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Moore's Federal Practice & Procedure

Wagstaffe's Civil Procedure Before Trial

December 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.

APPEAL

Time for Appeal

United States v. Conner

2018 U.S. App. LEXIS 29707 (5th Cir. Oct. 22, 2018)

Overruling circuit precedent, the Fifth Circuit holds that Appellate Rule 4(a)(1)(B)'s 60-day time limit for filing a notice of appeal applies to an appeal from a civil-contempt order when the United States is a party to the underlying lawsuit.

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CLASS ACTIONS

Coupon Settlements

Romero v. Perryman (In re Easysaver Rewards Litig.)

906 F.3d 747, 2018 U.S. App. LEXIS 28000 (9th Cir. Oct. 3, 2018)

The Ninth Circuit vacated an award of attorney's fees because the district court failed to treat $20 credits as "coupons" under the Class Action Fairness Act and therefore failed to consider only the value of the credits actually redeemed when calculating the amount of the fee award.

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STANDING

Concrete Injury

Muransky v. Godiva Chocolatier, Inc.

905 F.3d 1200, 2018 U.S. App. LEXIS 27980 (11th Cir. Oct. 3, 2018)

The Eleventh Circuit has held that a customer had standing to bring a class action alleging concrete injuries caused by a merchant's printing the first six and last four digits of credit card numbers on receipts in violation of the Fair and Accurate Credit Transactions Act.

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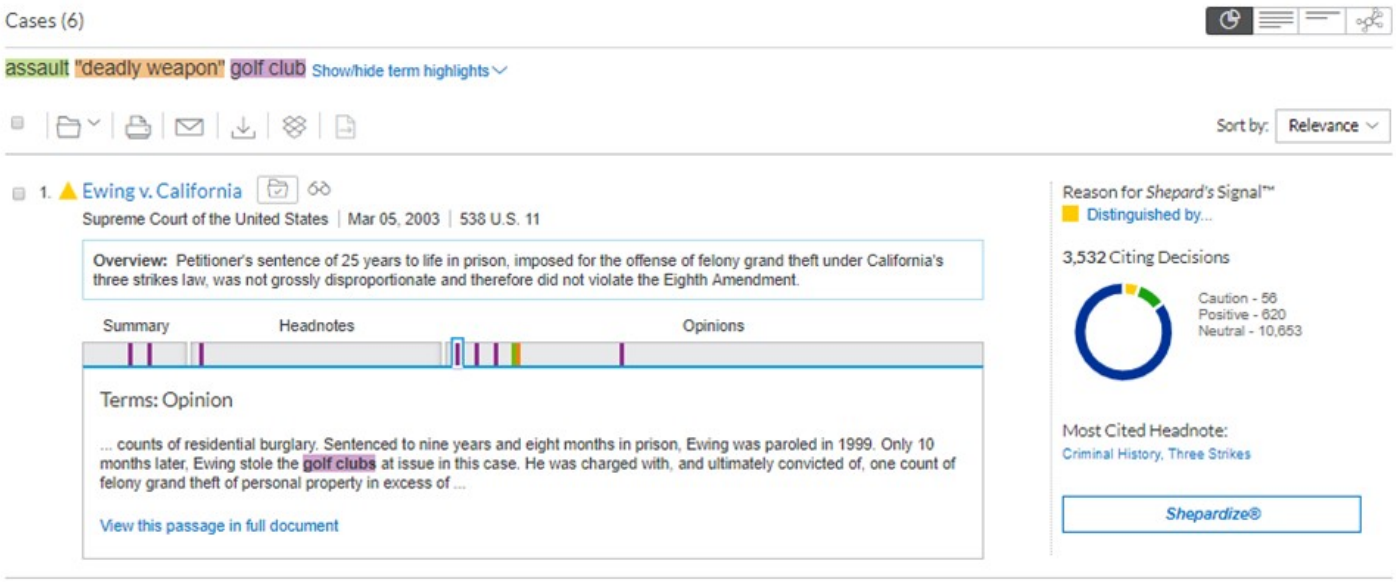
LEXIS ADVANCE SEARCH TERM MAPPING

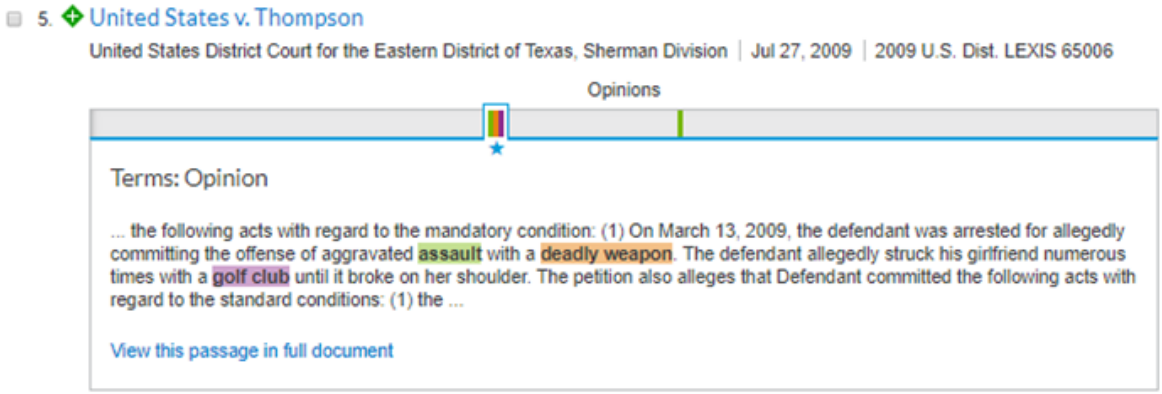
Samantha Chassin, Regional Solutions Consultant

