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LITIGATION INSIGHTS

Moore's Federal Practice & Procedure

Wagstaffe's Civil Procedure Before Trial

January 2019

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

Third Circuit Declines to Apply *American Pipe* Tolling to Named Plaintiffs

Weitzner v. Sanofi Pasteur Inc.

2018 U.S. App. LEXIS 33226 (3d Cir. Nov.27, 2018)

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FEDERAL QUESTION JURISDICTION

Modification or Vacatur of Arbitration Award

McCormick v. Am. Online, Inc.

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The Fourth Circuit holds that federal question jurisdiction over a motion to modify or vacate an arbitration award is determined by the nature of the underlying claim.

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Samantha Chassin, Regional Solutions Consultant

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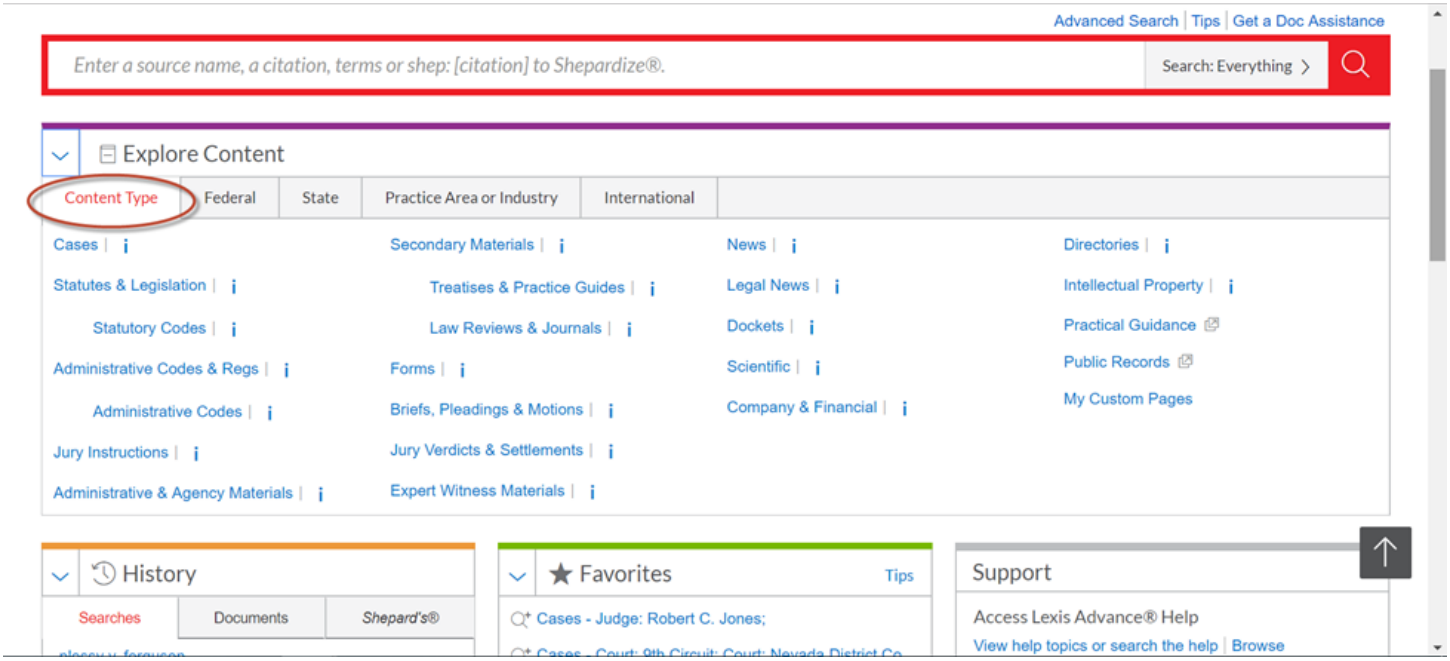

