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## Shoes That Did Not Drop

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## SHOES THAT DID NOT DROP

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Richard Marcus\*

It is not possible to capture the essence of Ed Cooper: his spirit and intelligence suffuse the rules process (and probably other processes as well). What that process produces, he improves. What that process receives, he evaluates. All who have been involved in that process have been enriched by Ed. I can therefore only write about a small piece of his pervasive influence.

I take “Shoes That Did Not Drop”<sup>1</sup> as my topic because I appreciate, by now, that what the Advisory Committee on Civil Rules does not do is, in some ways, as important as what it does. Similarly, the decision not to do something is equally important as, and may be more difficult than, the decision to do something. It may sometimes seem that amending the Rules is too easy. Greg Joseph once said that they are amended as often as the telephone book.<sup>2</sup> Some even think that it was a mistake to create a Rules Committee.<sup>3</sup> These reactions are overstated, however. Amendments do not and should not happen often. Amending the rules is not easy and should not be.

But a general appreciation of those truths does not mean that it is obvious when to go forward and when not to do so. There are certainly times when the clamor for action is very loud, and the risk of seeming to be a “do-nothing” body is unnerving. Sometimes that

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1. This expression is derived from the phrase “waiting for the other shoe to drop” that described early twentieth-century tenement life, when sounds from the apartment above could be easily heard. It is often used in legal parlance. See, for example, *United States v. Booker*, 375 F.3d 508, 510 (7th Cir. 2004), *aff'd*, 543 U.S. 220 (2005), in which Judge Posner wrote that a recent Supreme Court decision “let the other shoe drop.”

2. Gregory P. Joseph, *Rule Traps*, 30 LITIGATION 6, 6 (2003) (“The Federal Rules of Civil Procedure change with the telephone directory. Every year, something is tweaked, torn, wrenched, or rewritten. Most of this is merely annoying. Sometimes, though, buried amid the clutter is an amendment that carries a real wallop for major aspects of practice.”).

3. See Richard L. Marcus, *Of Babies and Bathwater: The Prospects of Procedural Progress*, 59 BROOK. L. REV. 761, 761 (1993):

[T]his Symposium's topic recalls what a prominent Manhattan lawyer remarked over lunch at an American Law Institute meeting several years ago: “The worst thing they ever did for civil litigation was to create a standing committee on the civil rules.” Having a standing committee meant somebody was always tinkering with the rules; it would be better, he felt, to leave the rules alone and to trust their evolution to careful judicial interpretation.

clamor may come from representatives of Congress, which can make inaction seem a particularly dubious outcome. Moreover, compared to the rulemaking titans of the past, it may seem that we are pygmies in the present, unable to get much of anything of consequence off the ground.<sup>4</sup>

So I thought I would reflect on some things that we<sup>5</sup> did not try to get off the ground, or that we allowed to fall to the ground, and pay tribute in this way to the enduring gentle guidance we have received from Ed.

## I. SHOES THAT DID DROP

By way of contrast, I will begin with a couple of examples of shoes that did drop. Perhaps those experiences can illuminate the risks of responding to clamor for change without sufficient appreciation of the results of the change.

### A. *Rule 11 in 1983*

The 1970s were a time of great and growing clamor about excessive litigation—both in terms of the number of cases and the level of litigation activity in cases.<sup>6</sup> In a way, the notion of complex litigation got its birth during that decade with some mega-litigations, such as *United States v. IBM*, a case of such popular prominence that it even made it into *Doonesbury* in 1982,<sup>7</sup> around the time the United States finally dropped the case.<sup>8</sup>

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4. See Richard L. Marcus, *Reform Through Rulemaking?*, 80 WASH. U. L.Q. 901, 901–03 (2002) (contrasting the pathbreaking work of the rulemaking titans of the past with the much more cautious product of contemporary rulemaking).

5. By “we,” I really mean the Advisory Committee.

6. For one vivid exploration of these topics, consider the 1976 “Pound Conference,” so called to recognize the seventieth anniversary of a famous 1906 speech that Roscoe Pound made to the ABA about procedural reform. See generally *Addresses Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*, 70 F.R.D. 79 (1976).