Lexis Advance Search Term Maps use color mapping to help you process case law search results more efficiently by allowing you to quickly hone in on relevant cases without wasting time! When you enter a natural language or Boolean search with up to five terms, Lexis Advance displays the search results with a Search Term Location Bar above each case in the results list. Utilizing a different color for each search term, the bar displays a summary view of where each resides in the case, and when they occur near each other, for greater relevance. You will also be able to see whether the search terms appear in the summary, headnotes, opinion or dissent.

In the example below, the search terms, "assault," "deadly weapon," and "golf club" were entered to research whether a golf club is considered a deadly weapon. As you can see, "golf club" appears in the opinion of a shoplifting case. The Search Term Map allows us to quickly determine that Ewing v. California is not a relevant case in our research.



On the other hand, the Search Term Map shows us that in *United States v. Thompson* the defendant struck his girlfriend with a golf club. With the Lexis Advance Search Term Map you will spend your time reading only the relevant court opinions!



NEW FROM JIM WAGSTAFFE

SEVEN SUMMARY JUDGMENT SURVIVAL SKILLS

By: Jim Wagstaffe

In federal and state court cases, the litigator's survival kit frequently has as its principal tool motions for summary judgment. For defendants, the winning case strategy frequently involves executing the summary judgment escape plan to survive the costs and risks of litigation. Conversely, for plaintiffs, "staying alive" for settlement and trial is quite often all about surviving the inevitable defense motion for summary judgement.

Therefore, summary judgment survival skills are crucial for litigators young and old. What follows are my seven sure-fire skills for winning or avoiding case dispositive summary judgment rulings.

1. Stay Abreast of the Very Most Recent Summary Judgment Case Law

The case law on summary judgment is ever-evolving. And if you file your summary judgment papers unaware of that controlling hot new case, unlike Tom Hanks in the movie Castaway, you will be stranded in your losing case position unaware of recent developments.

For example, if you represent government officials and the summary judgment motion raises questions of qualified immunity, you'd better be familiar with District of Columbia v. Wesby, 138 S.Ct. 577 (2018) and the Supreme Court's "totality of the circumstances" protection for law enforcement officials who make reasonable inferences about allegedly unlawful conduct. See also U.S. v. Perry, __ F.3d __ (10th Cir. 11/15/18) (qualified immunity – yes); Strand v. Minchuk, __ F.3d __ (7th Cir. 11/8/18) (qualified immunity – no).

Your summary judgment life raft can be found in Chapters 43 and 44 of The Wagstaffe Practice Guide: Federal Civil Procedure Before Trial (Lexis Nexis 2018). And access to the saving graces of hot developments in this area is right at your fingertips with our companion Current Awareness online feature that captures the hot new case decisions on summary judgment and all other procedural areas made available on a weekly basis.

2. Plan the Summary Judgment Escape Route

Great litigators plan for summary judgment before filing or defending their state or federal lawsuits. This means lawyers at the outset must painstakingly evaluate the evidence and proof (or lack thereof) necessary to prevail when the ultimate summary judgment motion is presented.

The survival trick is the early outlining of the claims and defenses, while actually drafting on Day 1 the jury instruction setting forth the required elements for the case. Toward this end, you should design your discovery to obtain the necessary evidence to prevail on the anticipated summary judgment motion.

By way of example, let's suppose there is a statute of limitations question in the case. The moving party defendant will perform summary judgment case planning at the outset, plead the affirmative defense, and then have defense counsel lead the plaintiff at deposition to acknowledge his or her actual or constructive knowledge of the alleged wrongdoing beyond the statutory period. There often is no better way to obtain summary judgment than through the sworn testimony of the potentially unsuspecting (or unprepared) plaintiff at his or her own deposition. See, e.g., Migliaro v. Fidelity Nat. Indem. Ins. Co., 880 F.3d 660 (3d Cir. 2018) (rejection of proof of loss claim leading to filing of suit triggers bar of statute of limitations).

By the same token, to avoid summary judgment in this example, the plaintiff's lawyers not only will research the governing statute(s) and, if necessary, plead a tolling element (e.g. delayed discovery or fraudulent concealment), they will map out the plan (through interviews, written discovery and deposition) to provide oppositional evidence to be presented later on summary judgment. Know where the landmines are located, plan allegations and present honest sworn testimony accord-

ingly—all in service of surviving the big defense litigation moment called summary judgment. See, e.g., Soto v. Sweetman, 882 F.3d 865 (9th Cir. 2018) (court rejects equitable tolling of civil rights claim against government).

Bottom line: you wouldn't take a trip without knowing your destination and the same is true when approaching surviving the summary judgment process. And you've got the perfect "summary judgment GPS" in Chapter 44 of my Lexis Nexis Practice Guide as it provides detailed "road maps" in the application of summary judgment motions in a large variety of substantive areas of law.

