Hunton*, 99 U.S. 80, 83 (1878). The intent behind the policy is to prevent federal courts from wasting their time and resources by considering satellite elements of pending state court actions and judgments. *Id., citing Travelers*, 689 F.3d 724. Plaintiff stressed that the Cook County Circuit Court case qualified as a satellite element of the pending North Carolina state court suit where the judgment was actually entered. *Id.*

But the Seventh Circuit declined to identify any "bright-line formula" that distinguishes independent and removable state court proceedings from the ancillary and non-removable cases. *Id., citing Travelers*, 689 F.3d 724. In this instance, the presence of BMO Harris Bank led the Seventh Circuit to believe that the citation case was removable. The bank was a non-participant in the underlying North Carolina state court case. Its presence in the citation case was distinct from the subject matter at dispute in the North Carolina state court case. *Id.* Specifically, in the North Carolina proceeding, plaintiff and defendant were fighting about covenants not to compete and commercial practices, whereas in the Cook County Circuit Court case, plaintiff, the judgment creditor, sparred with the bank, the lien holder, over who had priority as a creditor. *Id.* In such a scenario, the Illinois citation proceeding was removable under 28 U.S.C. §1441(a). *Id.*

Plaintiff made a second jurisdictional argument premised on 28 U.S.C. §1963, which states that a "judgment in an action for the recovery of money or property entered in any court of appeals, district court, bankruptcy court, or in the Court of International Trade may be registered" in a federal court. *Id.* Plaintiff stressed that §1963 did not support the registration of a state court judgment in a federal court and cited a series of supporting district court opinions. *Id.* at 623-24. Plaintiff characterized the present case as revolving around the registration of a foreign state court judgment, a proceeding that never could have originally been brought in federal court, and thereby rendered removal improper. *Id.* at 624. The Seventh Circuit disagreed. The court primarily relied on the absence of the words "state" and "federal" from the text of 28 U.S.C. §1963, and construed that nothing in the provision distinguished its application between federal and state courts, or excluded the registration of state court judgments. *Id.* at 624-25. Therefore, the Seventh Circuit found that §1963 does not bar the removal of all matters related to registering state court judgments, and did not prohibit the removal of the citation proceeding initiated by plaintiff. *Id.* Moreover, there were no decisions found where other federal appellate courts read §1963 as prohibiting post-judgment proceedings of the type that formed the removed citation action. *Id.* The court stated its belief that the independent proceeding requirement in 28 U.S.C. §1441(a) would largely limit the number of state court judgments that a federal court might enforce because enforcement proceedings usually constitute ancillary or supplementary proceedings. *Id.* at 625.

III. The Forum-Defendant Rule Applies to Illinois Citation Respondent

In the end, what barred the removal of the citation action was the Illinois citizenship of BMO Harris Bank, which called for applying the forum-defendant rule. *Id., citing* 28 U.S.C. §1441(b)(2). The court stressed that the forum-defendant rule is a nonjurisdictional statutory component of the removal laws. *Id., citing Hurley*, 223 F.3d 380 (endorsing "the longstanding line of authority that holds that the forum-defendant rule is nonjurisdictional"). The defendant's noncompliance with the forum-defendant rule created a statutory defect. *Id., citing Holmstrom v. Peterson*, 492 F.3d 833, 838-40 (7th Cir. 2007) (explaining why the forum-defendant rule is a statutory defect). As previously discussed, the 30 day timeline applies to objecting to removal based upon a statutory defect. 28 U.S.C. §1447(c).

Finally, in order to apply the forum-defendant rule, the Seventh Circuit had to decide whether BMO Harris qualified as a "defendant" under 28 U.S.C. §1441(b)(2). To make that determination, the Seventh Circuit performed a lengthy review of Illinois statutory law, Illinois Supreme Court rules, and various court opinions. *Id.* at 626-631. Following its review, the Seventh Circuit interpreted Illinois law to permit a judgment creditor like plaintiff to "prosecute" a citation to discover assets against a third party, such as BMO Harris Bank, as long as the creditor reasonably believed the third party held assets of the judgment debtor. *Id.* Once such an action was brought, the creditor was entitled to discovery, and an evidentiary hearing or trial, followed by rights to pursue an appeal. *Id.* Because the removal provision found at 28 U.S.C. §1441(b)(2) fails to define the term "defendant," the Seventh Circuit also analyzed federal appellate court opinions and dictionary definitions. *Id.* While acknowledging the less than substantial nature of both authorities, the court found that a third party citation respondent in an Illinois citation ac-

tion occupies a position comparable to a defendant who is required to answer in a citation action in order to retain the contested assets. *Id.* at 29. Moreover, under the strain of the often cited walk, talk or sound "like a duck" logic, the court underscored that if a respondent bore all the qualities of a defendant, then inductive reasoning supports the conclusion that a citation respondent was a defendant for purposes of removal. *Id.* at 30.

In sum, before pursuing removal, counsel should check the statutory maps related to their causes of action to see if they show an exit ramp leading back to state court. ■

Supreme Court affirms award of costs to defendant under F.R.CIV.P. 54 (d)(1)

By Michael R. Lied

Not too many cases involving $4,500 end up in the Supreme Court. This one did.