7. See RICHARD L. MARCUS, EDWARD F. SHERMAN & HOWARD M. ERICHSON, *COMPLEX LITIGATION I* (5th ed. 2010) (*Doonesbury* cartoon about “the IBM anti-trust suit” opposite the first page of the book).

8. See *In re Int’l Bus. Machs. Corp.*, 687 F.2d 591 (2d Cir. 1982) (holding that the district court exceeded its jurisdiction in attempting to review the government’s decision to dismiss the case). This decision has recently been back in the news as bearing on the propriety of Judge Jed Rakoff’s refusal to approve an SEC settlement of charges arising from the recent financial meltdown. See, e.g., Edward Wyatt, *Judge Rejects an S.E.C. Deal with Citigroup*, N.Y. TIMES, Nov. 29, 2011, at A1.

Although this tumult gave rise first to an effort to narrow the scope of discovery (eventually ditched),<sup>9</sup> the 1983 amendments were the true rulemaking watershed it produced. That year saw the adoption of key changes to Rule 16,<sup>10</sup> and the first endorsement in the rules of something that is now widely recognized as critical to effective supervision of civil litigation: case management.<sup>11</sup> We continue to build on that foundation.

That's not what the 1983 amendments became famous for, however. It was also the year Rule 11 was changed from a totally insignificant rule<sup>12</sup> into something like a monster. The general idea seems sensible in retrospect—tell lawyers they have some responsibility for the positions they take in court. But the actual results of the rule change were almost certainly far beyond what its framers had in mind.<sup>13</sup> Rule 11 motions proliferated, some courts regarded the rule as a basis for reversing the American Rule on recoverability of attorneys' fees, and litigation became nasty, or nastier.<sup>14</sup> As Professor Elliott has recently written:

From 1983 to 1993, the Federal Rules of Civil Procedure experimented with mandatory imposition of sanctions under Rule 11. Most commentators agree that this experiment with

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9. See Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747, 756–60 (1998) (describing the 1978–1980 consideration of altering the scope of discovery).

10. For the current versions of this sort of change in the rules, see FED. R. CIV. P. 16(b), which requires a “scheduling order” in most civil cases. For a description of the case-management movement that lay behind this addition to the Rules, see Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CALIF. L. REV. 770 (1981).

11. See Marcus, *supra* note 9, at 760–64 (describing a shift to case management as focus of rulemaking). For contemporary criticism, see Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

12. See D. Michael Risinger, *Honesty in Pleading and Its Enforcement: Some “Striking” Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1, 37 (1976) (stating that there was only one reported instance of striking a complaint on Rule 11 grounds under the 1938 version of the rule after it went into effect).

13. There is at least some room to be unsure about what the rulemakers expected to happen. Although some warned about increased Rule 11 activity, others worried that the rule change would cut off existing enforcement. See, e.g., Jonathan J. Lerner & Seth M. Schwartz, *Why Rule 11 Shouldn't Be Changed*, NAT'L L.J., May 9, 1983, at 13 (arguing that “elimination of the motion to strike would effectively emasculate proposed Rule 11”).

14. For reports on the results of the 1983 amendment to Rule 11, see, for example, AM. JUDICATURE SOC'Y, REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11 (Stephen Burbank ed., 1989). See also ELIZABETH C. WIGGINS ET AL., FED JUDICIAL CTR., RULE 11: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (1991); Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925 (1989).

mandatory financial sanctions for frivolous cases and motions was a disaster.<sup>15</sup>

In 1990, the Committee issued an unprecedented call for comments on changing Rule 11,<sup>16</sup> and in 1993, the rule was changed into essentially its present form. Although there have been occasional rumblings from Congress about undoing the 1993 changes,<sup>17</sup> it surely seems, as the Federal Judicial Center has shown more than once, that the reformed Rule 11 is working much better than the 1983 version.

### B. Initial Disclosure

Initial disclosure is actually a very good idea<sup>18</sup> whose time never came. The general notion—endorsed by such luminaries as Judge Schwarzer<sup>19</sup>—was to get out the “core information” early and thereby accelerate the discovery process and achieve the goals of Rule 1. Maybe that was simply not achievable at the time.<sup>20</sup> Maybe it is not achievable now.