3. **Master the "Most Favorable Light" Rule**

You'll never win the summary judgment game if you think it is a substitute for trial or somehow a vehicle for "educating" your judge. After all, you don't get summary judgment unless there is nothing for the jury to do—meaning the evidence, given the most favorable light for the other side, shows no genuine issue of material fact. See Fed. R. Civ. P. 56(a).

Thus, the most important rule for summary judgment is that all inferences, the weight of all evidence and each credibility determination are to be made in favor of the non-moving party. This is what the Supreme Court calls the "axiom" of summary judgment, I.e., the judge's function on summary judgment is not to weigh the evidence but to view it in the light most favorable to the non-moving party. Tolan v. Cotton, 134 S.Ct. 1861 (2014).

Survival for proponents and opponents of summary judgment, therefore means having more than the proverbial "strong" case. To the contrary, it must be plain that the moving party wins even if all inferences, weight and credibility are given to the other side. To ignore this survival tip means a lot of wasted time and expense, to say nothing of what one can read every day: appellate decisions reversing lower court grants of summary judgment. See, e.g., Strothers v. City of Laurel, 895 F.3d 317 (4th Cir. 2018) (manager's prior expressed wish to hire someone of another race supports inference of Title VII violation); Minarsky v. Susquehanna Cty., 895 F.3d 303 (3d Cir. 2018) (explanation for plaintiff's failure to report alleged harassment could be believed by jury).

4. **Play "Family Feud" Summary Judgment**

In the game show Family Feud, host Steve Harvey seeks a focus on the successful answer most given to the posted question. Applied to summary judgment motions, the Family Feud inquiry aims at the Number 1 ground for prevailing on such motions: if possible formulate your motion around a dispositive question of law and tell the court why its resolution compels victory for your client.

Judges naturally favor jury determinations of fact questions and, therefore, are most open to summary judgment motions when framed as a question of law. Frankly, those are the questions judges—not juries— decide in the first instance.

As a survival tip and if possible, therefore, identify and raise questions of law when making summary judgment motions. Here are some examples of dispositive questions that are routinely resolved on summary judgment:

- Res judicata
- Statute of limitations
- Statute of frauds
- Meaning of unambiguous contract
- Plaintiff's status as a public figure

Following this Family Feud approach flows from the prism through which all such motions are viewed—to wit, is the moving party entitled to "judgment as a matter of law." Fed. R. Civ. P. 56(a). So, for example, the question whether the plaintiff is an "employee" under the FLSA is one of law, therefore, authorizing the court on summary judgment to evaluate the statutory balancing factors. Xuedan Wang v. Hearst Corp., 877 F.3d 69 (2d Cir. 2017).

5. **Imagine Your Summary Judgment Evidence is on the Witness Stand**

Too many lawyers forget that on summary judgment the evidence submitted needs to be presented in an admissible form or with a showing that it will be admissible at trial. See TWG, sec. 43-VI[B][3]. So, my fifth survival tip on summary judgment is to imagine that the declarations, affidavits, discovery excerpts and exhibits are being introduced on the witness stand at a live hearing.

This discipline reminds you that, as if at a testimonial hearing, objections can and should be made to evidence that is not properly authenticated or inadmissible. This will emphasize to each side they must have fully contained evidentiary submissions, and also should make page and line written objections to the other side's evidence.

This survival skill is vital on multiple levels as seen in many exemplar cases in recent years. These include the following:

- Conclusory declarations are subject to objection on summary judgment. See, e.g., Mancini v. City of Providence, 2018 U.S. App. LEXIS 32962 (1st Cir. 11/21/18) (conclusory assertion of disability); Montgomery v. Risen, 875 F.3d 709 (D.C. Cir. 2017) (conclusory recitation of falsity in defamation suit).
- Authentication and a proper foundation for evidence is also required on summary judgment. See, e.g., Orr v. Bank of America, 285 F.3d 764 (9th Cir. 2002) (attorney declaration without court reporter certificate insufficient to authenticate deposition transcript).
- Sham affidavits, I.e., ones containing statements that inexplicably contradict prior sworn testimony, are subject to being stricken on summary judgment. See, e.g., Daubert v. NRA Group, 861 F.3d 382 (3d Cir. 2017).
- Evidence not properly disclosed in discovery can be excluded on summary judgment. See, e.g., Vanderberg v. Petco, 906 F.3d 698 (8th Cir. 2018) (failure to disclose expert testimony results in exclusion on summary judgment); Karum Holdings LLC v. Lowe's, 895 F.3d 944 (7th Civ. 2018) (same). And if imagining is hard, actually read your evidence out loud with a colleague at the ready to object as if at the evidentiary hearing. Be alert to all sorts of proper objections (e.g. hearsay, lack of personal knowledge, etc.) and then fix the evidence before submission. You can also try this out loud technique with the other side's evidence, converting it to written objection when justified.

And if imagining is hard, actually read your evidence out lout with a cooperative colleague objecting as if at the evidentiary hearing. Be alert to all sorts of proper objections (e.g. hearsay, lack of personal knowledge, etc.) and then fix the evidence, converting it to written objections when justified.

