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OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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TO: **Honorable Anthony J. Scirica, Chair, Standing Committee on Rules of Practice and Procedure**

FROM: **David F. Levi, Chair, Advisory Committee on the Federal Rules of Civil Procedure**

DATE: **December 3, 2002**

Re: **Report of the Civil Rules Advisory Committee**

Introduction

The Civil Rules Advisory Committee met on October 3 and 4 in Santa Fe, New Mexico.

Part I of this report describes the recommendation to publish for comment proposed amendments of Admiralty Rules B and C.

Part II of this report is an informational summary of matters described more fully in the attached draft Minutes for the October meeting.

I ACTION ITEMS: ADMIRALTY RULES B AND C FOR PUBLICATION

The Advisory Committee recommends publication in August 2003 of amendments to Admiralty Rules B(1) and C(6)(b)(i)(A) and the accompanying Committee Notes, which are attached to the report.

Rule B(1)(a)

The change to Admiralty B(1) was first proposed by a member of the Standing Committee during discussion of the Admiralty Rules changes that took effect on December 1, 2000, and has been endorsed by the Maritime Law Association.

Rule B(1) provides for attachment in a maritime in personam action. It applies when "a defendant is not found within the district." The "found" concept is old-fashioned; a defendant who is not physically present in the district and who has no agent there for the service of process is not "found" there, even though subject to personal jurisdiction on some other basis. Rule B(1) thus serves two purposes: it establishes a form of quasi-in-rem jurisdiction to substitute for personal jurisdiction, but it also provides a pre-judgment security device in some cases in which the court has

personal jurisdiction. The ploy attempted in the *Heidmar* case cited in the Committee Note reflects the use of Rule B(1) as a security device. The complaint was filed at 3:45 p.m. with a motion to arrest a vessel; at 4:00 the owner faxed notification that it had appointed an agent for service of process. After straightening out various confusions, the case came to be treated as presenting the question whether the application of Rule B(1) is determined at the time the complaint is filed or instead at the time the attachment issues. The court ruled that the time of filing controls. It relied in part on inference from the requirements that the complaint be accompanied by an affidavit that the defendant cannot be found, and that the court review these materials before ordering attachment — "not found" relates to the time of filing, not the time of attachment. More importantly, it relied on the theory that Rule B(1) serves the purpose of "assuring satisfaction in case the plaintiff's suit is successful," pointing out that an attachment, once issued, is not vacated when the defendant appears. The court also thought it unfair and inefficient to allow a defendant to defeat attachment by waiting to appoint an agent for service until a complaint had been filed.

Amendment is recommended to give direct notice to lawyers and courts, protecting against the need to identify the question and search for an answer in circumstances that often require prompt action. Maritime actions frequently involve defendants from other countries. Attachment is useful not only to establish quasi-in-rem jurisdiction when personal jurisdiction cannot be established, but also to meet the special needs for security that distinguish maritime practice from land-based practice. Enforcement of a personal judgment may be more difficult, more often.

C(6)(b)(i)(A)

The Committee Note tells the story. The problem with Rule C(6)(b)(i)(A) arises from the December 2000 amendments that divided Rule C(6) into separate provisions for forfeiture proceedings — subdivision (a) — and for maritime proceedings — subdivision (b). For forfeiture proceedings, C(6)(a)(1)(A) allows a statement of interest to be filed "within 20 days after the earlier of receiving actual notice of execution of process, or (2) completed publication of notice under Rule C(4)." That provision works. For maritime proceedings, the earlier rule had required that a claim be filed within 10 days after process has been executed, or within such additional time as may be allowed by the court. The admiralty bar was concerned that the 10-day period be retained, and also that it begin to run with execution of process — it was well established that the time runs from execution of process whether or not the claimant has actual notice. So the "actual notice" provision, newly added for forfeiture proceedings, was not added for maritime proceedings. At the same time, unthinking parallelism with the forfeiture proceeding retained the structure setting the date "within 10 days after the earlier of (1) the execution of process, or (2) completed publication of notice under Rule C(4) * * *." The problem is that Rule C(4) requires publication of notice only if the property that is the subject of the action is not released within 10 days after execution of process. It makes no sense to refer to completed publication of notice as if it could occur before process is executed — publication begins, at the earliest, 10 days after process is executed.