Olivea Marx defaulted on a student loan guaranteed by EdFund, a division of the California Student Aid Commission. In September 2008, EdFund hired General Revenue Corporation (GRC) to collect the debt. One month later, Marx filed a Fair Debt Collection Practices Act ("FDCPA") Complaint against GRC.

Marx amended her complaint to add a claim that GRC unlawfully sent a fax to her workplace that requested information about her employment status.

Following a bench trial, the district court found that Marx had failed to prove any violation of the FDCPA. GRC submitted a bill of costs and, pursuant to Federal Rule of Civil Procedure 54(d)(1), the court ordered Marx to pay GRC $4,543.03. Marx filed a motion to vacate the award of costs, arguing that the court lacked authority to award costs under Rules 54(d)(1) and 68(d) because 15 U. S. C. § 1692k(a)(3) sets forth the exclusive basis for awarding costs in FDCPA cases.

The district court rejected Marx's argument, and the Tenth Circuit affirmed. The United States Supreme Court granted certiorari.

Federal Rule of Civil Procedure 54(d)(1) gives district courts discretion to award costs to prevailing defendants unless a federal statute provides otherwise. The FDCPA, 15 U. S. C. § 1692k(a)(3), provides that, upon a finding by the court that an action under that section was brought in bad faith and for the purpose of harassment, the court may award to the defendant's reasonable attorney fees and costs. The question was whether § 1692k(a)(3) "provides otherwise" than Rule 54(d)(1).

According to the Supreme Court, a statute "provides otherwise" than Rule 54(d)(1) if it is "contrary" to the rule. Because the rule grants district courts discretion to award costs, a statute is "contrary" to the rule if it limits that discretion.

However, not all statutes that provide for costs are contrary to Rule 54(d)(1). Marx and the *amicus curiae* argued that any statute that specifically provides for costs displaces Rule 54(d)(1), regardless of whether it is contrary to the Rule.

As noted above, the second sentence of § 1692k(a)(3) provides: "On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney fees reasonable in relation to the work expended and costs."

Marx's argument depended on whether § 1692k(a)(3)'s allowance of costs created a negative implication that costs were unavailable in any other circumstances.

Context persuaded the Supreme Court that Congress did not intend § 1692k(a)(3) to foreclose courts from awarding costs under Rule 54(d)(1).

Initially, the background presumptions governing attorney fees and costs are a highly relevant contextual feature. Under the American Rule, each litigant pays his own attorney fees, win or lose, unless a statute or contract provides otherwise.

Section 1692k(a)(3) left the basic rules for attorney fees intact. The statute provides that when the plaintiff brings an action in bad faith, the court may award attorney fees to the defendant. But, a court has inherent power to award fees based on a litigant's bad faith even without Section 1692k(a)(3).

The statute was best read as codifying a court's pre-existing authority to award both attorney fees and costs.

Next, the second sentence of § 1692k(a)(3) had to be understood in light of the sentence that precedes it. If Congress had excluded "and costs" in the second sentence, Marx might have argued that the expression of costs in the first sentence and the exclusion of costs in the second meant that defendants could only recover attorney fees when plaintiffs bring an action in bad faith. By adding "and costs" to the second sentence, Congress foreclosed that argument, removing any doubt that defendants may recover costs as well as attorney fees when plaintiffs bring suits in bad faith.

Finally, § 1692k(a)(3) contrasted with other statutes in which Congress placed conditions on awarding costs to prevailing defendants. Such statutes confirmed that Congress knows how to limit a court's discretion under Rule 54(d)(1) when it so desires.

The Supreme Court was not persuaded by Marx's contention that this interpretation rendered the phrase "and costs" superfluous.

The Supreme Court observed that the canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme. Here, because § 1692k(a)(3) is not part of Rule 54(d)(1), the force of this canon was weakened.

The United States, as amicus, contended that § 1692k(a)(3) established explicit cost-shifting standards that displaced Rule 54(d)(1)'s more general default standard.

But the context of § 1692k(a)(3) indicated that Congress was simply confirming the background rule that courts may award to defendants attorney fees and costs when the plaintiff brings an action in bad faith.

Because Marx did not bring her case in bad faith, the case did not fall within the ambit of the more specific provision. The judgment of the court of appeals was affirmed.

Marx v. General Revenue Corp., 133 S. Ct. 1166 (2013). ■

Judicial profile: Thomas M. Durkin

By Kathryn Kelly

District Judge Tom Durkin has been on the bench for about eight months, after being confirmed by the Senate in December of 2012. The Section on Federal Civil Practice continues its tradition of introducing you to our new judges and brings you a profile of Judge Durkin.

Judge Durkin graduated from the University of Illinois with honors in 1975. He received his law degree with honors from DePaul College of Law in 1978. While at DePaul, Judge Durkin had the good fortune to extern with Judge Roszkowski, who then had chambers in the Dirksen Building. After law school, Judge Durkin served as a law clerk for Judge Roszkowski. Because Judge Roszkowski was also assigned to Rockford, Judge Durkin would occasionally travel to Rockford with the judge for trials and to handle the call there.