6. **Don't Count on Changing Horses in Middle of Summary Judgment Stream**

It is vital to understand that, unlike a motion to dismiss, courts routinely rule on summary judgment motions without giving leave to amend either the pleading or factual record. In other words, don't count on surviving summary judgment by changing the then-existing case template.

This "don't change horses" survival skill conforms to established and recent case law holding that summary judgment generally cannot be avoided by seeking to add new and different factual or legal theories of the case. See Chessie Logistics Co. v. KRINIS Holdings, Inc., 867 F.3d 852 (7th Cir. 2017) (court can deny summary judgment if non-moving party relies on facts beyond complaint).

By the same token, unless the motion is filed prematurely (e.g. well before close of discovery or when moving party is failing to comply with outstanding discovery), courts often will not continue the motion simply to allow further discovery. Hodgin v. UTC Fire & Sec. America's Corp., 885 F.3d 243 (4th Cir. 2018) (court rejects request for further discovery).

If, on the other hand, you find yourself behind the survival curve, you can ask the court to amend the complaint (if no unreasonable delay or prejudice) or alternatively for specified discovery that could not have been presented through due diligence. See Fed. R. Civ. P. 15, 56(d); see also Jacobson v. U.S. Department of Homeland Sec., 882 F.3d 879 (9th Cir. 2018) (plaintiff makes showing discovery could result in triable issue); BRC Rubber & Plastics, Inc. v. Continental Carbon Co., 900 F.3d 529 (7th Cir. 2018) (new legal theory could be pursued).

However, despite some potential openings, parties making and opposing summary judgment motions should proceed as if the factual and legal record is set. This is why pre-planning at an early stage (see above) is critical.

7. **Ensure that the Motion and/or Opposition are User-Friendly for the Court and Staff**

It is a fundamental survival skill on summary judgment to make the motion user-friendly for the Court and its staff. This is best accomplished by being absolutely clear in citations to the docket and ensuring that the referenced exhibits and evidence are in the record and readily accessible.

The case law makes it clear that the court, when addressing summary judgment motions, has no duty to scan the record to find information and evidence. See, e.g., Carlson v. Bos. Sci. Corp., 856 F.3d. 320 (4th Cir. 2017) (opponent's a failure to cite to evidence allows granting of motion); TWG, sec 43-VIII[E][2]. Moreover, even the moving party cannot rely on unsupported generalizations, but rather must direct the court to the non-moving party's lack of sufficient evidence. Nick's Garage, Inc. v. Progressive Cas. Co., 875 F.3d 107 (2d Cir. 2017).

In making your motion user-friendly for the Court, think about what it will be like to read the briefs and evidence. Try locating the supporting documents and references yourself, and if it's hard for you it will be even harder for busy judges and their clerks. Remember that winning at the motion level has two vital elements: 1) tell the court how you win, and 2) persuade the court why you ought to win. Clear and accessible briefs and supporting evidence will get these jobs done effectively.

Conclusion

The seven tips in this article will help you survive the summary judgment process and with greater efficiency and clarity. And through the use of The Wagstaffe Group Practice Guide and Current Awareness you can not only survive, you just might prevail.

APPEAL

Time for Appeal
United States v. Conner
2018 U.S. App. LEXIS 29707 (5th Cir. Oct. 22, 2018)

Overruling circuit precedent, the Fifth Circuit holds that Appellate Rule 4(a)(1)(B)'s 60-day time limit for filing a notice of appeal applies to an appeal from a civil-contempt order when the United States is a party to the underlying lawsuit.

Background—Question Presented. Appellate Rule 4(a)(1) generally provides a 30-day time limit to file a notice of appeal from a district court's judgment or order, but the rule extends that limit to 60 days if the United States is a party [Fed. R. App. P. 4(a)(1)]. In *United States v. Brumfield*, the Fifth Circuit held that the United States is not to be treated as a party to a civil-contempt proceeding for the purposes of the 60-day rule, even if it is a party to the litigation that prompted the contempt order [United States v. Brumfield, 188 F.3d 303, 305–306 (5th Cir. 1999)].

In the present case, a Fifth Circuit panel reconsidered *Brumfield*, given its tensions with other decisions of the Fifth Circuit, an intervening decision by the Supreme Court, and changes in the applicable federal rules of procedure. The appellate panel concluded that the 60-day limit does apply to an appeal from a civil-contempt order when the United States is a party to the underlying lawsuit.

***Brumfield* Decision.** In *Brumfield*, the Fifth Circuit followed the Sixth Circuit's reasoning in *United States v. Hallahan* and held that an appeal from a contempt order "is not a situation in which the United States' participation in a contempt holding is in the traditional posture required for [Appellate Rule 4(a)(1)'s] sixty day provision to apply" [United States v. Brumfield, 188 F.3d 303, 305–306 (5th Cir. 1999) (quoting *United States v. Hallahan*, 768 F.2d 754, 756 (6th Cir. 1985))].