The "dead letter" character of the provision to be deleted might justify deletion as a technical amendment adopted without publication and comment. If the Rule B(1) amendment is to be published, however, there is little added cost in publishing the Rule C(6) amendment as well. The admiralty bar is small and specialized, and the benefits of the amendment will be realized in large part by publication, and indeed are likely to be substantially realized by authorization in January to publish in August. Judges and lawyers will be spared the chore of working through to the conclusion that indeed the provision for filing after publication of notice has no meaning. Although the Standing Committee may wish to consider the issue further, the circumstances suggest that the easier path is to publish.

II INFORMATION ITEMS

These information items summarize matters presented more fully in the draft Minutes.

Rules Transmitted to the Supreme Court

The Judicial Conference has recommended to the Supreme Court adoption of the amendments of Civil Rules 23, 51, and 53 that the Standing Committee recommended for adoption at the June 2002 meeting.

Bankruptcy - Mass Torts Study

Representatives of the Advisory Committee have worked with the Bankruptcy Administration Committee in considering proposals by the National Bankruptcy Review Commission to address future mass tort claims in bankruptcy. The proposals are ambitious and raise questions that are at once challenging and fundamental. A cautious approach is likely to be taken by the Bankruptcy Administration Committee.

Style Project

The project to restyle the Civil Rules is being launched. The first day of the October Advisory Committee meeting was devoted to the general questions that have been identified in the earlier projects to restyle the Appellate Rules and the Criminal Rules. The Advisory Committee received cogent advice based on the earlier projects from Judge James Parker, Professor David Schlueter, Professor R. Joseph Kimble, and John K. Rabiej.

The Advisory Committee will divide itself into two subcommittees to consider successive "packages" of rules. Professors Richard L. Marcus and Thomas D. Rowe, Jr., have agreed to serve as consultants, each working primarily with one of the subcommittees. It is anticipated that Rules 1 to 37 and 45 will be published as one package, with Rules 38 to 85 published two years later. Transmission to the Supreme Court, however, will be in one single package of all the Civil Rules. The Forms and Admiralty Rules will be approached later.

The tentative timetable for the project is ambitious but feasible. If met, the restyled rules will take effect on December 1, 2009. The first subcommittee meetings, considering Rules 1 through 7.1 and 8 through 15, are set for this month. It is hoped that ordinarily the two subcommittees can meet on successive days in the same location; at times, a meeting of the full Advisory Committee will be inserted between the first and second subcommittee meetings.

Pending Projects

Several rules changes remain on the Advisory Committee agenda for consideration in parallel with the style project. Others will inevitably arise, at times as offshoots of the style project. The following subjects are among the matters being considered:

"Rule 5.1" — Notice to Attorney General of Constitutional Challenges: Civil Rule 24(c) implements 28 U.S.C. § 2403, which requires notice to the Attorney General when a constitutional challenge is made to a federal statute. There is a parallel provision for challenges to state statutes. Appellate Rule 44 implements the statute in a rather different way. The Department of Justice believes that still further changes are appropriate, at least in the Civil Rules. The Attorney General does not always get notice. One thought is that Rule 24 does not alert litigants or courts to the notice requirement because Rule 24 is likely to be read only by parties who are thinking of intervention, not by parties unaware of the government's interest in intervening.

Rule 6(e): The Appellate Rules Committee has pointed out an ambiguity in the provision of Rule 6(e) that adds 3 days to the period otherwise prescribed for responding to a paper when service is made by deposit with the court clerk, mail, electronic means, or other means consented to by the person served. The most important goal is to achieve inescapable clarity.

Rule 15(c)(3): The Third Circuit, in *Singletary v. Pennsylvania Department of Corrections*, 2001, 266 F.3d 186, has suggested that Rule 15(c)(3) be amended to allow relation back of an amendment changing the naming of a defendant when the plaintiff knew at the time of the original pleading that the plaintiff did not know the proper defendant's name. This proposal implicates many related questions presented by Rule 15(c)(3). It may not be possible to identify a "simple" change, nor to justify a complex set of changes. These issues remain under close study.

Class Actions: The pending proposals to amend Rule 23 have not completed the work of the Rule 23 Subcommittee. The Subcommittee continues to study questions surrounding class-action settlements. The Federal Judicial Center is completing a study of settlement experience after the *Amchem* and *Ortiz* decisions, looking both to the difficulty of reaching approvable settlements and to the possibility that federal court practices may be encouraging some plaintiffs to file in state courts. It may yet prove desirable to consider adoption of specific provisions for certification of a settlement class. The Subcommittee has concluded, on the other hand, that it should suspend further consideration of rules-based approaches to the problems that arise from overlapping, duplicating, and competing class actions.