It does seem that the rulemakers did not appreciate how much opposition they would encounter. In 1991, they put out a draft rule that would require disclosure of any information that “bears significantly” on claims or defenses likely to arise in the action.<sup>21</sup> This sounds somewhat like the kind of information lawyers in the U.K. supposedly already exchange without much ado.

Even suggesting such a shift, however, caused much ado in the United States. Opposition arose at every turn; the proposal provoked “a flood of objections unprecedented in 50-plus years of judicial rule-making.”<sup>22</sup> At first, the Committee backed off, but then it

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15. E. Donald Elliott, Twombly *in Context: Why Federal Rule of Civil Procedure 4(b) is Unconstitutional*, 64 FLA. L. REV. 895, 909 n.57 (2012).

16. See Call for Written Comments on Rule 11 of the Federal Rules of Civil Procedure and Related Rules, 131 F.R.D. 335 (1990).

17. See, e.g., Lawsuit Abuse Reduction Act of 2011, H.R. 966, 112th Cong. (2011).

18. By this, I mean that prompt and reliable disclosure of the “core” materials would surely avoid enormous expenditures of money and time that result from our current “hide-the-ball” practices. For that solution to work, however, one would need to be confident that there would be prompt and reliable disclosure.

19. See William W. Schwarzer, *The Federal Rules, The Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703 (1989) (endorsing a regime of disclosure).

20. See Marcus, *supra* note 3, at 805–12.

21. Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence, 137 F.R.D. 53, 87–89 (1991).

22. Ann Pelham, *Judges Make Quite a Discovery; Litigators Erupt, Kill Plan to Reform Federal Civil Rules*, LEGAL TIMES, Mar. 16, 1992, at 1.

proceeded with a revised rule that required disclosure only as to “disputed facts alleged with particularity,”<sup>23</sup> thereby perhaps giving lawyers an incentive (or disincentive) to make particularized allegations. More significantly, the rule allowed a local opt-out, which around half the districts used, producing a welter of different disclosure regimes across the land.

This was not a happy story. National uniformity matters, and on something this basic it may matter more than it does on other topics. Eventually, uniformity was restored in 2000, but only to require disclosure of witnesses and documents the disclosing party might use to support its claims and defenses.<sup>24</sup> And we are told that even these reduced disclosure obligations rarely achieve their desired results,<sup>25</sup> although arguments are frequently made that evidence proffered at trial or summary judgment should be excluded under Rule 37(c)(1) on the ground it was not disclosed when it should have been.<sup>26</sup>

## II. SHOES THAT DID NOT DROP

Amendments can have disturbing effects, and choosing them wisely is important. There are a number of examples of shoes that did not drop, or proposed changes that were retracted, that seem worthy of note. Here are a few.

### A. *Rule 23*

Certainly, the 1966 amendments to Rule 23 were a big deal, but it is not so clear that Committee members at the time appreciated their eventual importance. Arthur Miller, who was actually with the Committee in 1966, told the Committee in 1997 that the future importance of class actions had not been clear.<sup>27</sup> In 1979, he wrote

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23. AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND FORMS, H.R. DOC. NO. 103-74 (1993), *reprinted in* 146 F.R.D. 402, 431 (1993). This is the version adopted in 1993; it was changed to the present version, and made nationally uniform, in 2000.

24. *See* FED. R. CIV. P. 26(a)(1).

25. This statement is based on repeated reports to the Advisory Committee from lawyers that initial disclosure is not usually very effective. This is not to say that disclosure is entirely useless but only that it is often questioned by the bar.

26. *See* 8B CHARLES A. WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE & PROCEDURE § 2289.1 (3d ed. 2010) (discussing motions to exclude evidence on the grounds that it was not disclosed at the proper time).

27. Prof. Miller testified about the 1996 proposals to amend Rule 23 and provided background about the attitudes and expectations at the time that the rule amendments were adopted in the 1960s:

about how startlingly class actions had grown in importance during the first decade after the amendments and how much they had provoked a reaction.<sup>28</sup> A decade later, some predicted their demise.<sup>29</sup> As we now know, those predictions were wrong.<sup>30</sup>

But there is reason to doubt that the Committee fully appreciated in 1966 that something this big was afoot. For a quarter century after 1966, it did not give serious consideration to amending Rule 23. Then in 1991—prompted in part by the challenge of

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If anybody can claim to have been there at creation, I was there at creation. If anyone can claim to tell you what was in Ben's mind [referring to Ben Kaplan, Reporter of the Committee at the time] or the Committee's mind, John [Frank] comes close, but I yield not to John. Nothing was in the Committee's mind. And anyone who tells you that wondrous things were going on with direct relevance to the year 1997, it's good story telling. Just put yourself back in 1960 to '63. Nothing was going on. There were a few antitrust cases, a few securities cases. The civil rights legislation was then putative.

