LexisNexis

LITIGATION INSIGHTS

Moore's Federal Practice & Procedure

Wagstaffe's Civil Procedure Before Trial

November 2018

MOORE'S FEDERAL PRACTICE—TOP THREE HIGHLIGHTS

The following three summaries are this month's Editor's Top Picks from the dozens of decisions added to Moore's Federal Practice and Procedure.

CLASS ACTIONS

Attorney's Fees

Levitt v. Southwest Airlines Co. (In re Southwest Airlines Voucher Litig.)

898 F.3d 740, 2018 U.S. App. LEXIS 21417 (7th Cir. Aug. 2, 2018)

The Seventh Circuit holds that unless the parties to a class action settlement agreement, including objecting parties, expressly agree otherwise, a settlement agreement should not be read to bar an objector from requesting fees for efforts in adding value to a settlement.

Jump to full summary

DISMISSAL

Failure to Prosecute

Griggs v. S.G.E. Mgmt., L.L.C.

2018 U.S. App. LEXIS 27615 (5th Cir. Sept. 27, 2018)

The Fifth Circuit holds that a dismissal without prejudice for failure to prosecute under Rule 41(b) is a final, appealable decision if all that is left for the plaintiff to do is to submit the claim to arbitration.

Jump to full summary

PROCEEDING IN FORMAL PAUPERIS

Prisoner Litigation

Brown v. Sage

2018 U.S. App. LEXIS 25419 (3d Cir. Sept. 7, 2018)

The Third Circuit holds that courts within the circuit must use its precedent to evaluate whether a prior case qualifies as a "strike" that would bar a prisoner from proceeding in forma pauperis, regardless of which court decided the prior case.

Jump to full summary

View Moore's Federal Practice & Procedure in Lexis Advance

LEXIS ADVANCE ALERTS

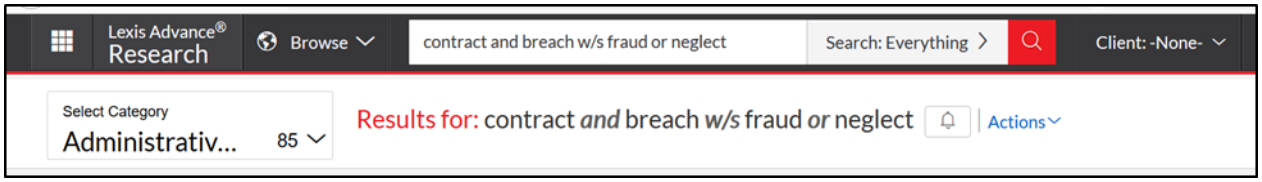
Adam Dietz, Solutions Consultant

Lexis Advance Alerts are one of the most powerful tools available to you. By allowing you to convert a search into a persistent query that runs automatically, alerting you to any new results. Alerts save you the time of running the search, and they save you the hassle of shifting through dozens (or more) of previously seen results. Best of all, they save you worry – the worry of missing an important development, whether it's a new case, statute, development, news article, etc., because you were too busy to rerun a search. With an Alert, you can help prevent yourself from ever being surprised by new developments.

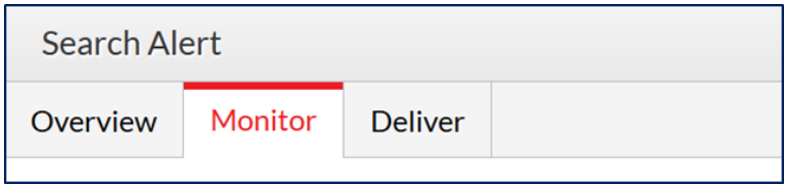
There are four types of Alerts in Lexis Advance, each with its own benefits and its own use case. These include the Search Alert, the Shepard's Alert, the Publication Alert and the Legislative Alert. For more information on setting up an Alert, contact your dedicated Solutions Consultant or our Help Desk.

1. **The Search Alert** is the most familiar to LexisNexis users. It allows you to run a search once, in any of our content, and then to save the search to run automatically thereafter. It can be used for any type of content – case law, administrative decisions, statutes, legislative material, news, etc., allowing you stay up to date on new precedent, upcoming new requirements or regulations, or even media coverage of issues of importance. There are three simple steps to creating a Search Alert:

- Do the search – create and run the search that you wish to convert to an Alert, just as you normally would.



This will bring up a form where you can customize your Alert. The Overview tab allows you to review and edit your search terms as well as to name your Alert. The Monitor Tab allows you to choose which content types to cover with your Alert. ***You can run the same Alert simultaneously against cases, administrative decisions, regulations, statutes, news, etc.***



The Deliver tab allows you to schedule the Alert on a daily, weekly, monthly or "as available" option. If you want email delivery, be sure to choose the "Email + Online" option.

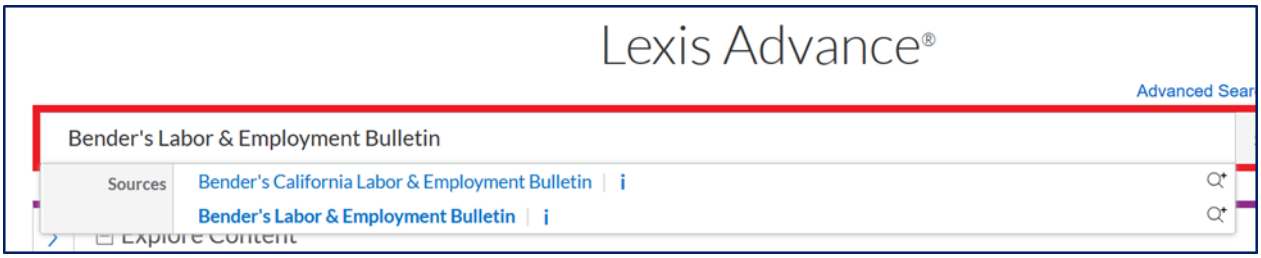
Your Alert will start running immediately, with new results delivered to your Lexis Advance front page, as well as via email, if you chose that option.

