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Overview of December 2015 Amendments to the Federal Rules of Civil Procedure
By: Ellie Neiberger

This article summarizes the amendments to the Federal Rules of Civil Procedure that went into effect on December 1, 2015, highlighting the changes expected to have the most significant effect on counsel litigating in federal court.

Without a Harm to Stand On
By: Rich Rivera

This article discusses Spokeo, Inc. v. Robins, in which the U.S. Supreme Court will decide whether Congress has authority to confer Article III standing by authorizing persons to file a lawsuit for a violation of a federal statute, irrespective of whether the person bringing the suit has suffered harm.

Ninth Circuit Joins Six Other Circuits in Adopting Rule on Relationship Between Preliminary Injunctive Relief and Final Relief Sought in Complaint
By: Ellie Neiberger

In a recent ruling, the Ninth Circuit became the seventh Circuit to establish a rule defining the requisite nexus between the relief sought in a motion for a preliminary injunction and the ultimate relief sought in the lawsuit.

Are Courts Better at Handling Sports Disputes than the NFL?
By: Isabella Demougeot

Recent high-profile matters have shown a lack of consistency in the way the NFL applies its internal rules for handling allegations of misconduct and indicate that the judiciary is better equipped to efficiently and fairly resolve such internal disputes.

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Overview of December 2015 Amendments to the Federal Rules of Civil Procedure

By: Ellie Neiberger

Several significant changes to the Federal Rules of Civil Procedure took effect on December 1, 2015. The changes, which are summarized below, apply to all cases filed after that date, and, to the extent “just and practicable,” to all previously-filed cases.

Rule 1 – Scope and Purpose of Rules
The amendment adds that “parties”—in addition to the courts—must construe, administer, and employ the rules to “secure the just, speedy, and inexpensive determination of every action and proceeding.” The Committee Note to the amendment states that the change does not create a new or independent source of sanctions.

Rule 4(m) – Time for Service of Process
The amendment reduces the number of days to serve process from 120 days to 90 days from the date the complaint is filed.

Rule 16(b) – Timing and Contents of Scheduling Orders
The amendment to Rule 16(b)(2) changes the time period within which the judge must enter a scheduling order. Previously, the rule required a scheduling order to be entered within the earlier of 120 days after any defendant has been served with process, or 90 days after any defendant has appeared in the case. Now, the rule provides that, unless the judge finds good cause for delay, the scheduling order must be entered within the earlier of 90 days after any defendant has been served with process, or 60 days after any defendant has appeared in the case.

The amendment to Rule 16(b)(3) adds three items to the permitted contents of a scheduling order. Scheduling orders may now provide for (1) preservation of electronically stored information; (2) clawback agreements regarding attorney-client privileged information; and (3) a requirement that a party must request a conference with the court before filing a discovery motion.

Rule 26(b)(1) – Scope of Discovery
The amendment revises the scope of discovery by expressly adding a proportionality requirement. Under the amended rule, information is discoverable if it is nonprivileged, relevant, and “proportional to the needs of the case.” The amended rule lists several factors to be considered in the proportionality analysis. Under the prior version of the rule, factors relating to proportionality were contained in Rule 26(b)(2)(C)(iii), which sets forth the circumstances under which the court can enter orders limiting discovery.

The Committee Note explains that this change is intended to reinforce that parties have an obligation to consider proportionality in making discovery requests, responses, and objections. The change is not intended to place the burden of considering all proportionality considerations
entirely on the party seeking discovery. Furthermore, the change does not authorize a party to refuse discovery by making a boilerplate objection that it is not proportional.

Additionally, the amendment deletes one of the most cited sentences in the federal rules. Rule 26(b)(1) no longer states that relevant but inadmissible information is discoverable if it “appears reasonably calculated to lead to the discovery of admissible evidence.” The Committee Note explains that the “reasonably calculated” language has been improperly used to define the scope of discovery in a way that risks “swallow[ing] any other limitation on the scope of discovery.” The rule now states: “Information within this scope of discovery need not be admissible in evidence to be discoverable.”

