

Federal Bar Update

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Recent Procedural Decisions

A perusal of the opinions issued in any given month by the federal district courts in Indiana reveals a remarkable volume of important procedural rulings. The last month is no exception. This article highlights several of these opinions.

Civility and Accuracy in Briefing – Several recent decisions stress the importance of civility and accuracy in briefing. For instance, in *IP Innovation LLC v. Thomson Inc.*, No. 1:03-cv-216 (S.D.Ind. April 8, 2004) (available on Court's website), Magistrate Judge Baker addressed several discovery issues in a patent case. The opinion is most noteworthy, however, for its comments regarding incivility in plaintiff's submissions, which were full of unfounded, improper attacks. The court wrote:

"[T]he undersigned expects civility and professionalism from the attorneys litigating cases before this Court. As a reminder to all attorneys of their duties in this regard, the Court will publish this opinion on its website with the expectation that it will be adhered to by members of the bar in the future. Otherwise, as Judge Williams stated in *Sodick*, 1987 WL 26105 at *1, in the future "this court will not hesitate to use the powers available to it to ensure that counsel treat each other with the level of respect expected from anyone admitted to the bar."

The opinion is worthy of full reading by all who practice in federal court, regardless of substantive practice area. When a federal judge finds a party's submissions to reflect incivility, the bar should take note.

In *Worldwide Financial v. Kopko*, No. 1:03-cv-428 (S.D. Ind. March 18, 2004) (available on court's website), Judge Hamilton similarly commented on the briefing, and expressed concern with both parties' submissions, writing, "The court is concerned about representations made in the briefs of both parties about potentially critical facts." After detailing several such representations in both parties' briefs, Judge Hamilton concluded, "Such exaggerations of the evidence by both sides are not helpful and result in extra scrutiny of other claims, as well."

Removal – Federal practice can be complicated by obscure procedural statutes and rules. Removal is one such procedure that can pose challenging for practitioners.

In *Dixon v. BorgWarner Diversified*, No. 1:03-cv-945 (S.D. Ind. March 29, 2004), two defendants were sued in state court. Defendant BorgWarner timely removed the case to federal court, reciting that "counsel for [co-defendant] has authorized counsel for BorgWarner to state that [co-defendant] consents to and joins in the removal of this action." Plaintiffs then moved to remand the case to state court, arguing in part that the

co-defendant was required to separately sign the removal notice or filing a separate confirmation of consent to removal.

In a thorough discussion of this topic, Judge Barker denied the remand motion. After tracing various cases on the subject, she concluded, “Although in drafting the removal notice, counsel for BorgWarner and Phenix cut the corner of § 1446 more closely than we think is good practice, we conclude that Phenix did consent to the removal of the case to federal court.”

For defense counsel who remove matters to federal court, *BorgWarner* is a must read. The safer practice is to have each defendant sign the actual removal notice or, if that is not practicable, timely file a separate consent to removal. Because costs are ordinarily awarded upon remand, extra care is appropriate in effecting removal.

Mark Your Calendars – The Federal Bar Association’s annual federal civil practice seminar will be held on December 9 from 1:15 – 4:30 in Indianapolis.

Federal Bar Membership – New members are welcome at the Federal Bar Association. Join on-line at www.fedbar.org.

Searching for Local Counsel? When searching for local counsel in other districts, a good source for prospects is the Former Federal Law Clerks Society – www.fedlawclerks.com.

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