2. **The Shepard's Alert** allows you to Shepardize a case, administrative decision, or statute and then to request updates as document receives new Shepard's treatment. The Shepard's Alert will help make sure that you are always aware of any changes to the important precedent that you rely upon for your practice, with no surprises. As with the Search Alert, the process is simple:

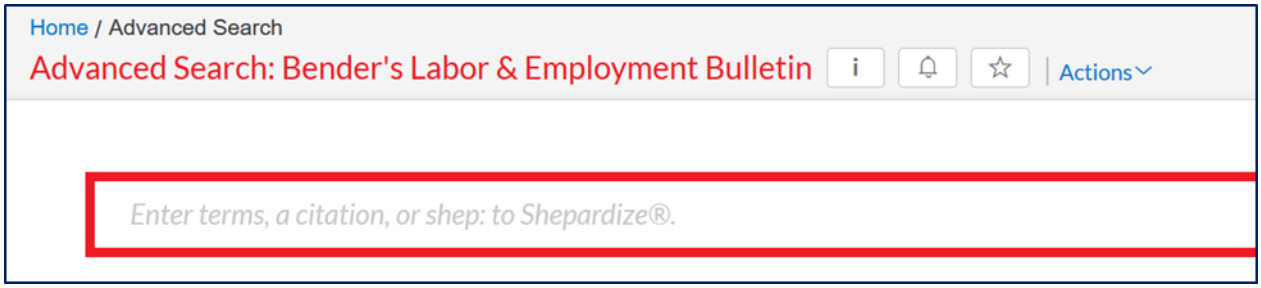
1. Shepardize the document.
2. Click the bell icon at the top and fill in the Alert form.

The Shepard's Alert form will again offer you the Overview, Monitor and Delivery tabs. Here, the Monitor tab allows you to customize your results. You can check off options to receive notice of any change in treatment, of just negative change (when the case you're following has been overruled, criticized, distinguished, etc.), or of just changes relevant to a specific headnote.

3. **The Publication Alert** allows you to receive notice of a new issue of a publication. For instance, perhaps you like to read each month's issues of the *Pratt's Government Contracting Law Report* or *Bender's Labor & Employment Bulletin*. With a Publication Alert, no search is necessary. Rather, you simply request that you receive notice of each new issue. The Alert will include a list of all the new articles, with links, so you can quickly browse and access the articles you find relevant. To create such an Alert, simply enter the publication's name in the red search box on Lexis Advance. Then, choose it from the list of suggested sources.



That will take you to a search page for that publication, where you can once again click the bell icon. (Clicking the star will instead save the source as a favorite, so you won't need to look for it again.) After clicking the bell, you'll just need to choose the Email + Online option, then enter your email address and choose "as updates are available" to receive word whenever there is a new issue.



4. **The Legislative Alert** notifies you of new activity on a bill that you're following. To set one up, first find the bill. This can be done via a terms search (e.g., find all bills that contain "acquisition and reform") or by a direct cite search (e.g., 2018 HR 5 or 2018 S. 728). Once you find a bill you would like to track, click on it to access the full text. Once in the full text, click the bell icon on the top and fill in the Alert form. The Monitor tab contains a list of general actions, allowing you to customize your Alert to cover all, or just certain, steps in the bill's progression.

Alerts are a very powerful part of your research toolbox. If you have any questions at all about how to create one, the best search strategies, etc., please do contact your LexisNexis Solutions Consultant.