Earlier Fifth Circuit Precedents. The Fifth Circuit panel in the present case noted that *Brumfield*'s holding on this point was in tension with earlier panel decisions within the Fifth Circuit. In *Montelongo v. Meese*, for example, the court held that when the United States was a party to the underlying suit but there were also other parties involved, all parties would have 60 days to appeal, even if "the government [was] not a party or . . . not interested in the appeal that [was] actually taken" [Montelongo v. Meese, 777 F.2d 1097, 1099 (5th Cir. 1985) (per curiam)]. The *Montelongo* panel explained that there was no reason to complicate the difficult task of attempting to determine the timeliness of appeals by requiring that timeliness be determined separately on the basis of which party is concerned with which issue [Montelongo v. Meese, 777 F.2d 1097, 1098 (5th Cir. 1985) (per curiam)]. Under *Montelongo*, therefore, the determinant is whether the government was a party in the district-court proceeding—regardless of whether the actual issue being appealed is one to which the government stands in some appropriate "posture."

Montelongo distinguished *Virginia Land Co. v. Miami Shipbuilding Corp.*, which had applied the 30-day limit to an interlocutory appeal in a case in which the United States, though it had been a party, no longer had any ongoing concern with any of the issues in the case [*see* Virginia Land Co. v. Miami Shipbuilding Corp., 201 F.2d 506, 507–508 (5th Cir. 1953)].

The appellate panel in the present case found that *Montelongo* and *Virginia Land*, read together, mean that the 60-day deadline applies if the United States is still present in the underlying case in the district court. Neither case suggests that the United States need stand in the "traditional posture" to the appeal, as described in *Brumfield* [*see* United States v. Brumfield, 188 F.3d 303, 305–306 (5th Cir. 1999)]. The present appellate panel found it significant that the *Brumfield* opinion, while relying on the Sixth Circuit opinion in *Hallahan*, made no mention of the Fifth Circuit's decisions in *Montelongo* and *Virginia Land*.

Intervening Statutory and Rule Amendments. The Fifth Circuit panel in this case found further support for its decision to overrule *Brumfield* in the 2011 amendments to Appellate Rule 4 and 28 U.S.C. § 2107.

In 1999, the year *Brumfield* was decided, the relevant portion of Appellate Rule 4(a)(1) read as follows:

> (A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

(B) When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.

In 2011, the rule was amended to clarify the application of the 60-day limit in suits against United States officers. As amended, Appellate Rule 4(a)(1)(B) reads as follows:

(B) The notice of appeal may be filed by any party within 60 days after entry of the judgment or order appealed from if one of the parties is:

(i) the United States;

(ii) a United States agency;

(iii) a United States officer or employee sued in an official capacity; or

(iv) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf—including all instances in which the United States represents that person when the judgment or order is entered or files the appeal for that person.

The rule amendment was accompanied by a congressional amendment of 28 U.S.C. § 2107 that substantially tracked the rule's new language [28 U.S.C. § 2107(b)].

The Fifth Circuit panel in this case found it significant that the 2011 amendments straightforwardly used party status as the determinant of the 60-day deadline. They used presence as a party, without reference to any issues on appeal, to create a sharply defined category: the 60-day rule applies when the United States represents an officer or employee, in addition to cases in which the officer or employee was otherwise sued for acts or omissions performed on the United States' behalf. And the amendments preserved the right of *any* party to file a notice of appeal within the expanded 60-day deadline. In the context of these amendments, which were designed to eliminate traps for the unwary, the Fifth Circuit concluded that Appellate Rule 4(a)(1)(B) means that the 60-day deadline applies if the United States was a party to the lawsuit being appealed, without any additional mandate that it be in a certain posture or possess a certain interest.

Conclusion and Disposition. Based on its reading of Appellate Rule 4(a)(1)(B) and the clarifying effect of the 2011 amendments, the Fifth Circuit panel held that *Brumfield*'s "posture" requirement does not comport with the rule.

The court of appeals also noted that its conclusion in the present case was effectively the same as that reached in *Montelongo*, under a prior version of the rule. The court of appeals thus found that its abandonment of *Brumfield* did not violate the Fifth Circuit's rule of orderliness, under which the earlier of conflicting panel decisions controls.

CLASS ACTIONS

Coupon Settlements

Romero v. Perryman (In re Easysaver Rewards Litig.)
906 F.3d 747, 2018 U.S. App. LEXIS 28000 (9th Cir. Oct. 3, 2018)

The Ninth Circuit vacated an award of attorney's fees because the district court failed to treat $20 credits as "coupons" under the Class Action Fairness Act and therefore failed to consider only the value of the credits actually redeemed when calculating the amount of the fee award.

Background. The defendants operated online businesses selling flowers, chocolates, fruit baskets, and similar items. The plaintiffs alleged that after they purchased items from the defendants they were enrolled without their consent in a membership rewards program. This program charged the plaintiffs a $1.95 activation fee and a recurring $14.95 monthly membership fee. After more than two years of litigation, including extensive discovery and mediation, the parties agreed to settle.

The proposed settlement established a $12.5 million fund, of which approximately $3.5 million would be available to reimburse class members for their membership fees and to pay for administration costs. Class members were entitled to receive a refund if they submitted a claim affirming that they had not intended to enroll in the program and had not used any program benefits. Additionally, $80,000 in enhancement awards for the named plaintiffs and $200,000 in litigation costs would come from the fund. Up to $8.7 million of the fund would pay attorney's fees for class counsel. Any remainder was designated for three cy pres beneficiaries—San Diego State University, the University of California at San Diego, and the University of San Diego School of Law—for a "chair, professorship, fel-

lowship, lectureship, seminar series or similar funding, gift, or donation program . . . regarding internet privacy or internet data security."