You did not have due process legislation; you did not have safety legislation; you did not have the environmental or consumer legislation. And the rule was not thought of as having the kind of application that it now has.

That doesn't tell you a thing about what the rule should be used for. But you can't blame the rule, because we have had the most incredible upheaval in federal substantive law in the history of the nation between 1963 and 1983, coupled with judicially created doctrines of ancillary and pendent jurisdiction, now codified in the supplemental jurisdiction statute.

It's a new world. It's a new world that imposes on this Committee problems of enormous delicacy. And you're shooting at a moving target, as I say in my written remarks . . . It's *deja vu* all over again. We had this debate in the '70s about the utility of the class action. We're having it again.

Arthur R. Miller, Testimony at Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure, Jan. 17, 1997, San Francisco, at 64–65 (on file with author).

28. See Arthur R. Miller, Comment, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664, 664 (1979) (describing "holy war over Rule 23" waged by "segments of the bench and bar").

29. See, e.g., Douglas Martin, *The Rise and Fall of the Class-Action Lawsuit*, N.Y. TIMES, Jan. 8, 1988, at B7 (reporting a substantial decline in the number of cases filed as class actions and asserting that "class actions had their day in the sun and kind of petered out").

30. In 1997, for example, Judge Paul Niemeyer, then Chair of the Advisory Committee on Civil Rules, testified before Congress that the class action was "transforming the litigation landscape" and that "[c]lass actions are being certified at unprecedented rates, and they are involving a substantial [number], if not a majority of American citizens." Senate Subcommittee Holds Hearing on Class Action Litigation Reform, 66 U.S.L.W. 2294 (Nov. 16, 1997). Five years later, two litigators wrote that "the class action device has changed from the more or less rare case fought out by titans of the bar in top financial centers of the nation to the veritable bread and butter of firms of all shapes and sizes across the country." Benjamin Reid & Chris S. Coutroulis, *Checkmate in Class Actions: Defensive Strategy in the Initial Moves*, 28 LITIGATION 21, 21 (2002).

dealing with asbestos personal injury litigation<sup>31</sup>—the Judicial Conference urged the Committee to take another look at Rule 23.<sup>32</sup>

This led to a five-year reform effort that began with serious consideration of a proposal to junk the current structure of Rule 23(b) and replace it with a much more discretionary arrangement.<sup>33</sup> Such a change might have seemed in keeping with the shift from the original, highly formalistic Rule 23(b) to the more functional version adopted in 1966. But making that shift would involve discarding a quarter century of experience under the existing rule.

Eventually the complete rewrite was shelved. Attention focused on Rule 23(b)(3), and various “improvements” of its factors were devised. Meanwhile, the Third Circuit seemed to require that the district court conduct a full litigation certification review even if the parties proposed a settlement. That approach could have scotched the possibility of settlement-class certification even though many circuits had found it very useful.<sup>34</sup> So the Advisory Committee proposed a new Rule 23(b)(4) to provide authority for such certification for settlement.<sup>35</sup> Moreover, the absence of a ready route for appellate review of class certification decisions prompted a proposal to add Rule 23(f).<sup>36</sup>

The Committee submitted these ideas for public comment in August 1996. It got a big reaction. Eventually the Committee published a four-volume compilation of those comments<sup>37</sup> that included a letter signed by more than one hundred law professors protesting various aspects of the amendment package.<sup>38</sup> Very serious questions were raised about many aspects of the Rule 23(b)(3) changes. And the Supreme Court granted cert. in *Amchem*, eventually firmly, but gently, telling the Third Circuit it was wrong about

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31. See JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION (1991) (recommending congressional action to deal with challenges of this form of litigation).