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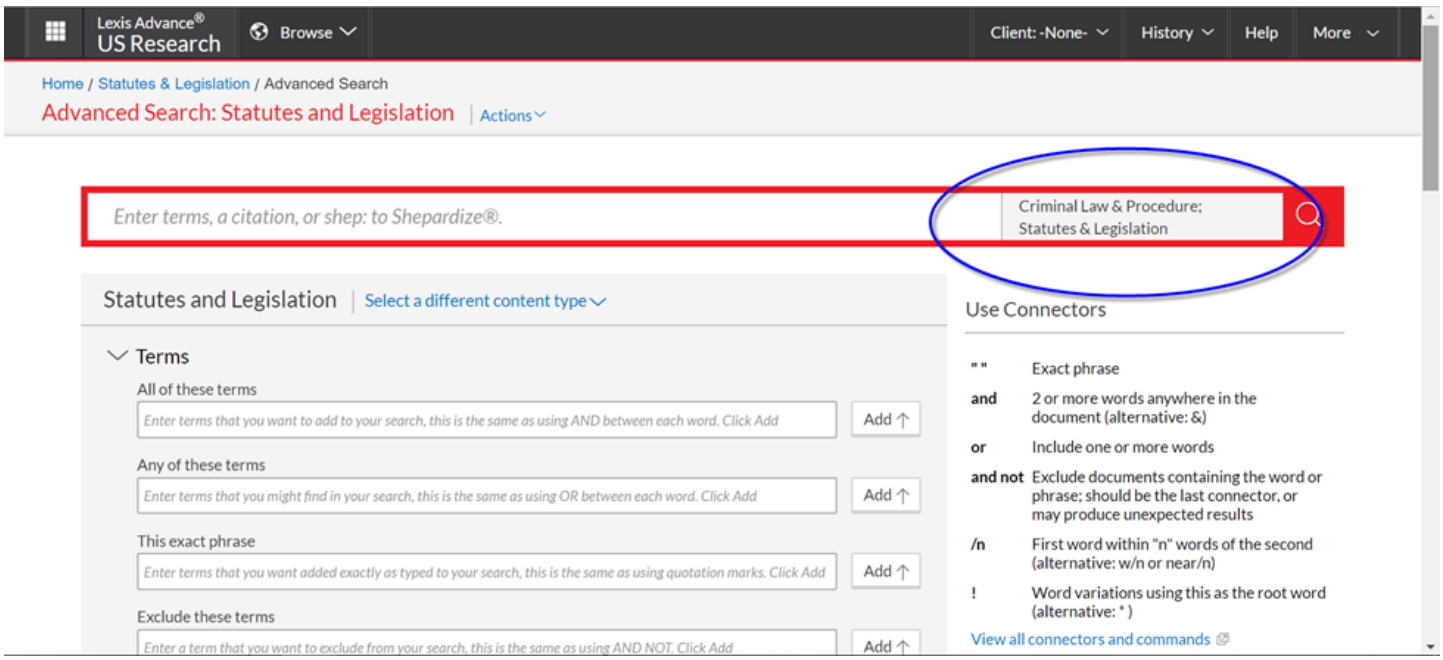