The settlement provided for one other benefit to the class: defendants would email each class member a $20 credit that could be used to purchase items on defendants' websites. These credits were transferrable but included a number of restrictions, including that they would expire one year after their distribution date and could not be used in the lead-up to Christmas, Valentine's Day, or Mother's Day. The credits also could not be used for same-day orders, nor could they be combined with other promotions.

Class members, numbering about 1.3 million, were notified of the settlement and given a 135-day period to request a refund, during which only about 3,000 class members did so. Their submitted claims requested a total of $225,000 in cash refunds, leaving approximately $3 million of the settlement fund to be distributed to the cy pres beneficiaries. Class counsel also moved for $8.7 million in fees and $200,000 in costs. One class member objected to the settlement. He argued that the attorney's fee award did not comply with the requirements for coupon settlements under the Class Action Fairness Act (CAFA) and that the cy pres award was improper. The court rejected these objections and issued a final order approving both the settlement and class counsel's accompanying fee request. The district court's order placed the full settlement value at $38 million, including $12.5 million for the cash fund and $25.5 million for the $20 credits to be distributed to the approximately 1.3 million class members. Under this calculation, the $8.7 million award represented 23 percent of the settlement value. The district court determined that the credits should not be construed as coupons, so that it was unnecessary to apply CAFA's restrictions for coupon settlements.

District Court Should Have Treated $20 Credits as Coupons Under CAFA. CAFA imposes restrictions on attorney's fee awards for class action settlements that provide class members relief in the form of coupons [*see* 28 U.S.C. § 1712]. The court of appeals noted that Congress targeted such settlements for heightened scrutiny out of a concern that the full value of coupons was being used to support large awards of attorney's fees regardless of whether class members had any interest in using the coupons. That is, Congress was concerned that when coupons that class members would not use were factored into the value of a settlement, they inflated the nominal size of a settlement fund, and fee award, without a concomitant increase in the actual value of relief for the class.

To avoid this result, CAFA requires district courts to consider the value of only those coupons that were "actually redeemed" when calculating the relief awarded to a class. This ensures that class counsel benefit only from coupons that provide actual relief to the class, lessening the incentive to seek an award of coupons that class members have little interest in using.

CAFA does not define "coupon," but a prior case, *In re Online DVD*, outlined three factors for courts to consider in determining whether a credit must be treated as a coupon under CAFA: (1) whether class members have to hand over more of their own money before they can take advantage of a credit, (2) whether the credit is valid only for select products or services, and (3) how much flexibility the credit provides, including whether it expires or is freely transferrable [In re Online DVD, 779 F.3d 934, 950 (9th Cir. 2015)]. Under these factors, the credits here were clearly coupons for CAFA purposes. The credits could be used to purchase items from a small number of products offered on the defendants' websites: flowers, chocolates, and similar gifts. The plaintiffs would be able to purchase few if any of these without spending their own money, because the defendants offered few products for under $20, and these prices did not include shipping. The court of appeals noted that, to use the credits, plaintiffs would have to purchase items from the defendants and provide their billing information once again to the very company that they claimed mishandled that information in the first place. Further, the credits were not flexible in that they would expire one year after issuance, and they had several blackout periods in which they could not be used—specifically, on holidays on which consumers would be most likely to buy flowers and chocolates. The only logical conclusion, the court said, was that the credits were coupons under CAFA.

Fee Award Was Reversed. Because the district court had incorporated the full face value of the credits into its fee calculations, the fee award had to be recalculated considering the redemption rate of the credits. The district court had approved the settlement under the percentage-of-recovery method on the basis that the $8.7 million award represented only 23% of the total $38 million recovery, which the court viewed as appropriately below the 25% benchmark the Ninth Circuit has generally held to be reasonable. Because the $38 million figure did not account for the redemption rate of the credits, it was unclear whether the fee award was in fact a reasonable percentage of the settlement fund. Accordingly, the attorney's fee award was vacated with instructions that it be recalculated on remand in a manner that treated the $20 credits as coupons under CAFA.

The court of appeals found it unnecessary to reverse the settlement approval in conjunction with vacatur of the fee award. The parties' settlement agreement expressly did not depend on approval of the fee award, and it provided that any decrease in the award would increase the funds distributed to class members, as well as to the cy pres beneficiaries if necessary. Accordingly, from the class members' perspective, the only effect of reducing the fee award

would be to increase the amount ultimately paid to the cy pres recipients.

Use of Cy Pres Distribution Was Not Improper. The objecting class member also challenged the use of cy pres principles to distribute the remaining settlement funds. Cy pres provides a mechanism for distributing unclaimed funds to the "next best" class of beneficiaries. Class members receive an indirect benefit, usually through defendant donations to a third party, rather than a direct monetary payment. Here, the settlement agreement provided for unclaimed funds to be distributed to San Diego State University, the University of California at San Diego, and the University of San Diego School of Law to support scholarship in the area of internet privacy and data security.

