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REPORT OF *WARNE V. HALL* SUBCOMMITTEE

TO: Civil Rules Committee

FROM: Bradley A. Levin

The subcommittee was formed to assess the impact of the Colorado Supreme Court's decision in *Warne v. Hall*, 373 P.2d 588 (Colo. 2016), on the civil rules and, in particular, to provide recommendations as to any rule changes that may be warranted in light of *Warne*. The other members of the subcommittee are: Judge Ann Frick, Damon Davis, David DeMuro, Dave Little, Judge Eric Elliff, Skip Netzorg, Judge Jerry Jones, Jose Vasquez, Jeannette Kornreich, Brent Owen, Peter Goldstein, Richard Holme, and Stephanie Scoville.

The subcommittee met twice, once in October and again in January. At the first meeting, there was vigorous discussion regarding the implications of the *Warne* decision, the proper role of the Civil Rules Committee in addressing those implications, and how best to approach determining whether any changes to the rules are necessary. The subcommittee decided to have an informal, nonscientific survey conducted to ascertain the breadth of any impact of the decision on the district courts statewide, *i.e.*, whether there was any perceptible increase in Rule 12 motions, or any other noticeable effect on the cases filed since *Warne* was issued. Judge Elliff sent an email with various queries to all of the district court judges, and compiled the responses he received. A copy of Judge Elliff's Memorandum reporting the results of the survey is attached. Judge Elliff concluded, "[T]here does not appear to be a huge demand (or a need) for any rule changes to adjust for a possible increase in Rule 12 motions in light of *Warne*. At best, it counsels in favor of a wait-and-see approach."

At its second meeting, the subcommittee concurred with Judge Elliff. The subcommittee then discussed whether, particularly in view of *Warne's* adoption of the plausibility standard, some of the pleading forms should be either modified or jettisoned entirely. While there was much discussion regarding this matter, the subcommittee did not reach a consensus recommendation, but determined to submit the matter for consideration and decision by the Civil Rules Committee as a whole.

MEMORANDUM

To: Warne Subcommittee Members

From: Eric Elliff

Date: November 23, 2016

Re: Email Survey Results

To assess the impact of the Colorado Supreme Court's decision in *Warne v. Hall*, the following email was sent to all of the district court judges in the state:

> The Supreme Court Civil Rules Committee has formed a subcommittee to review the rules in light of Warne v. Hall (which adopts the federal "plausibility" standard for Rule 12 motions). To that end, I would value your input on the following questions:
>
> 1) Since the decision was announced, have you noticed an increase in Rule 12 motions?
>
> 2) If so, can you quantify it?
>
> 3) If not, do you expect to see an increase in light of the decision?
>
> 4) Why or why not?
>
> 5) Has your district adopted any local procedures to deal with the impacts (if any) of the decision? If so, what are they?

Seventeen of approximately 190 judges responded. The vast majority had noticed no increase in the number of motions to dismiss. Those who commented further generally believed that this was because the bar was unaware of the decision. Most of those responding also felt that the volume of motions to dismiss would increase in light of the decision, though no one was expecting the floodgates to open up (with one exception, who expected a fifty percent increase in filings). And, not surprisingly, no one had developed any special local procedures to deal with any anticipated increase in motions to dismiss.

Representative comments are reproduced below.

> I do think there was already a significant uptick in Rule 12s and Rule 56s in the past year or two, perhaps as a result of CAP and its expiration and the sweeping changes to Rules 16 and 26. Whack a mole effect of curtailing discovery and discovery motions.
>
> I think it will take a while for the bar to catch on, but the day is coming. A lot of our docket doesn't lend itself to the standard, as compared to the feds (it's not hard to state a plausible MVA claim). That's a negative against the decision,

> rather than being a positive or neutral—I'm expecting to see it used when it shouldn't be.
>
> For whatever reason, I don't think most counsel are even aware of it. I have been incorporating it into my decisions to help educate the bar.
>
> I don't think it changes the landscape that much
>
> [E]ventually the bar will hear about *Warne* and get around to filing more Rule 12 motions. Could be wrong.
>
> Colorado judges have been given the same discretion as federal judges to evaluate the most basic bona fides of a claim (or entire lawsuit). Huge legal fee expenses can be avoided by a Rule 12 motion presented under the higher *Iqbal* - *Warne* standard for stating a claim.

Given these results, there does not appear to be a huge demand (or a need) for any rule changes to adjust for a possible increase in Rule 12 motions in light of *Warne*. At best, it counsels in favor of a wait-and-see approach. Granted, this is a small sample, but it seems that if there were serious concerns we would have had more responses.