Discovery: The Discovery Subcommittee continues to monitor developing practices in the discovery of computer-based information. The Federal Judicial Center has performed a study for the Advisory Committee, and continues intensive work in this area. A number of problems have been identified, but it remains unclear whether it is desirable — or even feasible — to adopt effective rules changes. In addition to this continuing project, the Subcommittee is considering a number of more specific questions. Among them are the practice of taking "de bene esse" depositions for use as trial evidence as a means to avoid the difficulties of assembling all witnesses at the place and time of trial; forfeiture of hard-core work-product protection for materials shown to an expert trial witness; and notice to a deponent that a deposition is to be recorded by video.

"Rule 62.1": "Indicative Rulings": The Appellate Rules Committee has referred to the Civil Rules Committee a proposal by the Solicitor General to adopt express provisions to address action by a district court on a motion for relief from a judgment that is pending on appeal.

Rule 68: A new proposal to amend the offer-of-judgment provisions of Rule 68 has been made by the New York State Bar Association Committee on Federal Procedure of the Commercial and Federal Litigation Section. The proposal would allow plaintiffs to make offers; allow Rule 68 benefits to a defendant when a plaintiff loses completely; make clear provisions for entry of final judgment as to part of a multiparty or multiclaim case; and put "teeth" into the rule by recognizing discretion to add expenses other than attorney fees to the available sanctions. The Advisory Committee studied a proposal to amend Rule 68 several years ago, and surrendered the effort in 1995. The new proposal remains on the agenda.

Sealed Settlements: The Advisory Committee has undertaken to consider whether express Civil Rules provisions should be adopted to address the practice of filing settlement agreements under seal. The scope of the project has yet to be defined — it is not clear whether it is sensible to address only sealed settlements, or whether those issues cannot be severed from related issues that arise from other limits on access to court proceedings or records.

Civil Forfeiture Proceedings: The Department of Justice believes that civil forfeiture proceedings should continue to fall within the Admiralty Rules — many statutes specify that forfeiture proceedings are governed by the rules for in rem admiralty proceedings. At the same time, it believes that the forfeiture provisions should be gathered together in a new and separate Rule G. A new rule could address questions that have arisen in practice and are not now addressed in any of the rules. Much work has been done to refine a draft Rule G, and informal comments have been received from the defense bar. The work continues.

PROPOSED AMENDMENTS TO THE SUPPLEMENTAL RULES FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS*

Rule B. In Personam Actions: Attachment and Garnishment

(1) When Available; Complaint, Affidavit, Judicial Authorization, and Process. In an in personam action:

(a) If a defendant is not found within the district when a verified complaint praying for attachment and the affidavit required by Rule B(1)(b) are filed, a verified complaint may contain a prayer for process to attach the defendant's tangible or intangible personal property — up to the amount sued for — in the hands of garnishees named in the process.

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*New material is underlined; mater to be omitted is lined through.

Committee Note

Rule B(1) is amended to incorporate the decisions in *Heidmar, Inc. v. Anomina Ravennate di Armamento Sp.A.*, 132 F.3d 264, 267-268 (5th Cir. 1998), and *Navieros Inter-Americanos, S.A. v. M/V Vasilia Express*, 120 F.3d 304, 314-315 (1st Cir. 1997). The time for determining whether a defendant is "found" in the district is set at the time of filing the verified complaint that prays for attachment and the affidavit required by Rule B(1)(b). As provided by Rule B(1)(b), the affidavit must be filed with the complaint. A defendant cannot defeat the security purpose of attachment by appointing an agent for service of process after the complaint and affidavit are filed. The complaint praying for attachment need not be the initial complaint. So long as the defendant is not found in the district, the prayer for attachment may be made in an amended complaint; the affidavit that the defendant cannot be found must be filed with the amended complaint.

Rule C. In Rem Actions: Special Provisions

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(6) Responsive Pleading; Interrogatories.

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(b) Maritime Arrests and Other Proceedings. In an in rem action not governed by Rule C(6)(a):

(i) A person who asserts a right of possession or any ownership interest in the property that is the subject of the action must file a verified statement of right or interest:

(A) within 10 days after ~~the earlier of (1)~~ the execution of process, ~~or (2) completed publication of notice under Rule C(4),~~ or

(B) within the time that the court allows.

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Committee Note

Rule C(6)(b)(i)(A) is amended to delete the reference to a time 10 days after completed publication of notice under Rule C(4). This change corrects an oversight in the amendments made in 2000. Rule C(4) requires publication of notice only if the property that is the subject of the action is not released within 10

days after execution of process. Execution of process will always be earlier than publication.