The objector argued that the amounts remaining in the settlement fund should have been distributed to the class, but the court of appeals concluded that it was reasonable for the district court to approve the use of a cy pres distribution. The availability of cy pres as a mechanism to distribute unclaimed funds rests on the premise that class action settlements will sometimes have just that—unclaimed funds. A settlement is not fatally flawed solely because class members did not deplete the entirety of the settlement fund. The district court was under no obligation to adopt a distribution approach that might overcompensate claimants, all of whom were already fully reimbursed for the money they lost through the rewards program. Further, the court was not required to distribute the remaining funds to non-claimant class members. Given that the existing fund contained approximately $3 million, and that there were over a million non-claimants, each non-claimant's recovery would be de minimis, especially after the costs of distribution were deducted.

The court of appeals also concluded that the three schools were appropriate cy pres recipients. The recipients of cy pres funding should be selected in light of the objectives of the underlying statutes and the interests of the silent class members, and the court has broad discretionary powers in shaping a cy pres award. The objector argued that the schools were inappropriate recipients because all three were located in San Diego, even though the case involved a nationwide class. However, the court of appeals ruled that the beneficiaries had a nationwide reach sufficient to justify their receipt of the cy pres award. The award was designed to support scholarship in internet privacy and data security—topics of national scope. That the scholarship would be conducted by scholars in San Diego did not mean that its impact would be confined to San Diego. The touchstone of the inquiry is whether a cy pres award bears a substantial nexus to the interests of the class members. Because the award funded research directly responsive to the issues underlying the litigation, the physical location of the beneficiaries was not an overriding consideration.

The objector also argued that the choice of the three schools was improper because three of the (many) attorneys had graduated from the University of San Diego School of Law. This did not impermissibly taint the selection process, the court of appeals concluded. There was no appearance of impropriety here because the cy pres award was closely connected to the class members' interests and underlying claims. Moreover, the objector had not suggested that there was a continuing relationship between the attorneys and their alma mater, nor had he challenged the parties' descriptions of what those institutions would do to further the interests of the class. A bare allegation that the institutions were selected for an improper reason was insufficient to show that the district court abused its discretion by approving their selection.

STANDING

Concrete Injury

Muransky v. Godiva Chocolatier, Inc.
905 F.3d 1200, 2018 U.S. App. LEXIS 27980 (11th Cir. Oct. 3, 2018)

The Eleventh Circuit has held that a customer had standing to bring a class action alleging concrete injuries caused by a merchant's printing the first six and last four digits of credit card numbers on receipts in violation of the Fair and Accurate Credit Transactions Act.

Facts and Procedural Background. The defendant allegedly willfully violated the Fair and Accurate Credit Transactions Act (FACTA) by printing the first six and the last four digits of customers' credit card numbers on receipts, exposing the class members to an elevated risk of identity theft. The district court approved a settlement over the objections of several class members. On appeal, one objector challenged the named plaintiff's standing to pursue the FACTA claim. The Eleventh Circuit affirmed, holding, among other things, that the named plaintiff had standing.

FACTA. FACTA was enacted to protect consumers from identity theft. It prohibits merchants that accept credit or debit cards from printing more than the last five digits of the card number or the expiration date on any receipt provided to the cardholder at the point of the sale or transaction [15 U.S.C. § 1681c(g)(1)]. Customers are authorized

to bring private actions against merchants that violate this rule [15 U.S.C. §§ 1681n(a), 1681o(a)]. In the case of willful violations, customers may recover actual or statutory damages [15 U.S.C. § 1681n(a)(1), (2)]. Statutory damages are available for willful violations even if the customers cannot show their identities were stolen or their credit impacted [15 U.S.C. § 1681n(a)] and even if they received and kept the defective receipts.

History and Congressional Judgment Considered. To determine whether a statutory violation results in a concrete injury sufficient to support Article III standing, a court considers (1) whether the intangible harm that results from the violation bears a close relationship to harms that have traditionally been regarded as providing a basis for a lawsuit in English or American courts, and (2) the judgment of Congress, which is well positioned to identify intangible harms that meet minimum Article III requirements [Spokeo, Inc. v. Robins, 578 U.S. —, 136 S. Ct. 1540, 194 L. Ed. 2d 635, 645 (2016)].

Breach of Confidence. The Eleventh Circuit determined that the defendant's disclosure of the plaintiff's credit card number was similar to the common-law tort of breach of confidence. Typically, a breach-of-confidence case involves a customer entrusting formulas, letters, or images to a trusted person, such as a merchant, who, without permission, discloses those items to other people or to the public or uses them for personal gain. The harm occurs when the plaintiff's trust in the breaching party is violated. Viewing this case through a breach-of-confidence lens, when a customer uses a credit card to make a purchase, the customer entrusts the merchant with the card number, and this trust is violated when that card number is not kept confidential.

Breach of Implied Bailment. Willful violation of FACTA's card-truncation duty also resembles a modern version of a claim for breach of an implied bailment agreement, according to the Eleventh Circuit. The common law often implies a bailment agreement when a merchant holds a customer's property as a necessary incident to the merchant's business. In that situation, the merchant has a duty to protect the customer's property from damage, loss, or theft and is obligated to return the property in a time, place, and manner prescribed by agreement or by the nature of the objective to be accomplished by the bailment. Viewed through an implied-bailment lens, the defendant was a bailee of the plaintiff's credit card information and had a duty to return it without displaying more than the last five digits of the card number.