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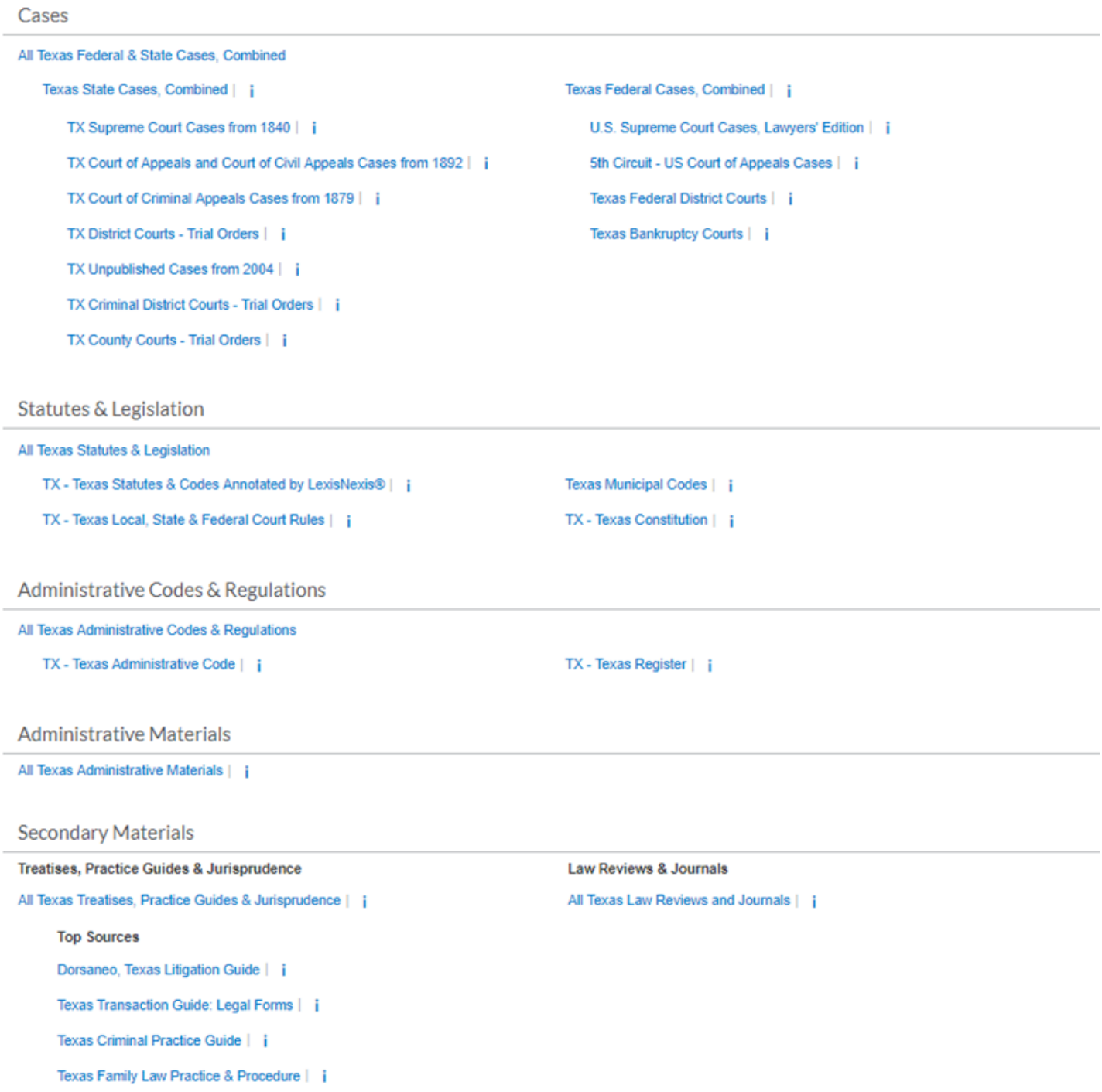

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TX Unpublished Cases from 2004

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NEW FROM JIM WAGSTAFFE

THE CHALLENGE TO CHANGE: LEARNING THE HOT NEW LITIGATION DEVELOPMENTS

By: Jim Wagstaffe

It's been said that change is the only constant. And in words that should resonate for practicing lawyers -- young and old -- General Eric Shinseki put it even more bluntly: "If you don't like change, you're going to like irrelevance even less."

So meeting the challenge to change means stay relevant by knowing the hot new rule and case law developments in litigation practice. And certainly, this includes the significant amendments to the Federal Rules of Civil Procedure effective December 1, 2018.

To stay abreast of the most recent changes in litigation case law, you should have at your fingertips my LexisNexis Current Awareness feature which is an online companion to The Wagstaffe Group Prac. Guide: Fed. Civ. Proc. Before Trial (Lexis Nexis 2018). There, you'll find weekly reports on the hottest new cases on litigation procedure.

So, if it's true, as they say, that when you're through changing, you're through, then read below some highlights from recent months to keep us all relevant and adaptive to new rules and developments.