32. See John K. Rabiej, *The Making of Class Action Rule 23—What Were We Thinking?*, 24 MISS. C. L. REV. 323, 347 (2005).

33. See *id.* at 347–50.

34. See *In re Gen. Motors Corp. Pick-Up Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3d Cir. 1995), cert. denied, 516 U.S. 824 (1995).

35. See Proposed Rules, 167 F.R.D. 523, 539 (1996) (presenting a proposed addition of new Rule 23(b)(4)).

36. See *id.* at 560.

37. See 1-4 WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RULES ON PROPOSED AMENDMENTS TO CIVIL RULE 23 (1997).

38. Letter from Steering Committee to Oppose Proposed Rule 23 to Standing Committee on Rules of Practice and Procedure (May 28, 1996) in 2 ADVISORY COMMITTEE ON CIVIL RULES, WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RULES ON PROPOSED AMENDMENTS TO CIVIL RULE 23 1–9 (1997).



using exactly the same standards for litigation and settlement certification.<sup>39</sup>

The public hearing process is a great boon to the Committee and produced understandable second thoughts in 1997. Only the Rule 23(f) proposal went forward,<sup>40</sup> and it has indeed produced a body of appellate law on class certification that has contributed to significant changes in the way class actions are handled.

Meanwhile, building on its experience, the Committee returned to Rule 23 to examine not its certification criteria but its processes for managing class actions. This effort led to changes published for comment in 2001 and was also the subject of wide interest. But this time the reaction was not nearly so radioactive, and the changes went forward (with modifications) and became effective some nine years ago.<sup>41</sup>

Along with other things (CAFA<sup>42</sup> comes to mind), the 2003 amendments produced changes that contribute to the current review of Rule 23 issues.<sup>43</sup> That review has identified a considerable variety of issues for consideration, but that development hardly means another set of Rule 23 shoes will soon be dropping.

### B. *E-Discovery*

Discovery has been on the Committee's calendar fairly continuously for a third of a century. For the last decade or so, e-discovery has surely been the biggest feature of it. More than fifteen years ago, lawyers criticized the Committee's focus on discovery issues as "fighting the last war" because they did not deal with the challenges

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39. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 619 (1997) ("We agree with petitioners to this limited extent: Settlement is relevant to class certification. The Third Circuit's opinion bears modification in that respect.").

40. See FED. R. CIV. P. 23(f).

41. See FED. R. CIV. P. 23(c), (e) (amended 2003); 23(g), (h) (added 2003).

42. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified at scattered sections of 28 U.S.C. (2006)).

43. See Memo Regarding Rule 23 Issues, in ADVISORY COMMITTEE ON CIVIL RULES, AGENDA MATERIALS TO THE ADVISORY COMMITTEE ON CIVIL RULES MEETING, ANN ARBOR, MI 449-644 (2012), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2012-03.pdf>.

of email discovery.<sup>44</sup> By late 1998, public hearings on other discovery amendments included criticisms that there was nothing in the pending amendment package to address e-discovery.<sup>45</sup>

There was a reason for that omission—the Committee did not feel confident that it had a sure grasp of the problems presented by e-discovery and certainly did not know what to do about them. In 2000, it made a sustained effort to find out more.<sup>46</sup> Although many urged that it act quickly, few had clear ideas about what that prompt action should include, and the whole project was put on hold. Only in 2003 did the Committee feel that it had gained a sufficient understanding to begin to devise changes that had promise of success. Actually, those changes, adopted in 2006, were direct descendants of similar changes circulated for discussion as early as March 2000. But the learning curve is steep for many of the Committee's tasks, and that shoe was not ready to drop in 2000.

It seems that the 2006 amendments have done some good, and complaints that they have also done some harm seem unpersuasive (e.g., would it really be better to deal with these problems without rules?). Many states have adopted rules or statutes that track what the Committee did.<sup>47</sup>

Now we are presented with some unfinished business from the 2006 amendments—coping with the burdens and challenges of preserving electronically stored information. Again, we are presented with calls that we act with alacrity. Again, we are immersed in the difficult task of figuring out what exactly the problems are and how exactly a rule change can produce positive effects. As discussion during the March 2012 meeting in Ann Arbor

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44. This notion first emerged for the Committee during a January 1997 miniconference on discovery issues in San Francisco. For background on the evolution of the Committee's treatment of these issues, see generally Richard Marcus, *Only Yesterday: Reflections on Rulemaking Responses to E-Discovery*, 73 *FORDHAM L. REV.* 1 (2004).