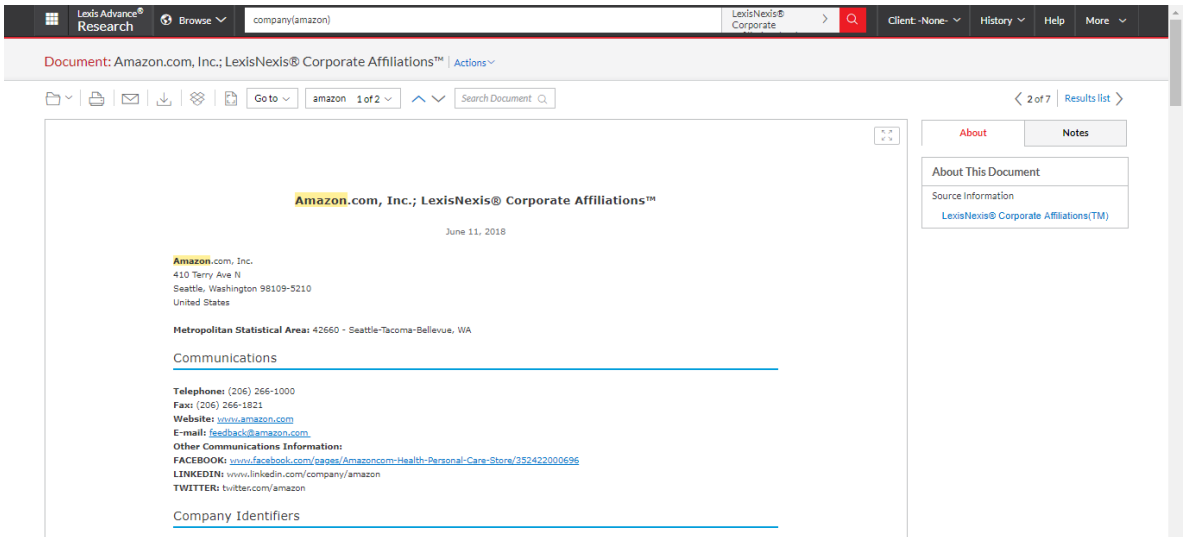
QUICK PRODUCT OVERVIEW—LEXISNEXIS ® CORPORATE AFFILIATIONS ™

Brenna Clanton, Solutions Consultant

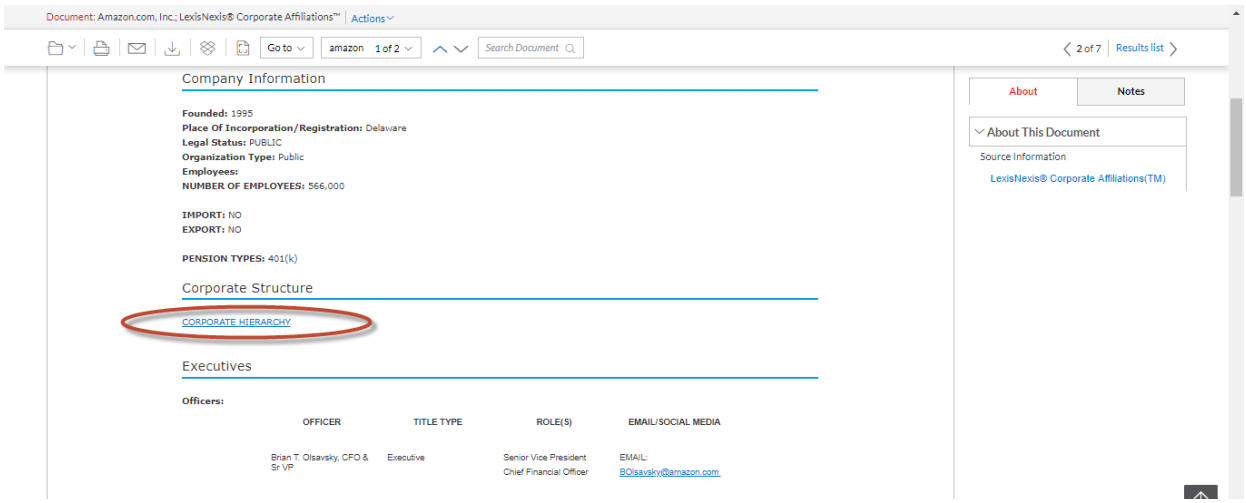
LexisNexis® Corporate Affiliations™ contains profile information and corporate linkage to the eighth level for public and private companies (including parent companies worldwide).Domestic companies usually demonstrate revenues in excess of $10 million, substantial assets/net worth, or a work force in excess of 300 persons while non-U.S. based companies usually demonstrate revenues in excess of $50 million.

Corporate Affiliations offers you hierarchical information as well as corporate information, descriptive data about the company, current financial and personnel details.

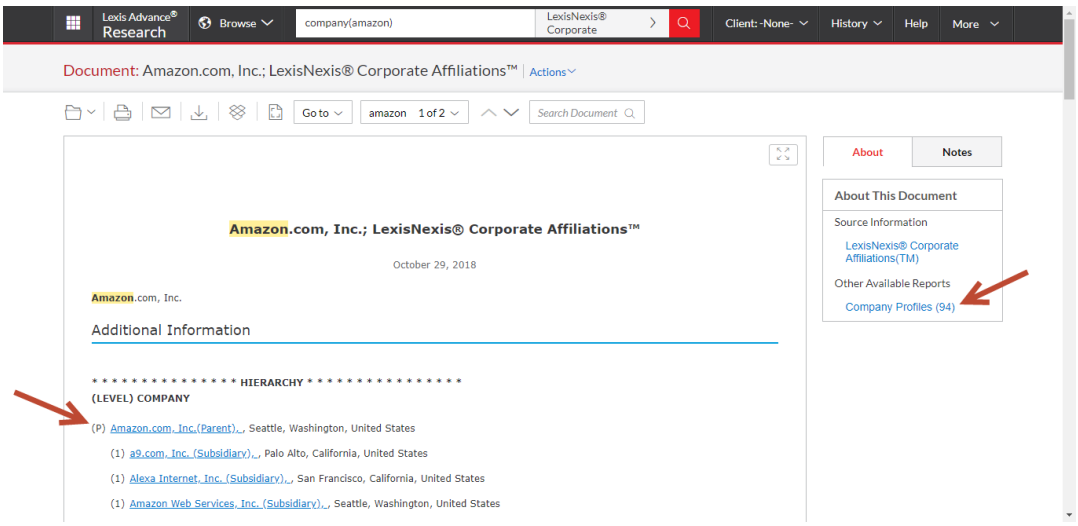
Here's an example of a record from LexisNexis Corporate Affiliations:



The hyperlink for "Corporate Hierarchy" is located mid-way down the page; this will take you to the company's family tree:



Once in the corporate hierarchy, you can click on any subsidiary's link to retrieve a profile for that specific subsidiary. Alternatively, you can use the hyperlink in the right-hand margin to retrieve profiles for all of the companies listed in the corporate hierarchy.