The New Federal Rule Amendments

If change brings opportunity, they abound with the new federal rules of civil procedure effective December 1, 2018. Here's a quick summary:

- Giving notice of certified/settled class actions now hits the 21st Century with amended Rule 23(c)(2) as it acknowledges "contemporary communication realities" and allows the "best practicable notice" to include notice by electronic means, including email or even texts that could be combined with mail notice.

- The new Rule 23(e)(1) also now allows courts to order notice of a proposed settlement class if there is a sufficient likelihood of certification and approval. And we now must make sure that such notice details the settlement benefits, likely range of outcomes, other litigation, and the fees.

- Want your settlement class approved? New Rule 23(e)(1) says tell the court about discovery in your case (and how it showed strengths and weaknesses) and the outcome of any similar or parallel cases.

- Under new Rule 23(e)(5), any payment agreement with objectors has to be approved by the district court, and be sure you specifically state in your fairness analysis whether any objectors' objections apply to the entire class, a subset of the entire class or only to the objectors.

- On another front, the newly amended Rule 5 affects electronic service and eliminates paper certificates of service.

- And in our final new rule alert, Rule 62's automatic stay of judgment enforcement is now a presumptive 30 (not 14) days, and the court may earlier dissolve that 30 day automatic stay of enforcement.

New Cases on Jurisdiction and Removal

A notice of removal does not need to include evidence supporting jurisdiction, so long as it includes a short and plain statement of the grounds for removal. *Betzner v. Boeing Co.*, 2018 U.S. App. LEXIS 35172 at *6 (7th Cir. December 12, 2018) (federal officer removal based on simple allegation of federal contractor defense sufficient without any other evidentiary facts).

Speaking of fun removal issues, if a local defendant removes *before* service, some courts hold that the statutory bar on removal does not apply. *Encompass Ins. Co. v. Stone Mansion Rest. Inc.*, 902 F.3d 147 (3d Cir. 2018).

A federal court will have no ancillary jurisdiction over a fee dispute between lawyers even if the fees were being sought for work in a federal court action. The dispute between the lawyers is a simple breach of contract suit to be decided in state court. In re Comty. Bank N. Va. Mortg. Lending Practices Litig., 2018 U.S. App. LEXIS 35841 at *10 (3d Cir. December 20, 2018).

In diversity cases, distinguish between business trusts (e.g. REITs) and traditional fiduciary trusts—only the former takes on the citizenship of all trust members (as opposed to the trustee alone). *Doermer v. Oxford Fin. Grp., Ltd.*, 884 F.3d 643 (7th Cir. 2018).

Court shouldn't dismiss supplemental claims without notice and opportunity to be heard—especially right before trial. *Catzin v. Thank You & Good Luck Corp.*, 899 F.3d 77 (2d Cir. 2018).

If insurance case involves validity of an insurance policy, the policy's full amount is the amount in controversy for diversity purposes. *Elhouty v. Lincoln Ben. Life Co.*, 886 F.3d 752 (9th Cir. 2018).

Speaking of the amount in controversy, you can include (if awardable by statute or contract) past *and future* attorney's fees. *Fritsch v. Swift Transp. Co.*, 899 F.3d 785 (9th Cir. 2018).

There is no personal jurisdiction over even a large, national defendant just because the plaintiff lives in the forum state—especially if the injury is suffered elsewhere. *Waite v. All Acquisition Corp.*, 901 F.3d 1307 (11th Cir. 2018).

New Cases on Twombly/Iqbal

If you allege mere puffery and *possibly* higher than advertised prepackaged food prices you don't satisfy Twombly/Iqbal plausibility or pleading securities fraud. *Employees' Ret. Sys. v. Whole Foods Mkt., Inc.*, 905 F.3d 892 (5th Cir. 2018); see also *Wysong v. APN*, 889 F.3d 267 (6th Cir. 2018) (Lanham Act case based on competitor's dog food label showing premium meat cuts doesn't pass Twombly/Iqbal test since consumers not really misled).