45. See Allen Black, Testimony at Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure, Dec. 7, 1998, Baltimore, at 22–23 (protesting that the proposed amendments would do nothing to take account of the growing importance of electronically stored information in discovery) (on file with author).

46. For a display of discussion issues about possible amendment ideas, see Memorandum from Richard Marcus, Special Reporter, to Participants in Mini-Conference on Electronic Discovery at Brooklyn Law School on Oct. 27, 2000 (Sept. 26, 2000), in *AGENDA BOOK FOR ADVISORY COMMITTEE ON CIVIL RULES* tab 8 (2000), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2000-10.pdf>.

47. See Thomas Y. Allman & James Ancone, *E-Discovery in State Courts*, in 4 *ELECTRONIC DISCOVERY DESKBOOK*, at 31 (PLI, Course Handbook Ser. No. 38154, 2012).

showed, the eventual outcome of this consideration remains far from certain.<sup>48</sup>

### C. Pleading

We are all so transfixed by *Twombly* and *Iqbal* that we may forget that the pleading ball was tossed into the Committee's lap almost twenty years ago by the Supreme Court's decision in *Leatherman*,<sup>49</sup> which stated that courts could not engraft heightened pleading standards onto the rules to address problems resulting from perceived drawbacks of looser standards. While holding that the rules did not contemplate such judicial innovation, Chief Justice Rehnquist was clear that the Committee could decide to change the rules through the amendment process.<sup>50</sup>

Thus invited, the Committee did consider that possibility.<sup>51</sup> I believe that was one of Ed's first tasks as Reporter, and eventually—after the sort of thorough evaluation that always occurs under Ed's guidance—the Committee decided not to pursue the topic.

Now, as we know, the shoe is somewhat on the other foot. The Court has acted on its own. Some urge that it inappropriately side-stepped the rules process. Many yearn for the careful consideration the Committee's process affords. You could say that what the Court needed, but did not have, was Ed. But it hardly seems likely that more effort twenty years ago would have had a profound effect on the current situation.

So we find ourselves again pondering the possibilities of revising pleading standards.<sup>52</sup> Particularly in the current context, this raises a profoundly challenging set of issues. Fortunately we have Ed to identify the alternatives and evaluate them thoroughly and dispassionately.

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48. For a review of the issues, see AGENDA MATERIALS TO ADVISORY COMMITTEE ON CIVIL RULES MEETING, ANN ARBOR, MI 249–304 (2012), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2012-03.pdf>.

49. *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993).

50. See *id.* at 168 (“Perhaps if Rules 8 and 9 were rewritten today, claims against municipalities under § 1983 might be subjected to the added specificity requirement of Rule 9(b). But that is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.”).

51. See ADVISORY COMMITTEE ON CIVIL RULES, MEETING MINUTES, Washington, D.C. 17–18 (May 3–5, 1993) (describing discussion of Rule 9(b)).

52. See, for example, the brief treatment of pleading issues in the AGENDA MATERIALS TO THE ADVISORY COMMITTEE ON CIVIL RULES MEETING, ANN ARBOR, MI, at 311–14 (Mar. 22–23, 2004).

## D. Rule 68

A final brief example rounds out my chronicle. Many in the 1980s and early 1990s embraced Rule 68 as a wonderful model for curing various ills thought to afflict federal-court litigation.<sup>53</sup> Some states had more vigorous versions of the same sort of rule, and the federal version seemed inappropriately to equip defendants to apply pressure to plaintiffs but not the other way around. Moreover, after *Marek v. Chesny*,<sup>54</sup> it seemed that the rule applied acute pressure only in the very cases in which it looked like Congress wanted to encourage lawyers to take plaintiffs' cases and encourage plaintiffs to seek relief in court.<sup>55</sup>

It is difficult to recapture now the variety of Rube-Goldbergesque rule proposals that the Rule 68 discussion included. Suffice to say that they proved Tom Rowe's observation that thinking about attorney-fee awards actually turns out to be very complicated.<sup>56</sup> And Steve Burbank vigorously urged that, as to all of these ideas, it was "time to abandon ship."<sup>57</sup>