*Rule 26(c)(1)(B) – Cost-Shifting in Protective Orders*

The amended rule expressly provides that protective orders may shift discovery costs. The Committee Note states that the addition of this language is intended to explicitly recognize the courts’ existing authority to allocate discovery costs. The change does not imply that cost-shifting should become a common practice; the general rule continues to be that the responding party bears the costs of responding.

*Rules 26(d)(2) and 34(b)(2)(A) – Early Requests for Production*

The rules now allow requests for production to be “delivered” to a party anytime after the 21-day period following the date that party was served with process, even if the parties have not yet had a Rule 26(f) conference. However, such a request is not considered to be served on the date it is delivered. Instead, service is deemed to occur on (and, therefore, the 30-day response period begins to run from) the date of the first Rule 26(f) conference.

*Rule 26(f)(3) – Discovery Plans*

Discovery plans must now address issues about preserving electronically stored information.

*Rule 34(b)(2)(B)-(C) – Objections to Requests for Production*

The amended rule makes two changes regarding objections to requests for production. First, the grounds for an objection must be stated “with specificity.” Second, an objection must state whether any responsive materials are being withheld on the basis of that objection. The second change is designed to eliminate situations where a responding party broadly objects to a request, but still produces some documents, so that the requesting party is left to guess whether responsive documents have been withheld based on the objection. The responding party does not have to provide a detailed description or a log identifying all withheld documents; it is sufficient to “alert the other parties to the fact that documents have been withheld” based on the objection.

The rule also now requires the responding party to produce documents by a specific date—either the date specified in the request or another reasonable date specified in the response. The Committee Note adds that, if it is necessary for the documents to be produced in stages, the response should specify the beginning and end dates of the production.

*Rule 37(e) – Preservation of Electronically Stored Information*

Amended Rule 37(e) provides standards for imposing sanctions or curative measures on parties who fail to preserve electronically stored information (ESI). It authorizes the court to take
measures against a party when (i) relevant ESI "should have been preserved in the anticipation or conduct of litigation"; (ii) the relevant ESI was lost because the party "failed to take reasonable steps to preserve" it; (iii) the lost ESI "cannot be restored or replaced through additional discovery"; and (iv) another party suffered prejudice as a result. If these elements are established, the court may order measures “no greater than necessary to cure the prejudice.” However, if the court finds that the party acted with the intent to deprive another party of the ability to use the ESI in the litigation, the court may presume (or instruct the jury it may or must presume) that the lost ESI was unfavorable to the party who lost it, dismiss the action, or enter a default judgment.

A redline reflecting the December 2015 amendments with the Committee Notes is available on the U.S. Court’s website and can be accessed here.

Ellie Neiberger practices appellate advocacy and government litigation with Bryant Miller Olive P.A., a Florida-based law firm with a 45-year history of serving public sector clients.

**Without a Harm to Stand On**

By: Rich Rivera

Can Congress authorize a person to sue in federal court, regardless of whether he suffered any actual harm, by writing a private cause of action into a statute? This issue is currently being considered by the United States Supreme Court, which heard oral arguments on November 2, 2015 in Spokeo, Inc. v. Robins, No. 13-1339. Spokeo appealed a decision from the Ninth Circuit, which held that when Congress provides a statutory claim, an individual need only show a violation of the statute, not actual harm, to demonstrate standing. The Supreme Court will now decide whether to affirm or overrule the Ninth Circuit’s decision. The forthcoming opinion promises to shift the landscape for many consumer protection claims.

In his complaint, Robins claimed that the website Spokeo.com published information characterizing him as more educated and experienced than reality, but did not claim any harm from that information. Robins brought suit under the Fair Credit Reporting Act, or FCRA, which provides a private right of action for statutory damages against an entity regulated by the Act that willfully violates its provisions.

The Supreme Court’s decision will affect more individuals than just Mr. Robins. The statutory scheme of the FCRA, providing both a set of requirements for entities engaged in particular activities and a claim against entities which fail to meet its standards, is common in the realm of consumer protection statutes, which regulate activities such as debt collection, funds transfers, and real estate closings.