If the allegations even of state of mind elements (e.g. actual malice in public figure defamation case) aren't plausible or detailed, a Twombly/Iqbal dismissal is in order. *Lemelson v. Bloomberg, L.P.*, 903 F.3d 19 (1st Cir. 2018); see also ." *Nwanguma v. Trump*, 903 F.3d 604 (6th Cir. 2018) (complaint against Trump campaign for injuries suffered at rally failed to allege plausible incitement to riot claim since candidate did say "don't hurt them).

The Twombly/Iqbal plausibility standards have been held to apply even to pleading subject matter jurisdiction and standing. *BNSF v. Seats, Inc.*, 900 F.3d 545 (8th Cir. 2018).

Some circuits deplore what they call "shotgun complaints" that over-incorporate generalized allegations without specificity. *Jackson v. Bank of America, N.A.* 898 F.3d 1348 (11th Cir. 2018).

Don't count on conclusory "aiding and abetting" allegations to survive a Twombly/Iqbal motion to dismiss. Vexol, S.A. v. Berry Plastics Corp., 882 F.3d 633 (7th Cir. 2018).

New Cases on Summary Judgment

If evidence on summary judgment is conclusory, it will be insufficient to survive summary judgment. *Mancini v. City of Providence*, 909 F.3d 32 (1st Cir. 2018).

Oppose summary judgment with Rule 56(d) declaration for more discovery? Don't count on it. Mere speculation for fishing expedition might be "mere hope of revealing smoking gun." *Helping Hand Caregivers v. Darden,* 2018 U.S. App. LEXIS 22490 (7th Cir. 2018)

New Cases on Arbitration

The Supreme Court has just held that a court cannot decline to delegate to an arbitrator the arbitrability question simply because it determines that the question is wholly groundless. Arbitration is a matter of contract and courts must enforce the contract according to its terms—which may include delegating to the arbitrator "gateway" questions of arbitrability. *Henry Schein, Inc. v. Archer*, ___ U.S. ___ (January 8, 2019).

Think you can never get an arbitration decision reversed. Generally, you're right as reversal only happens when the showing of unfairness is compelling. *Republic of Argentina v. AWG*, 894 F.3d 327 (D.C. Cir. 2018).

Federal question jurisdiction over every challenge to FINRA arbitration? No federal jurisdiction just because FINRA arbitrator allegedly breached duties. *Wells v. FINRA*, 889 F.3d 853 (7th Cir. 2018); *but see Turbeville v. FINRA*, 874 F.3d 1268 (11th Cir. 2017).

New Cases on Discovery

In the name of proportionality, the court can phase discovery (e.g. causation) and apply its common sense in limiting search terms for producing ESI. *Vallejo v. Amgen*, 903 F.3d 733 (8th Cir. 2018).

Also in the name of proportionality, the court can order production of archived backup tapes by emphasizing the large amount in controversy and the producing party's sole access to the information. *Physicians All. Corp. v. WellCare Health Ins. of Ariz., Inc.*, 2018 U.S. Dist. LEXIS 31001 (M.D. La. 2018).

New Cases on Exclusion of Undisclosed Witnesses

If you don't disclose, for example, the treating physician as an expert witness during discovery, don't count on calling them to testify at trial. *Vanderberg v. Petco Animal Supplies Stores, Inc.*, 906 F.3d 698 (8th Cir. 2018).

By the way, if you don't disclose a party witness as a damages expert, they'll be excluded at the summary judgment stage as well. *Karum Holdings LLC v. Lowe's Cos.*, 895 F.3d 944 (7th Cir. 2018).

New Cases on Erie Doctrine

The Erie debate as to whether state anti-SLAPP statutes apply in federal court lives on. Some courts say no since the federal rules cover the situation. *Los Lobos Renewable Power, LLC v. AmeriCulture, Inc.*, 885 F.3d 659 (10th Cir. 2018).