Rule 68 has not gone away, but amendment proposals have also not gone forward. From time to time ideas for revision come up. I recall particularly that the Second Circuit proposed amending the rule in a 2006 decision.<sup>58</sup> And I admit to being lured in that direction, perhaps because I had endorsed some thoughts along those lines.<sup>59</sup> But Ed quickly brought me up short. He had thought through all the permutations of the rule in a way that nobody else

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53. See, e.g., William W. Schwarzer, *Fee-Shifting Offers of Judgment—An Approach to Reducing the Cost of Litigation*, 76 JUDICATURE 147 (1992). Rule 68 permits a defendant to make an "offer of judgment" to a plaintiff, and if the plaintiff proceeds with the litigation but does not obtain a more favorable judgment, the plaintiff must pay the defendant's post-offer costs of suit. See FED. R. CIV. P. 68.

54. 473 U.S. 1 (1985).

55. *Marek* involved a claim based on a statute subject to an attorney fee shifting provision that said fees were recoverable "as a part of costs." The Court held that because Rule 68 also spoke of a "costs" award the making of a Rule 68 offer of judgment prevented a successful plaintiff from recovering post-offer costs (including attorney fees) unless the plaintiff won more than the amount offered.

56. See Thomas D. Rowe, Jr., *Predicting the Effects of Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS. 139, 140 (1984) (asserting that predicting the effects of fee shifting turns out to be "surprisingly complex").

57. Stephen B. Burbank, *Proposals to Amend Rule 68—Time to Abandon Ship*, 19 U. MICH. J.L. REFORM 425 (1986).

58. See *Reiter v. MTA N.Y.C. Transit Auth.*, 457 F.3d 224, 233 (2d Cir. 2006) (recommending that the Advisory Committee address the method of determining whether a Rule 68 offer of judgment is superior to the judgment ultimately entered when both deal with non-monetary relief).

59. See 12 CHARLES A. WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE & PROCEDURE, § 3006.1 at 127 (2d ed. 1997), quoted in *Reiter*, 457 F.3d at 230.

had done. He had myriad versions of possible amendments that pursued and highlighted those difficulties. His patient dismantling of all the issues showed that this was not a route that could easily lead in a productive direction.<sup>60</sup> The Rule 68 amendment idea faded from the docket, Second Circuit recommendation notwithstanding.

### III. UBIQUITOUS ED

It is probably a good thing that many ideas fade from the docket. Quite a few more items that appeared briefly (or not so briefly) but eventually disappeared occur to me, but seem not worthy of mention here. My basic point is that Ed has been ubiquitous in the crucial process of evaluating and discarding those ideas that do not pass muster. As he is central to all aspects of Civil Rules activity (the most important branch of rules activity), he unquestionably serves as the acid test for ideas that die on the vine.

What's critical to appreciate is that Ed does this crucial job by embracing and pursuing ideas, by exploring them more fully than the people who propose them have done, and thereby revealing the flaws or problems that the rest of us would figure out only years afterwards. On that score, I have three examples, all drawn from our class-action experience.

First, after the collapse of the 1996 proposed amendments, Ed undertook to see what could be designed as a truly aggressive and effective reshaping of class actions and related techniques to improve the handling of mass torts in federal court. What he devised was clearly "outside the box"—a rather breathtaking leap into the unknown.<sup>61</sup> So far as I know, it went beyond what anyone else had put forth as even a discussion topic. I was so startled by the proposal that it prompted me to invoke Senator Moynihan's "benign neglect" image as a less risky alternative.<sup>62</sup> So Ed clearly can imagine things others cannot. But he also sees the attendant risks and hardly insists on pursuing them. Benign neglect did not control, but the actual rulemaking agenda was much less ambitious.

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60. See *Rule 68: A Progress Report*, in ADVISORY COMMITTEE ON CIVIL RULES, AGENDA MATERIALS TO ADVISORY COMMITTEE ON CIVIL RULES MEETING, BROOKLYN, N.Y. (Apr. 19–20, 2007).