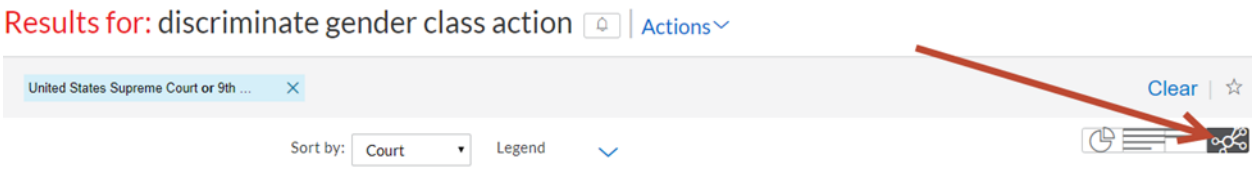
For more than 45 years, LexisNexis® Corporate Affiliations™ has helped customers leverage relevant corporate information to guide smarter business decisions. Corporate Affiliations offers critical insights—including company profiles and hierarchy data on nearly two million parent and subsidiary businesses worldwide and in-depth details on directors, executives and their professional interactions—to help you uncover the relevant information you need.

RAVEL VIEW

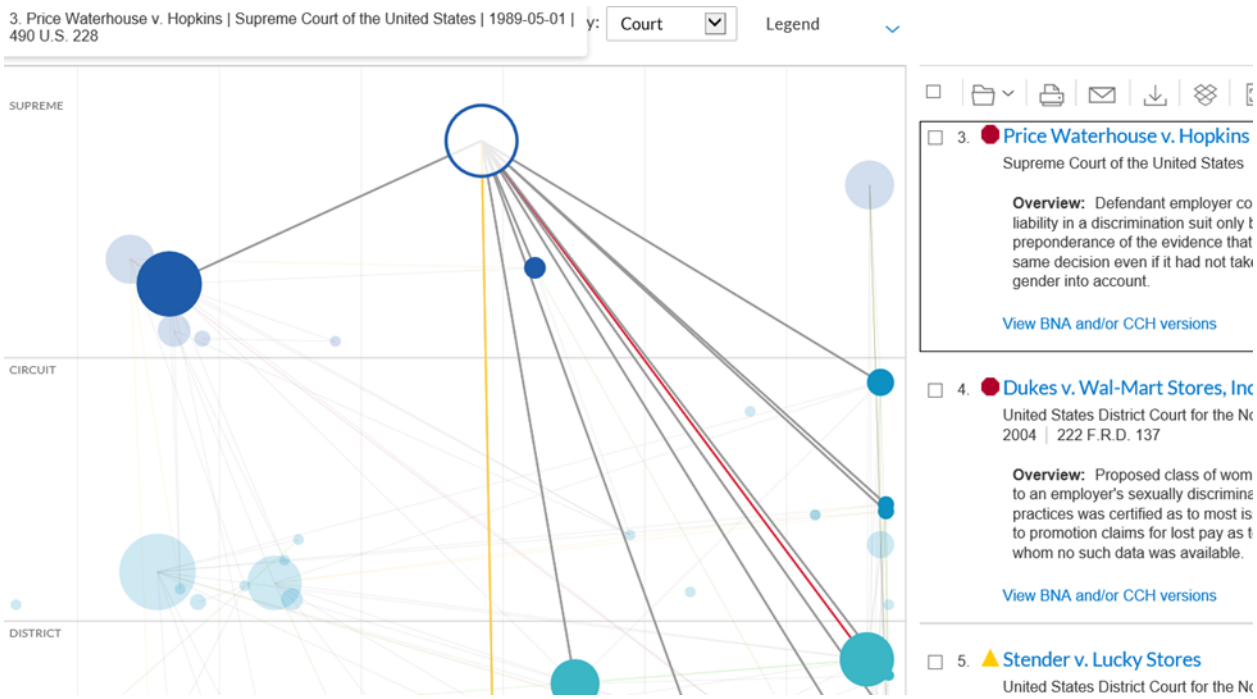
Chet Lexvold, Regional Solutions Consultant

Have you ever wondered how you can quickly identify the seminal cases on the issue you're researching? With Ravel View on Lexis Advance, it's as easy as 1-click!

After running a keyword search on Lexis Advance, the "Ravel View" is available on the top-right of your case law results:



Ravel View graphically presents the top 75 results from your search. Each circle represents one case, and the larger the circle, the more times that case has been cited. The line color connecting cases represents *Shepard's* treatment, e.g., red for negative. The horizontal axis displays cases from oldest to newest, and the vertical axis displays court hierarchy.



In addition, the addition of Ravel Law has allowed LexisNexis to incorporate over 6 million case reporter images into our cases, meaning you can download PDF images of cases as they appear in official case reporters. It's also as easy as 1-click (see below):

For more information, check out our Guide on Ravel View, or this great 3-minute video.

NEW FROM JIM WAGSTAFFE

FIVE BATTLE STRATEGIES FOR CAPTURING THE REMOVAL FLAG

By: Jim Wagstaffe

Choosing between state and federal court can be a critical battle for capturing the victory flag in civil litigation. The D-Day victory strategy depends on who wins the initial skirmish on removal and remand.

In light of very recent court decisions on and statutory changes to removal jurisdiction and procedure, there are five major battle--strategies for plaintiffs to keep the case in state court (i.e., by remand motions) and conversely for defendants successfully to have their removal strategies ensure federal court survival.

1. Plant (or un-plant) the Federal Jurisdiction Flag

Advanced planning by plaintiffs can thwart removal. Plaintiffs' lawyers can pursue only alternative state law claims, eschew federal causes of action and be sure to name a non-diverse plaintiff or defendant to avoid the risk of diversity removal. Defendants, on the other hand, can tease out federal jurisdiction from uncertain state court complaints, by obtaining clarification to federal claims that are, in fact, being asserted. And, when facing a seeming absence of diversity, case law does allow the defendant to remove but only if it can show that there is no possible factual and legal basis for a claim against the non-diverse party. See GranCare, LLC v. Thrower, 889 F.3d 543 (9th Cir. 2018).