New Cases on Sanctions

Don't even think about threatening potential witnesses with a Facebook post. It can lead to monetary sanctions even if you (or your client) threaten only "liars". See *Emerson v. Dart*, 900 F.3d 469 (7th Cir. 2018).

Facing a motion to dismiss, the plaintiff submits materially altered email. The court properly dismisses the action per Rule 11 because submitting falsified evidence interferes with the integrity of the judicial process. Dismissal is an "essential tool" in the sanctions toolbox. *King v. Fleming*, 2018 U.S. App. LEXIS 22611 (10th Cir. 2018); see also *Fuery v. City of Chicago*, 900 F.3d 450 (7th Cir. 2018).

What's in the Pipeline?

Preparing for success in litigation often is to know and understand important cases in the U.S. Supreme Court of the United States (SCOTUS) pipeline (i.e. cert. granted but awaiting decision). These include:

- Is an exemption under the FAA an arbitrability issue to be resolved by the arbitrator? See New Prime v. Oliveira – SCOTUS argued 10/3/18.
- Does the FAA foreclose a state-law interpretation of general language in an arbitration agreement to allow for class arbitration? See Lamps Plus Inc. v. Varela – SCOTUS argued 10/29/18.
- The scope of cy pres awards in class actions will be addressed in Frank v. Gaos – SCOTUS argued 10/31/18.
- Whether claims process appeal deadline of Fed. R. Civ. P. 23(f) is jurisdictional is before SCOTUS in Nutraceutical Corp. v. Lambert, argued 11/27/18.
- Can a cross-defendant (not the original defendant) remove the case under CAFA? See Home Depot v. Jackson

– SCOTUS argued 1/15/19.

- Is Williamson exhaustion rule (ripening of taking claims in fed. court) still valid (or should it be abandoned)? See SCOTUS in Knick v. Township of Scott – argued 1/16/19.
- How about APA discovery outside administrative record aimed at evidence from decision maker? See SCOTUS In re Dept. of Commerce – argument 2/19/19.
- What is a state actor and does it include private entities that operate public access television stations? See SCOTUS – Manhattan Community Access Corp. v. Halleck – SCOTUS – argument 2/25/19.

And you can be the first to know the holdings in such cases and stay ahead in The Wagstaffe Group Prac. Guide: Fed. Civ. Before Trial, and its Current Awareness feature. Open the platform on a weekly basis and you'll be ahead of the competition!

No one less than Stephen Hawking said that "intelligence is the ability to adapt to change." So it might be a step down but equally compelling to end with a refrain from Dr. Seuss: "You'll be on your way up! You'll be seeing great sights! You'll join the high fliers who soar to high heights."

CLASS ACTIONS

Third Circuit Declines to Apply *American Pipe* Tolling to Named Plaintiffs

Weitzner v. Sanofi Pasteur Inc.

2018 U.S. App. LEXIS 33226 (3d Cir. Nov. 27, 2018)

The Third Circuit holds that tolling under the *American Pipe* rule does not extend the statute of limitations with respect to the named plaintiff's individual claims.

Background. A doctor and his professional corporation brought claims under the Telephone Consumer Protection Act, seeking certification of a class action. In an earlier case in state court, the doctor had brought substantially the same claims: he alleged that the defendants transmitted thousands of faxes in violation of the Act, including at least one sent to the doctor. The state court denied class certification. That action then continued as an individual action, but had never proceeded to judgment. More than three years after denial of class certification in the state action, and over six years after defendants sent any unsolicited faxes, the plaintiffs filed the present case. There was no dispute that these claims were untimely, absent tolling, and the district court granted defendants' motion for summary judgment and dismissed the claims, concluding that *American Pipe* tolling did not apply to the plaintiffs' class or individual claims.

***American Pipe* Tolling.** Under *American Pipe & Construction Co. v. Utah*, the timely filing of a class action tolls the applicable statute of limitations for putative class members until the propriety of maintaining the class is determined [American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974)]. This tolling is an equitable remedy that promotes the efficiency and economy goals of Rule 23 by encouraging class members to rely on the named plaintiff's filings, and protects unnamed class members who may have been unaware of the class action. Plaintiffs have no substantive right to bring their claims outside the statute of limitations—their ability to do so derives from this judicially crafted tolling rule. Accordingly, the tolling rule should not be applied mechanically.