61. See Edward H. Cooper, *Aggregation and Settlement of Mass Torts*, 148 U. PA. L. REV. 1943 (2000).

62. See Richard L. Marcus, *Benign Neglect Reconsidered*, 148 U. PA. L. REV. 2009, 2012 (2000).

Second, that agenda included the notion that a rule would be a good way to address whether class members could appeal the district court's approval of a proposed settlement if they objected to the proposed deal. Some courts had held that class members who opposed the settlement had "standing" to appeal the court's approval of the settlement only if they were granted leave to intervene.<sup>63</sup> As a practical matter of litigation management, there was something to be said for permitting the district judge thus to police objections; certainly, the Committee heard much about bad-faith, blackmailing objectors who extorted money by threatening to string out the settlement process through a lengthy appeal,<sup>64</sup> and giving the judge the power to cut off that possibility had much to recommend it. But as Ed pointed out, there could be serious questions about using a civil rule to try to decide matters of appellate standing. Moreover, since the class-action settlement would extinguish the class members' claims—except to the extent they had rights under the settlement—there would seem to be standing even though no rule said so. Under such wise guidance, this idea was jettisoned. Years later, on literally the eve of final presentation of what became the 2003 Rule 23 amendments to the Standing Committee, the Supreme Court decided *Devlin v. Scardeletti*,<sup>65</sup> holding that objecting class members may appeal from denial of their objections. Having a rule proposal addressing the same thing just then would have been awkward at best. Thank goodness Ed's work showed that this was not the way to go.

Third, the problem of overlapping class actions was another recurrent headache, as were efforts at gaming the class-action system by seeking certification in multiple courts or shopping proposed settlements until some judge, somewhere, was willing to approve what others had not.<sup>66</sup> Could the Committee solve these problems? There were large obstacles to doing so, but Ed was able to develop

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63. See ADVISORY COMMITTEE ON CIVIL RULES, AGENDA MATERIALS TO ADVISORY COMMITTEE ON CIVIL RULES MEETING, TUCSON, AZ (Oct. 16–17, 2000) (offering a proposed new Rule 23(g) entitled "Appeal Standing").

64. This was a recurrent theme during the long process of developing and revising the 2003 amendments to Rule 23.

65. 536 U.S. 1 (2002).

66. Judge Frank Easterbrook provided a classic statement of the concern:

Suppose that every state in the nation would as a matter of first principles deem inappropriate a nationwide class covering these claims and products. What this might mean in practice is something like "9 of 10 judges in every state would rule against certifying a nationwide class" . . . . Although the 10% that see things otherwise are a distinct minority, one is bound to turn up if plaintiffs file enough suits—and, if one nationwide class is certified, then all the no-certification decisions fade into insignificance. A single positive trumps all the negatives.

ingenious rule-based ways of giving fairly binding effect to denials of class certification and refusals to approve proposed class settlements. Those proposals were so thoughtful that they were published along with actual amendment proposals to permit discussion.<sup>67</sup> But they also were so thorough that they educated the Committee, and it decided not to try to address these issues by rule. Again, Ed was thinking outside the box, and again, his creativity enabled the Committee to decide to stay inside the box. Just last Term, in *Smith v. Bayer Corporation*,<sup>68</sup> the Court confirmed the wisdom of that discretion, although it included a cryptic footnote about possible rulemaking on the subject.<sup>69</sup>

Again and again, Ed is willing and able to appreciate and pursue new ideas with unflagging enthusiasm. Nobody else is as open to rethinking things at every stage of the process. But nobody else is as capable of seeing (after fully exploring an idea) that it really should not be pursued. That's why the shoes that should not drop don't drop, and why I decided to pay tribute to this feature of his service that does not get enough attention.

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*In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 333 F.3d 763, 766–67 (7th Cir. 2003).

67. See ADVISORY COMMITTEE ON CIVIL RULES, MEETING MINUTES 40–41 (Oct. 22–23, 2001) (describing panel discussion of “unpublished” proposals regarding overlapping, duplicative, and competitive class actions).

68. 131 S. Ct. 2368 (2011) (holding that the Anti-Injunction Act forbids federal-court injunction against state-court certification of a class that the federal court had refused to certify).

69. See *id.* at 2382 n.12 (observing that the Court's decision did not “at all address the permissibility of a change to the Federal Rules of Civil Procedure pertaining to this possibility”).