Based on the questions posed by the justices at oral argument, it appears unlikely that the Supreme Court will issue an opinion giving Congress carte blanche to allow suits irrespective of any harm. Some of the liberal Justices, for example, Justices Kagan and Ginsburg, voiced support for such a rule. Justice Kagan asked “why isn’t . . . it perfectly sufficient if Congress says that’s a concrete injury?” On the other hand, the more conservative Justices, such as
Justice Scalia and Chief Justice Roberts prefer a rule requiring a traditional economic harm for standing. Chief Justice Roberts asked whether a person who wished to avoid unsolicited phone calls would have standing to sue an entity that published an incorrect phone number for that person. In that case, he stated, “that is inaccurate information about you, but you have no injury whatever.”

It appears that some compromise is likely. The perennial swing-vote, Justice Kennedy, voiced his opinion that Supreme Court precedent only recognizes Congress’s ability to recognize a de facto harm, which he characterized as “actual, existing in fact, having effect, even though not formally or legally recognized.” Such a compromise may require some measurable or ascertainable loss, whether economic or otherwise. This may stem certain technical claims for which no harm could have arisen.

A compromise by the Supreme Court may also erode the ability of individuals to bring class actions, a result which the Supreme Court could be signaling by taking on multiple issues related to class actions this term. In the first opinion issued in this trio of cases, the Court, although ruling for the class in Gomez v. Cambell-Ewald, No. 14-857, signaled a potential way for defendants in class actions to satisfy the claims of the individual representative and avoid litigating class issues. In the other class-related case heard this term, Tyson Foods v. Bouaphakeo, No. 14-1146, which remains undecided, the Court could limit a class’s ability to be certified if it holds that all members of the class must have suffered an actual or statutory harm.

Will the Court continue its pro-business trend this term? Or will it take this opportunity to formally support private attorneys general? Either way, the Spokeo opinion is bound to have wide-reaching effects for years to come.

Rich Rivera practices commercial litigation with Smith, Gambrell and Russell, located in Florida. His practice focuses on consumer litigation defense under state and federal law. He also advises clients on matters of compliance under consumer laws, and partners with clients to craft and maintain policies and procedures to ensure compliance with such laws in order to preclude litigation and avoid liability.

 Ninth Circuit Joins Six Other Circuits in Adopting Rule on Relationship Between Preliminary Injunctive Relief and Final Relief Sought in Complaint

By: Ellie Neiberger

In a recent ruling, the U.S. Court of Appeals for the Ninth Circuit affirmed a district court order denying a motion for a preliminary injunction because it sought relief that was not sufficiently related to the ultimate relief sought in the lawsuit. Pacific Radiation Oncology, LLC v. The Queen’s Medical Center, No. 14–17050, 2015 WL 9286637 (9th Cir. Dec. 22, 2015). In doing so, the Ninth Circuit expressly joined the Second, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits in holding that a party seeking a preliminary injunction must establish “a relationship between the injury claimed in the motion for injunctive relief and the conduct asserted in the underlying complaint.”

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The plaintiff in this case, Pacific Radiation Oncology (“Pacific Radiation”), was a group of doctors who used two medical facilities to treat patients: the defendant, The Queen’s Medical Center (“Queen’s Medical”), and a competing facility, The Cancer Center of Hawaii (“Cancer Center”). Some of Pacific Radiation’s doctors had a financial interest in the Cancer Center. However, Queen’s Medical was the only facility in the area with a license to provide a specialized type of cancer treatment. For many years, Queen’s Medical allowed Pacific Radiation’s doctors to treat their patients at its facility.

Pacific Radiation filed its lawsuit when Queen’s Medical switched to a “closed-facility model,” under which Pacific Radiation’s doctors would be denied hospital privileges unless they agreed to exclusive employment with Queen’s Medical and divested themselves of all financial interest in the Cancer Center. Pacific Radiation’s complaint asserted numerous state law claims for unfair trade practices and interference with business relationships.