2. The Complete Preemption Firebomb

Even if the state court complaint alleges only what appear to be state law claims, they may be in the unusual category of being completely preempted by federal law and replaced necessarily with a federal claim (e.g. ERISA, LMRA, Copyright, etc.). In such situations, the defendant can recharacterize the claims as necessarily federal and remove them to federal court The plaintiff can do his or her best to find an independent basis for liability such as a licensing contract in a seeming copyright case or where a non-negotiable state law right (e.g. privacy) in a labor law case.

3. The Local Defendant Booby Trap

Even if there is complete diversity of citizenship otherwise allowing removal, if the plaintiff is from out-of-state and one of the served defendants is local (i.e. from the forum state) ordinarily there is a statutory bar on removal 28 U.S.C. §1446(b)(2).

However, a brand-new case gives the battleplan to defendants for still capturing the removal flag. In Encompass Ins. Co. v. Stone Mans. Rest., 902 F.3d 147 (3d Cir. 2018), the Court held that if the local defendant removes *before* service (e.g. searches the filings online) then the statutory bar does not apply. While other district courts have disagreed, this new case certainly renders the removal in good faith.

Plaintiffs need not despair if they strategically file and serve simultaneously, thus preventing the local defendant from deploying this battle strategy. Plainly, if the local defendant has been served, removal is improper and the motion to remand for this statutory defect, if made within 30 days of removal, will result in a remand.

4. Timing the Removal Gambit is Where it's All At

It is a familiar rule that a defendant must remove within 30 days of service (or 30 days after the co-party is served). But we all know what happens: the defense client gets an extension and does not remove within the 30 days or a prior counsel or you simply missed it at the outset.

All is not lost. The law in virtually every circuit is that if the complaint has any genuine or not so genuine ambiguity about removability, you can seize upon that ambiguity, obtain formal information, say by way of an interrogatory or deposition response, and remove within 30 days of that clarification. See Harris v. Bankers Life, 425 F.3d 689 (9th Cir. 2005).

For example, the state court complaint might not set forth any information about the amount of controversy, the citizenship of the parties, or even the legal basis for a generally described "due process" claim. In this situation, prudent defendants will be file a notice of removal within 30 days of service and provide the jurisdictional facts.. However, if the time has passed, capturing the flag is not lost since the "seized ambiguity" strategy can be utilized. To prevent this counterattack, plaintiffs' counsel should include, if allowed by state practice, the jurisdictional facts in the original complaint.

5. THE CHANGING REMOVAL-REMAND BATTLEFIELD

If there is a federal claim and the defendant timely removes the case to federal court, can the plaintiff dismiss the federal claim or upon diversity removal add a non-diverse party to effectuate a remand to state court? While a federal court can examine the jurisdictional bad motives of a plaintiff in making such changes, most courts will allow the amendment and order a remand.

Defense counsel in such situations will attempt to rely on the "snapshot" rule and correctly argue that federal jurisdiction once properly invoked can remain even if the original jurisdictional hook has been lost.

But be certain to get the time right. Removal takes place 30 days from the change in the case which might be revealed by a deposition transcript elucidating the federal nature of the claim, the jurisdictionally satisfying amount of controversy or even the citizenship of the party. See Morgan v. Huntington Ingalls, 879 F.3d 602 (5th Cir. 2018). However, as long as it is in good faith, if the change takes place more than one year after commencement, diversity removal is not allowed if the grounds (e.g. plaintiff voluntarily dismisses or settles with the non-diverse party more than one year after commencement).

CONCLUSION

The removal battle is all about capturing the flag of the court in which you want your clients' case to be heard. Knowing the recent cases and statutory changes can be the difference for winning and losing this legal conflict.

CLASS ACTIONS

Attorney's Fees

Levitt v. Southwest Airlines Co. (In re Southwest Airlines Voucher Litig.)
898 F.3d 740, 2018 U.S. App. LEXIS 21417 (7th Cir. Aug. 2, 2018)

The Seventh Circuit holds that unless the parties to a class action settlement agreement, including objecting parties, expressly agree otherwise, a settlement agreement should not be read to bar an objector from requesting fees for efforts in adding value to a settlement.

Background. An airline stopped honoring in-flight drink vouchers it had previously awarded to customers who had bought certain fares. The parties settled the ensuing class action against the airline, which agreed to issue a replacement voucher to each customer who submitted a claim. In an earlier appeal, the court of appeals held that 28 U.S.C. § 1712 allowed the district court to award class counsel attorney's fees based on the lodestar method rather than the value of the redeemed vouchers. In a cross-appeal, class counsel argued that the district court abused its discretion by awarding less in fees than the amount the airline agreed not to oppose ($3 million). The court of appeals rejected this argument and affirmed the settlement.

Back in the district court, class counsel made what the court of appeals termed an "astonishing" request for supplemental fees. For its work on the motion to amend the fee award and the prior appeal, class counsel essentially requested the difference between the $3 million the airline agreed not to oppose and the amount the court of appeals had affirmed in the appeal, $1,365,882. Counsel arrived at this number by requesting the same 1.5 multiplier for its post-judgment time as for the initial fee award and by claiming 572 hours in attorney time for the motion to amend and more than 970 hours of attorney time for the appeal—totals that the district court called "grossly excessive." The district court declined to award a multiplier for the post-judgment work but nevertheless awarded class counsel one-third of the requested amount: $455,294 plus expenses.

One class member moved for reconsideration under Rule 59 and, alternatively, for vacatur of the settlement approval and accompanying fee orders under Rule 60(b). The district court granted the motion for reconsideration and vacated the additional fee award so that the class would receive notice of and a chance to object to it. The class member appealed, and the parties reached a deal. In exchange for the class member dismissing his appeal, class counsel agreed to take half of the supplemental fee award ($227,647 plus $3,529.68 in expenses), and the airline agreed to triple the relief to the class (two additional vouchers for every one claimed). The district court approved this new settlement. The airline distributed the vouchers and paid class counsel.