Interestingly, Judge Durkin succeeds Judge Roszkowski in a way. When Judge Roszkowski assumed senior status, Judge Wayne R. Andersen filled that judicial vacancy. Judge Durkin now assumes the vacancy created by Judge Andersen's retirement. And it is fitting that he assumes the seat once held by Judge Roszkowski, a man Judge Durkin calls "a role model for life." In turn, Judge Roszkowski said that Judge Durkin "possesses the kind of temperament which will enable him to be a superb trial judge."

After his clerkship in 1980, Judge Durkin became an Assistant United States Attorney in Chicago. For 13 years, he prosecuted a wide variety of cases and he served in many leadership roles, including Chief of the Special Prosecutions Division, Chief of the Criminal Receiving and Appellate Division, and First Assistant United States Attorney. He tried many cases, working with some of the best attorneys in Chicago. In 1987, he worked on the case convicting former Illinois Gov. Dan Walker on bank-fraud charges. He also helped to secure the convictions of former Ald. Fred Roti, former State Sen. John D'Arco and former Cook County Chancery Court Judge David Shields.

In 1993, Judge Durkin joined Mayer Brown as a litigation partner. Engaged on many different kinds of cases all over the country, he handled white collar criminal cases, patent litigation, class action cases, product liability and other large cases; but he always took on duty day criminal cases and was appointed counsel in many other matters in both federal and state court.

Nominated by President Obama in May of 2012, he was confirmed in December. Judge Durkin's opening docket contained 325 cases, randomly assigned to him from the other judges. That number, not surprisingly, has grown. On the civil side, he inherited many fully briefed motions that he is diligently working on deciding. About a month after assuming his judicial duties, Judge Durkin went on the criminal wheel. He has not yet had a criminal trial, but has accepted a guilty plea.

On Judge Durkin's docket are many cases, including Title VII and prisoner litigation. He also has many excessive force cases, which are the subject matter of all six of his jury trials thus far. One area that is new to him is consumer class action cases. He has trials scheduled nearly every week for the rest of the year.

In addition to Judge Roszkowski, Judge Durkin has benefitted from the wisdom of his new colleagues—colleagues he now calls by their first names, but still instinctively calls "judge."

Already setting policies in his courtroom, Judge Durkin strives to make status hearings meaningful. If the attorney with knowledge of the case has a scheduling conflict, he is willing to reschedule the hearing to a better date. Similarly, he allows attorneys outside the Loop to call into status hearings but requires that attorney to be present for substantive arguments. Aside from issues if the attorney is on a cell phone, the sound system in the courtroom allows for ease of communication, passing on savings to clients.

Judge Durkin advises that if you file a lawsuit, you should be prepared to go to trial. The Northern District is a trial court, after all. To keep cases moving, Judge Durkin keeps notes on each case and reviews those notes and the transcript of the previous hearing before the next status hearing.

As for motions for summary judgment, no party can file such a motion without first attending a meeting in chambers. This practice is discussed on his court website. Judge Durkin asks the parties to discuss the uncontested facts and finds that parties can more realistically gauge settlement at this time, prior to incurring the large costs of preparing summary judgment papers. This is also an opportunity for the judge to become more familiar with the case.

Judge Durkin refers parties to the assigned Magistrate Judge for settlement conferences. He does so because of time constraints, which will grow with an increasing criminal caseload, and because the Magistrate Judges are true experts at dispute resolution. He is flexible about staying discovery if it would assist settlement or eschewing the referral if a conference would not be helpful.

As for trial practice, Judge Durkin believes that *firm* trial dates move cases along, and thus he is loathe to revisit them. One week prior to trial, he meets with the parties at a pretrial conference and discusses each witness on both the will and may call list. At this time, witnesses may indeed be cut. He does not require trial briefs in jury trials. If a party does not object to an exhibit in the pretrial order, it still should be moved into evidence but a foundation is not required. Instead of listing every exhibit possible, Judge Durkin will allow the use of an exhibit that was not included in the pretrial order if it was produced in discovery and will not be a surprise to the other side. Again, his website contains the particulars about this procedure.

Asked about his judicial philosophy during his nomination process, Judge Durkin highlighted the need for a judge to be fair, to treat others with respect, and to be patient with an open mind. He believes that an early case assessment is helpful.

At his installation, Judge Durkin spoke about his life and career. He is one of eight boys raised in the Chicago area. He speaks of his "luck" in being raised by his parents, going to U of I and DePaul Law, and having each position he has held. Not to be disagreeable, at his swearing in his colleagues noted his judgment, his smarts, and his demeanor. They concluded that it wasn't luck but hard work. Durkin also credits his wife and four children for his success.

Judge Durkin says he loved practicing in federal court, so his new position is a dream come true. So far, the position has exceeded his already great expectations. Our Committee welcomes Judge Durkin! ■

Federal Civil Practice

Illinois Bar Center
Springfield, Illinois 62701-1779

September 2013

Vol. 12 No. 1

Non-Profit Org.
U.S. POSTAGE
PAID
Springfield, Ill.
Permit No. 820