The district court granted a preliminary injunction allowing Pacific Radiation to continue to use Queen’s Medical during the litigation to treat patients who needed the specialized treatment it was licensed to provide. Queen’s Medical subsequently filed a counterclaim alleging that Pacific Radiation’s doctors were unlawfully diverting patients to the Cancer Center.

In conducting discovery relating to its counterclaim, Queen’s Medical served a subpoena on the Cancer Center seeking documents relating to 132 patients who had an initial consultation with a Pacific Radiation doctor at Queen’s Medical, but did not return to Queen’s Medical for treatment. The subpoena identified the 132 patients by name, patient number, and treating physician. Queen’s Medical obtained this information from its own record-keeping system.

In response, Pacific Radiation filed a motion for a preliminary injunction preventing Queen’s Medical from reviewing or using patient records during the litigation on the basis that it violated HIPAA and state privacy laws. The district court denied the motion, reasoning Pacific Radiation’s complaint “does not contain a claim alleging improper review and use of confidential patient information.”

The Ninth Circuit agreed. Adopting the rule followed by six other Circuits, the court held that there must be a relationship between the injury claimed in a motion for preliminary injunction and the conduct asserted in the underlying complaint. The court concluded that Pacific Radiation failed to establish that the privacy claims underlying its motion bore any relationship to its complaint. The complaint did not contain any privacy law claims or any allegations relating to patient records. The injury claimed in Pacific Radiation’s motion—the misuse of patient records—was completely unrelated to the conduct alleged in the complaint—illegal business practices.

As recognized by the other Circuits that have adopted this rule, it is consistent with the purpose of preliminary injunctions: to provide “interim equitable relief is to protect the movant, during the pendency of the action, from being harmed or further harmed in the manner in which the movant contends it was or will be harmed through the illegality alleged in the complaint.” Colvin v. Caruso, 605 F.3d 282, 300 (6th Cir. 2010) (quoting Omega World Travel, Inc. v. Trans World Airlines, 111 F.3d 14, 16 (4th Cir. 1997)).
A mismatch between the injury alleged in a motion for a preliminary injunction and the conduct alleged in the complaint is most likely to happen where the factual basis for the motion did not arise (or was not known to the plaintiff) until after the complaint was filed. Where this happens, counsel should determine whether the new facts give rise to a cause of action. If so, the new cause of action must be asserted before a temporary injunction can be granted. Therefore, depending on the procedural posture of the existing case, counsel should either (1) file a motion to amend the complaint to add the claim at or before filing a motion for a temporary injunction in the case; or (2) file a separate lawsuit raising the claim and seek a preliminary injunction in the new action.

Ellie Neiberger practices appellate advocacy and government litigation with Bryant Miller Olive P.A., a Florida-based law firm with a 45-year history of serving public sector clients.

Are Courts Better at Handling Sports Disputes than the NFL?

By: Isabella Demougeot

After the 2014 AFC Championship Game, Deflategate became the only topic discussed in sports news. The controversy revolved around allegations of tampering with the air pressure in the game footballs by the New England Patriots. The NFL, on May 11, 2015, announced its punishments for the parties that had allegedly participated, in some fashion, in the deflating of the game balls. The NFL fined the New England Patriots $1 million and took away the team’s 2016 first round draft pick and 2017 fourth round draft pick. Additionally, the NFL suspended New England Patriots quarterback Tom Brady for four games. Tom Brady filed an internal appeal of his suspension. The NFL Players’ Association objected to NFL Commissioner Roger Goodell presiding over the appeal. Most tellingly, Commissioner Goodell failed to recuse himself despite the objections, presided over the appeal and affirmed the suspension, leading to an appeal being filed in New York Federal Court.

In recent years, the distance between the world of sports and the legal world has become increasingly smaller. In 2015, a significant legal case was litigated in the United States District Court for the Southern District of New York against the most popular sports’ league in the country, the National Football League (“NFL”). NFL Mgmt. Council v. NFL Players Ass’n, No. 15-cv-5916, 2015 WL 5148739 (S.D.N.Y. Sep. 3, 2015).