The objecting class member then moved for $80,000 in attorney's fees and an incentive award of $1,000 to come out of the more than $1.8 million in fees awarded to class counsel. The class member described this request as "a fraction of his lodestar and less than 5% of class counsel's total award." The district court denied the motion, and the class member appealed that denial.

District Court Abused Its Discretion by Denying Objector's Attorney's Fees for Improving Settlement. Under Rule 23(h), a court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The underlying settlement agreement and the agreement to settle the second appeal were silent on the issue of objector's fees. Generally, however, objectors who add value to a class settlement may be compensated for their efforts. Unless the parties expressly agree otherwise, settlement agreements should not be read to bar attorney's fees for objectors who have added genuine value.

The original settlement agreement said nothing about objector fees. It defined "Attorneys' Fees and Expenses" to mean funds "awarded to Class Counsel by the Court, for distribution to Class Counsel." It also set a ceiling and a floor for fees the airline would pay, with court approval, and implied that the parties would continue to negotiate. The agreement also provided that the airline would not pay any amounts not provided for in the agreement and that the airline had the right to terminate the settlement if the district court ordered it to pay any additional amounts. Eventually, the parties agreed that the airline would pay up to $3 million in fees and $30,000 in costs. The airline argued that awarding the objecting class member fees out of the amount already paid to class counsel would undo the underlying settlement agreement. That was incorrect, the court of appeals said. The airline would not

have to pay anything more because the objector's fees would come out of the amount the airline had already paid to class counsel. To avoid these problems, the court of appeals said, the parties should have addressed objector's fees up front as part of the comprehensive settlement negotiations. However, the failure to do so did not doom the objector's fee request.

Background contractual and equitable principles filled the gap left by the parties' agreements, the court of appeals said. First, because of the skewed incentives in some class action settlements, objectors who bring those incentives back into balance by increasing a settlement's benefit to a class may be compensated for their efforts. The principles of restitution that authorize such a result also require that the objectors produce an improvement in the settlement worth more than the fee they are seeking; otherwise they have rendered no benefit to the class. This recognition is consistent with a second principle: the common-fund doctrine. This doctrine provides that a litigant or a lawyer who recovers a common fund for the benefit of a class is entitled to a reasonable attorney's fee from the fund as a whole.

The common-fund doctrine applies as a default rule unless the parties draft their settlement agreement to depart from it. Because the parties did not address objector's fees, the court of appeals "interpolated" the common-fund doctrine to avoid unintended consequences. It would be inequitable, the court said, for the objector's lawyer to receive nothing despite negotiating, in exchange for dropping the second appeal, a tripling of relief for the class and a significant cut to class counsel's fees. The objector's $80,000 fee request was a modest 10% of the market value of the additional vouchers the airline agreed to supply, $825,630. The request was even more modest if calculated based on the higher $5 face value of the vouchers. This was not a case in which an objector ran up a tab with minimal value added.

The court of appeals remanded for entry of a judgment granting the objector's fee request, payable from class counsel. The court noted that this would end the litigation and there would be no more fee requests. Class counsel had represented at oral argument that they would not seek any more fees after remand. The court of appeals observed that it would have been inclined to reverse any award of supplemental fees in the earlier appeal—especially given hours that the district court called "grossly excessive"—but that it had no jurisdiction to address that award because the objector had dismissed that appeal. In the interests of finality, the court declined to expand its jurisdiction by recalling its mandate from the earlier appeal because the airline had already distributed the vouchers and paid class counsel.

DISMISSAL

Failure to Prosecute

Griggs v. S.G.E. Mgmt., L.L.C.
2018 U.S. App. LEXIS 27615 (5th Cir. Sept. 27, 2018)

The Fifth Circuit holds that a dismissal without prejudice for failure to prosecute under Rule 41(b) is a final, appealable decision if all that is left for the plaintiff to do is to submit the claim to arbitration.

Background. Stream was a Texas electricity provider that marketed its services through Ignite, its wholly owned subsidiary. Ignite was a multi-level marketing program that plaintiff contended was an illegal pyramid scheme in which the participants (Independent Associates, or IAs) were destined to lose money. When plaintiff began working as an IA for Ignite, he agreed to Ignite's Policies & Procedures, which included an arbitration clause covering all claims between (1) any two or more IAs and (2) any IA and Ignite. The arbitration clause also gave the arbitrator the "sole power" to decide questions of arbitrability. Despite that, plaintiff brought a class action in federal court, asserting RICO claims against defendant Ignite, Stream, their related entities, and several other IAs (collectively, "defendants").

Defendants moved to compel arbitration, and the magistrate judge issued a report and recommendation concluding that the arbitration agreement was valid and that the parties had agreed to arbitrate arbitrability. The district court granted the motion to compel arbitration and stayed the case pending arbitration. The case remained stayed for more than a year, during which time plaintiff refused to arbitrate. The district court ordered plaintiff to show cause why the case should not be dismissed for want of prosecution. Plaintiff responded that he disagreed with the court's conclusion that the matter must go to arbitration. Plaintiff refused to pursue arbitration and stated he would either litigate the matter or appeal when dismissed. The district court then dismissed the case without prejudice, and plaintiff appealed.

Appellate Jurisdiction Over Order Compelling Arbitration. The Fifth Circuit explained that a plaintiff seeking to appeal an order compelling arbitration may do so only if that order is a final decision with respect to an arbitration. A final decision is one that ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment. When the district court has ordered the parties to proceed to arbitration, and dismissed all the claims before it, that decision is final and therefore appealable. In contrast, if a district court orders that a case be stayed pending arbitration instead of dismissing it, that order is not appealable. Some circuits have held that a district court must stay a case when all claims are submitted to arbitration, but the Fifth Circuit allows district courts to dismiss all claims outright.