FACTA Violation Caused Concrete Injury. The Eleventh Circuit concluded that the harm resulting from the violation of FACTA is concrete in the sense that it involves a clear de facto injury, i.e., the unlawful disclosure of legally protected information. Congress established a duty of care for merchants that print receipts, defined as prohibiting printing more than five digits of credit card numbers. Congress made willful violations of that duty actionable, even when the customer suffers no actual damages, from which the court inferred Congress conceived the harm as happening when the merchant gives a customer a receipt with an untruncated card number. Thus, FACTA provides customers a right to enforce the nondisclosure of their untruncated credit card numbers, similar to the rights and harms asserted in breach-of-confidence or bailment cases. Any differences between these common-law torts and the FACTA cause of action are merely examples of Congress's power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed at common law.

When a statutory violation creates a concrete injury, a plaintiff need not allege any additional harm beyond the one identified by Congress. However, in this case the plaintiff did allege an additional harm: the burden of keeping safe or destroying the receipt with the untruncated credit card number. Although time spent safely disposing of or keeping the untruncated receipt is a small injury, it is enough for standing purposes, according to the Eleventh Circuit.

Effect of Clarification Act. According to findings in the Credit and Debit Card Receipt Clarification Act of 2007 ("the Clarification Act") [Pub. L. No. 110-241, 122 Stat. 1565 (2008)], experts agree that proper truncation of a credit card number prevents a potential fraudster from perpetrating identity theft or credit card fraud, regardless of whether the expiration date is included. Accordingly, several circuits have held that Congress does not consider the mere inclusion of a card's expiration date on a receipt to be harmful [*see* Bassett v. ABM Parking Servs., 883 F.3d 776 (9th Cir. 2018); Crupar-Weinmann v. Paris Baguette Am., Inc., 861 F.3d 76 (2d Cir. 2017); Meyers v. Nicolet Rest. of De Pere, LLC, 843 F.3d 724 (7th Cir. 2017)]. In contrast, the Eleventh Circuit concluded that Congress created actionable rights against merchants that provide customers with receipts containing untruncated credit card numbers.

Case-Specific and Fact-Specific Inquiry Required. In *Katz v. Donna Karan Co. Store, L.L.C.*, the Second Circuit found no clear error in the district court's dismissal of a suit for lack of standing when the plaintiff alleged a merchant violated FACTA by printing the first six and the last four digits of his credit card number, just as the plaintiff alleged in this case. The defendant in *Katz* presented evidence that the first six digits of a credit card number identify only the card's issuer, revealing nothing about the consumer, while the plaintiff asserted that the more digits revealed, the more vulnerable a card number may be to a brute force cryptological attack. The Second Circuit affirmed the dismissal based on the district court's finding there was no risk of harm to the consumer because publication of the

first six digits did not create a material risk of injury. However, the Second Circuit emphasized that it was not resolving whether other procedural violations of FACTA should or would meet a similar outcome, a question that must be answered on a case- and fact-specific basis [Katz v. Donna Karan Co. Store, L.L.C., 872 F.3d 114, 116, 121 (2d Cir. 2017)].

The Eleventh Circuit found *Katz* distinguishable on two grounds: (1) the Second Circuit did not consider whether the FACTA violation was comparable to breach of confidence or breach of an implied bailment, and (2) the court addressed a factual challenge to standing and gave deference to district-court findings. The Eleventh Circuit noted that the *Katz* plaintiff may have done a poor job of proving standing as a factual matter, so findings against him should not preclude standing for other plaintiffs. Moreover, evolving technology may affect the amount of risk related to different disclosures or data breaches. The idea that revealing the first six digits does not pose a risk of identity theft apparently had its origin in expert reports and declarations dating from 2007 and 2008. Later cases that have adopted findings based on this expert opinion have not necessarily considered the effect of technological advances since that time. The Eleventh Circuit was not aware of a court that had taken a fresh look at the argument that an identity thief could use the first six digits of a card number, in combination with other available information, to access more information about a victim than would have been possible in 2007.

Standing Requirements Satisfied. <D>Presented with a facial challenge to the plaintiff's standing, the Eleventh Circuit was required to take the allegations in the complaint as true and evaluate whether they plausibly alleged standing. The court concluded that the complaint alleged two concrete injuries: (1) one based on the statutory violation and its relationship to common-law causes of action, and (2) one based on the defendant giving the plaintiff an untruncated receipt. Faced with no challenge to the other standing requirements, the Eleventh Circuit concluded they were satisfied.

Objector's Standing Questioned. In a concurring opinion, Judge Jordan pointed out that the class member objecting to the settlement might have lacked standing to challenge the standing of the named plaintiff. Judge Jordan noted that as a member of the class who chose not to opt out and submitted a claim for compensation under the settlement agreement, the objector was going to realize approximately $85 from the settlement. How, then, could he have suffered a cognizable harm from the institution of the lawsuit by the named plaintiff or the consummation and approval of the settlement that provided him with a tangible benefit?