The most interesting issue in this litigation was whether the NFL’s internal arbitration process was still appropriate to handle such disputes because of the role of the Commissioner throughout the arbitration and subsequent appeals. The Deflategate case highlighted the bias, taint, and objectivity issues within the NFL at a time when many wonder what power and authority the Commissioner should have.

At worst, Tom Brady tampered with equipment, which can be punished by a fine but not a suspension. The Commissioner and those who played a role in the arbitration went outside the rules to decide and sustain the four game suspension of Tom Brady for his alleged participation in Deflategate. Courts cannot easily deviate from the law despite judicial discretion; whereas, the Commissioner of the NFL is not held to the same standards as a judge. Thus, is litigating a
sports league-related claim in a court rather than through the NFL’s systems a plausible alternative?

With regard to the issue of taint and lack of fairness in the NFL’s handling of the Deflategate matter, Tom Brady’s counsel argued:

On June 8, 2015, Goodell held the arbitration....The hearing defied any concept of fundamental fairness. Prior to the hearing, Goodell had ruled that Brady and the Union could not question essential witnesses, denied them access to the investigative files underlying the Wells Report (which were nonetheless available to the NFL’s counsel at the arbitration), and summarily rejected Brady’s unlawful delegation argument without considering any evidence (other than “facts” decreed by Goodell himself in his decision). At the hearing itself, Paul, Weiss – the purportedly “independent” law firm whose findings about Brady were being challenged – abandoned all pretense of objectivity, and actively participated as counsel for the NFL conducting direct and cross-examinations of witnesses (including Brady’s). A Paul, Weiss partner represented the NFL for most of the hearing, even though he was a signatory to the Wells Report and his law partner (Wells) was a fact witness at the same hearing.¹

In his July 28, 2015, Award or Final Decision, Roger Goodell, acting as the Commissioner, stated, “I am bound, of course, by standards of fairness and consistency of treatment among players similarly situated.”² One need only look at the NFL’s recent track record to know that the NFL’s application of its own internal rules is far from fair or consistent. For example, Ben Roethlisberger, quarterback for the Pittsburgh Steelers, was accused of rape in 2010 and was subsequently suspended for six games. However, Commissioner Goodell upon further review decided to shorten the suspension to four games. Rape is a far greater offense than the alleged deflation of game balls. Yet, in the eyes of the NFL, these two offenses warrant the same punishment.

Judge Berman in his decision to overturn the NFL’s arbitration award in the Deflategate matter referenced Paragraph 15 of the standard NFL Player Contract, which states that a player should not engage in conduct that is detrimental to the game or the league and, if such behavior occurs, “the Commissioner will have the right, but only after giving the Player the opportunity for a hearing at which he may be represented by counsel of his choice, to fine Player in a reasonable amount....”³ Players sign their players’ contracts, which contain this clause, with the expectation that if one of them commits an offense by which they will be investigated and, if necessary, punished, the process will be as close to fair and equitable as possible. However, if one were to compare the punishment of the New Orleans Saints to that of the New England

¹ Petitioner’s Unredacted Petition to Vacate Arbitration Award, No. 15-CV-3168-RHK-HB, at 8 (July 29, 2015).
³ Id. at 10.

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Patriots, or the handling of the Ray Rice, Adrian Peterson and Greg Hardy’s domestic cases, one thing is clear--the NFL’s application of its own internal rules is anything but fair.

In 2010, the NFL investigated accusations of a bounty scheme within the New Orleans Saints organization that encouraged players to injure the other team’s players during games. On March 2, 2012, the NFL announced that it had evidence that the Saints defensive coordinator Gregg Williams had fostered such a bounty program soon after his arrival in 2009, and that between 22 and 27 Saints players were involved in it. As a result of the findings of the investigation, the Saints were fined $500,000 (maximum fine for such an offense). Greg Williams was suspended indefinitely, and was banned from applying for reinstatement until the end of the 2012 season. Sean Payton, the Saints head coach, was suspended for the 2012 season, which made him the first head coach to be suspended in recent history. The Saints general manager Mickey Loomis was suspended for the first eight games of the 2012 season. Furthermore, Saints assistant head coach, Joe Vitt, was suspended for the first six games of the 2012 season. However, the New England Patriots were not fined as severely during the 2007 Spygate, where allegations relating to the Patriots filming Jets’ coaches on the sideline arose. The Patriots head coach, Bill Belichick, was fined $500,000; however, he was not suspended, and the Patriots were fined $250,000.