Plaintiff Did Not Obtain Rule 41(a) Dismissal. Defendants contended that plaintiff voluntarily dismissed the case under Federal Rule of Civil Procedure 41(a). A voluntary dismissal of a case without prejudice under Rule 41(a) is not a final appealable decision. The court explained that there are three forms of voluntary dismissal under Rule 41 (a). One of those is a voluntary dismissal by notice without court order. Defendants had not answered or moved for summary judgment, so a court order was not required for plaintiff to dismiss the case. The question then was whether plaintiff's response to the show-cause order amounted to a voluntary dismissal under Rule 41(a)(1)(i), which allows a plaintiff to dismiss an action by filing a notice of dismissal if the defendant has not yet answered or moved for summary judgment. A notice of dismissal is self-effectuating and terminates the case in and of itself; no order or other action of the district court is required.

The Fifth Circuit acknowledged that there is limited authority describing the notice requirements for a plaintiff to dismiss a case under Rule 41(a)(1)(i). However, a plaintiff's inaction is not sufficient to dismiss a case voluntarily. In this case, after the district court compelled arbitration and stayed the case in November 2015, the parties submitted a status report in February 2016, notifying the court that plaintiff had not submitted the dispute to arbitration. More than a year later, the court again ordered a status report, and the parties confirmed in June 2017 that plaintiff still had not submitted the case to arbitration. The court then ordered plaintiff to show cause why it should not dismiss the case "for want of prosecution." Plaintiff responded that he disagreed with the court's conclusion that the matter must go to arbitration, and informed the court that he would not "pursue" arbitration. Plaintiff also asserted that different district courts do not stay, but dismiss, allowing the plaintiff to appeal an order of arbitration. Plaintiff informed the court that he would appeal when the case was dismissed.

The court found that plaintiff's actions did not serve as a notice of dismissal, but rather were "statements of inaction." If the district court had not dismissed the case, it was unlikely that the parties would have understood that plaintiff's response to the show-cause order dismissed the case. Because that response was not a "self-effectuating" notice of dismissal, it was not a voluntary dismissal under Rule 41(a).

Court's Dismissal Without Prejudice Supported Appellate Jurisdiction. The Fifth Circuit then addressed for the first time whether a Rule 41(b) dismissal without prejudice is an appealable order. The court noted that several of its unpublished opinions have held that a dismissal without prejudice is a final decision if all that is left for the plaintiff to do is to submit the claim to arbitration. In this case, the court concluded that the district court's action ended the litigation on the merits, by sending all the issues to arbitration and leaving the district court nothing more to do than execute the judgment. Thus, its order was a final, appealable decision.

The court also explained that Rule 41(b) authorizes the district court to dismiss an action *sua sponte* for failure to prosecute or comply with a court order. Dismissal with prejudice under Rule 41(b) is appropriate only when there is a showing of a clear record of delay or contumacious conduct by the plaintiff, and when lesser sanctions would not serve the best interests of justice. A plain record of delay or contumacious conduct is found if one of the three aggravating factors is also present: (1) delay caused by the plaintiff, (2) actual prejudice to the defendant, or (3) delay as a result of intentional conduct. The court found a clear record of intentional delay and contumacious conduct in this case.

After the district court granted defendants' motion to compel arbitration and stayed the case, plaintiff persistently refused to arbitrate as ordered. Specifically, a status report submitted three months after the arbitration order stated: "Plaintiff has not submitted the case to arbitration." More than a year after that, another status report stated that plaintiff had not yet submitted to arbitration. When the district court ordered plaintiff to show cause why the case should not be dismissed "for want of prosecution" he responded that he disagreed with the court's conclusion about arbitration, would not pursue arbitration, and stood ready to litigate the case. Thus, the district court was well within its discretion to dismiss this case for want of prosecution in response to plaintiff's disobedience to its prior order.

Conclusion. For these reasons, the Fifth Circuit concluded that it had jurisdiction and affirmed the district court's dismissal without prejudice.

PROCEEDING IN FORMA PAUPERIS

Prisoner Litigation

Brown v. Sage

2018 U.S. App. LEXIS 25419 (3d Cir. Sept. 7, 2018)

The Third Circuit holds that courts within the circuit must use its precedent to evaluate whether a prior case qualifies as a "strike" that would bar a prisoner from proceeding in forma pauperis, regardless of which court decided the prior case.

Background. Under the Prison Litigation Reform Act (the "Act"), a federal prisoner may proceed in forma pauperis (IFP) and file a case without prepaying the requisite fees if the prisoner meets certain requirements, including filing an affidavit that demonstrates he or she cannot afford the fees [28 U.S.C. § 1915]. However, under 28 U.S.C. § 1915 (g), the Act's so-called "three strikes rule," a prisoner cannot proceed IFP if he or she has "on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action . . . that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury."

The plaintiff in this case was a federal prisoner who filed three separate *Bivens* actions alleging that his Fifth and Eighth Amendment rights had been violated by prison employees. These actions were filed in the U.S. District Court for the Middle District of Pennsylvania. The district court denied the plaintiff's motions to proceed IFP in those actions, on the ground that he had previously accumulated three strikes and was not under imminent danger of serious injury. When the plaintiff failed to pay the filing fees, his actions were dismissed. He appealed and filed motions to proceed IFP in those appeals. After consolidating the appeals, the Third Circuit granted the plaintiff's motion to proceed IFP.

Three Previous Cases Had Occurred Within Another Circuit. The plaintiff in this case had three previous cases that the district court had found to be strikes. Those previous cases had been filed in the Eastern and Central Districts of California. Thus, the threshold question for the Third District panel in this case was whether to use its own or the Ninth Circuit's precedent to determine whether those previous cases constituted strikes.

Third Circuit Applied Its Own Precedent. As a matter of first impression, the Third Circuit panel concluded that courts within the circuit should use Third Circuit precedent to evaluate whether a prior case qualifies as a strike under the Act, regardless of the court from which it originated. The court explained that as a general matter, panels of the Third Circuit are bound by the precedent of prior panels, as are the district courts in the circuit. The court in this case saw no reason to depart from that general rule in the present situation. And the court found no other circuit that has declined to follow its own precedent when considering potential strikes from another circuit.

The court of appeals noted that following its own precedent, no matter where the potential strike occurred, promotes uniformity and efficiency within the circuit. Specifically, following its own precedent ensures that petitioners in identical circumstances are treated identically with respect to their motions to proceed IFP, regardless of where they have filed past cases, and it obviates the need for the court to ascertain what constitutes a strike in any other circuit.

The court of appeals acknowledged that using its own precedent to determine whether a prior dismissal qualifies as a strike may at times result in a conclusion that certain dismissals are not strikes, even if they were intended as strikes by other courts. However, the court opined that that possibility, although not ideal, was not significant enough to warrant abandoning the longstanding principle that Third Circuit panels are bound to follow Third Circuit precedent.

Plaintiff Had Two Previous Strikes. The Third Circuit panel then turned to the question whether the three previous cases constituted strikes under the Act as construed by Third Circuit precedent. The court easily concluded that two of the previous cases were indeed strikes: they were explicitly dismissed with prejudice for "failure to state a claim," a ground specified in the relevant provision of the Act [*see* 28 U.S.C. § 1915(g); *see also* Byrd v. Shan-

non, 715 F.3d 117, 126 (3d Cir. 2013) (strike will accrue only if entire action or appeal is (1) dismissed explicitly for ground specified in 28 U.S.C. § 1915(g), or (2) dismissed pursuant to statutory provision or rule that is limited solely to dismissals for such reasons); Millhouse v. Heath, 866 F.3d 152, 161 (3d Cir. 2017) (to qualify as strike, dismissal must be with prejudice)].

Plaintiff's Third Previous Case Was Not Strike. In contrast, the Third Circuit panel found that the third previous case was not a strike. In that case, the plaintiff had filed a request to proceed IFP, with a complaint attached. The district court noted that the complaint had been "lodged" and was "sought to be filed" by the plaintiff. Ultimately, the district court denied the request to proceed IFP, stating that the plaintiff had "failed to state a valid claim in two attempts. This matter will be closed."

Although the district court in the previous case indicated that the denial of IFP status and of leave to amend the complaint might constitute a strike for the purposes of the Act, the Third Circuit panel in the present case found it significant that the complaint had been "lodged" but never actually filed with the district court. The Third Circuit noted that the Act provides that a prisoner cannot proceed IFP "if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, *brought* an action or appeal" that was dismissed on the specified grounds [28 U.S.C. § 1915(g)].

Under Third Circuit precedent, an action has not been "brought" unless the complaint is actually filed [*see* Gibbs v. Ryan, 160 F.3d 160, 162 (3d Cir. 1998)], and a complaint cannot be filed until the litigant has paid the filing fees or until his or her motion to proceed IFP has been granted. Thus, because the plaintiff's complaint in the Central District of California was never filed, the Third Circuit concluded that it was not an action that was "brought" under the Act, so it did not constitute a strike.

The Third Circuit panel recognized that its conclusion would change if it applied the Ninth Circuit's precedent [O'Neal v. Price, 531 F.3d 1146, 1152 (9th Cir. 2008) (plaintiff has "brought" action for the purposes of Act when he or she submits complaint and request to proceed IFP to court)]. But as explained above, the Third Circuit panel was bound to follow its own precedent.

Procedure for Docketing IFP Motion and Complaint. The court of appeals briefly clarified the procedure that a district court within the circuit should use to docket a petitioner's IFP motion and complaint. When a district court receives a complaint before a petitioner's motion to proceed IFP has been granted, the court should indicate on the docket that the complaint has been "lodged." Then, if the district court grants the IFP motion, it should update the docket with a new entry that indicates that the complaint is "filed." If the district court denies the IFP motion, the complaint should remain "lodged" until the petitioner pays the filing fees.

Conclusion and Disposition. Because the plaintiff had not previously accrued three strikes under the Act, the Third Circuit granted his motions to proceed IFP on appeal. On the merits, the court of appeals reversed the district court's denials of IFP status, concluding that the plaintiff had not incurred three strikes before filing his present complaints.

As discussed above, a previous case in which the complaint had never been filed did not count as a strike for any of the plaintiff's present actions. And another previous case that met the criteria for a strike did not count as a strike for one of the plaintiff's present actions, because the dismissal of that previous case did not occur "prior" to the filing of the present action [*see* 28 U.S.C. § 1915(g)].

Accordingly, the Third Circuit granted the plaintiff's motions to proceed IFP on appeal, reversed the district court's denials of his IFP motions, and remanded all three cases for further proceedings.

Dissent. Circuit Judge Chagares dissented in part, urging the Third Circuit to take this case en banc and reconsider its precedent requiring a two-step procedure for handling motions to proceed IFP. Judge Chagares opined that reconsideration of the two-step procedure was necessary to eliminate a circuit split and to bring Third Circuit jurisprudence in line with the Act and with the decisions of other circuits.

LexisNexis®