In 2015, domestic violence allegations against Greg Hardy came to light, but neither the NFL nor the Dallas Cowboys took action against Hardy. On the other hand, Ray Rice and Adrian Peterson were suspended in 2014 for their respective domestic violence matters. Ray Rice was even released from the Baltimore Ravens.

These examples illustrate the lack of consistency and predictability in the NFL’s internal dispute processes and the punishments it imposes on players for the same offenses. Because of these glaring defects, the NFL’s internal arbitration process and other internal mechanisms are unable to effectively resolve disputes. Indeed, as a result of these problems, the Commissioner’s rulings have been (and will likely continue to be) challenged in court. Because many internal disputes will end up in court at some point, and because courts are more capable of independently and consistently ruling on such matters, the judicial system is a more efficient and fair forum.

Isabella Demougeot is part of the litigation practice group at Rifkin, Weiner, Livingston, Levitan & Silver, LLC, in Maryland, where she focuses on civil and complex commercial litigation matters. Ms. Demougeot received her Juris Doctor from the William & Mary School of Law and received her Bachelor of Arts degree from Vassar College.
NEWS AND ANNOUNCEMENTS

Call for Article Submissions—We Need Authors!

Members of the Young Lawyers Division are encouraged to submit articles for publication in the Litigation Committee’s quarterly newsletter. The Litigation Committee’s quarterly newsletter provides young lawyers a unique opportunity to have their published articles distributed to thousands of young lawyers across the country. If you are interested in submitting an article, please contact Ellie Neiberger (eneiberger@bmolaw.com) or Co-Chairs Andrew Atkins (aatkins@mcguirewoods.com) or Morgan Swing (mswing@cfjblaw.com).

Social Media Team Update

The Social Media Team is pleased to announce the new Social Media Policy! The purpose of this policy is to provide direction on appropriate and effective ways to utilize social media on behalf of the ABA YLD when delivering content, facilitating engagement, and communicating with both members and non-members. The policy includes sample posts, proper use of our social media channels, and of course directions for using the online spreadsheet we set up to capture posts from across the division. The new policy can be found here.

Disaster Legal Services Team

The DLS team is currently implementing DLS in Mississippi, Texas, South Carolina, and California. Earlier this year, we implemented DLS in Texas, Wyoming, Saipan, and Kentucky. We expect this to be a busy year on the DLS front, as NASA predicts that this year’s El Nino is going to be the worst ever.

The DLS team encourages all young lawyers to be prepared in the event of an emergency or disaster, and to coordinate with your local or state bar association to help disaster survivors. More information about the DLS program can be found here.

National Conferences Team Update

In addition to the regular activities of the ABA YLD National Conferences Team during the ABA Midyear meeting, this Team is putting together a social media photo scavenger hunt. New attendees will have the opportunity to be a part of a scavenger hunt that allows them to meet seven YLD leaders, receive their business cards, and also take a selfie and post it to their social media accounts with the hashtag #YLDmidyear16. The first person to have a selfie with each YLD leader and receive their signature on a business card will receive a generous gift from the ABA YLD National Conferences Team.
Member Services Project Update

The Member Services Project is proud to launch the Young Lawyer Toolkit at the ABA Midyear Meeting. The Toolkit is a curated collection of ebooks, tutorials, and online resources, intended to be a one-stop-shop for lawyers in their first years of practice. The Toolkit contains resources covering trial practice, the business of law, going solo/opening a firm, financial wellness, diversity and inclusion, and first-year lawyers. At launch, the Toolkit will include materials for lawyers with one to three years of experience, with materials for more experienced lawyers to come.

The Young Lawyer Toolkit is free for ABA Members and can be accessed here.

Upcoming Conferences

YLD Spring Conference
May 5-7, 2016
St. Louis, Missouri