Application to Class Claims. The plaintiffs' claims on behalf of the class were precluded by the Supreme Court's recent opinion in *China Agritech, Inc. v. Resh* [584 U.S. —, 138 S. Ct. 1800, 201 L. Ed. 2d 123 (2018)]. That decision clarified that *American Pipe* tolling does not allow a putative class member to commence a new class action outside of the statute of limitations. Tolling allows unnamed class members, if class certification is denied, to join the action individually or file individual claims. It does not permit the maintenance of a follow-on class action filed after expiration of the statute of limitations. The Court explained that the efficiency and economy of litigation that supports tolling of individual claims do not support maintenance of untimely successive class actions.

Application to Individual Claims. The named plaintiffs' individual claims were also precluded as untimely. *American Pipe* was designed to protect individual claims filed after the denial of class certification, but the Supreme Court did not specify whether tolling should protect named plaintiffs as well as unnamed plaintiffs. *American Pipe*'s broad language might be interpreted to provide for tolling of the claims of both named plaintiffs and unnamed putative class members in the initial class action. However, the Third Circuit concluded that the purposes of *American Pipe* tolling made clear that tolling does not protect named plaintiffs.

Two primary purposes supported the *American Pipe* rule. First, the Court emphasized that efficiency and economy of litigation supported the tolling rule because, without such a rule, potential class members would be induced to file protective motions to intervene or join. However, this concern does not apply to named plaintiffs, who have already filed their claims; neither efficiency nor economy would be advanced by allowing named plaintiffs to rely on their own filings to maintain a second suit. Second, the Supreme Court emphasized the need for tolling to protect the interests of putative unnamed class members who had not received notice and were unaware of the pending class action. This purpose also supported tolling only for unnamed class members. A named plaintiff's individual claim will remain viable upon denial of class certification, without tolling, because the putative class action is then simply transformed into an individual action.

Given the equitable nature of *American Pipe* tolling, the Third Circuit said, there was no reason to extend its reach to named plaintiffs. Allowing named plaintiffs to file new individual claims outside the statute of limitations—when they can instead pursue their original, timely filed individual claims in the first case—serves no legitimate purpose.

The Third Circuit concluded that this reasoning applied equally to the two named plaintiffs, the doctor and his professional corporation. The professional corporation had not been a named plaintiff in the earlier state action, so the corporation may have been a putative class member in that action. However, it was not the type of unaware, absent

class member *American Pipe* was designed to protect. The corporation had certainly received actual notice of the pending state court action and the denial of class certification through its sole shareholder, the doctor, but took no steps to pursue its claims within the statute of limitations. Moreover, any judgment in favor of the corporation would benefit only the doctor, effectively allowing him to pursue his claims for a second time, outside the statute of limitations.

The Third Circuit concluded that all the claims, both class and individual, were barred as untimely: "We now hold that *American Pipe* tolling does not allow individuals who were named plaintiffs in an initial class action to toll their own statute of limitations. We emphasize that *American Pipe* tolling has long been recognized as an equitable remedy that applies only where necessary to prevent injustice. Courts should not permit tolling where doing so would result in an abuse of *American Pipe*."

ABSTENTION

Action Seeking Access to State-Court Filings

Courthouse News Serv. v. Brown

908 F.3d 1063, 2018 U.S. App. LEXIS 32110 (7th Cir. Nov. 13, 2018)

The Seventh Circuit holds that a district court must abstain from deciding a case in which the plaintiff seeks an injunction requiring a state court clerk to release electronically filed complaints to the press immediately on receipt.

Facts and Procedural Background. When all complaints were filed on paper, the Cook County Circuit Court Clerk's Office put copies of filed complaints in a tray behind the intake counter, allowing reporters same-day access. From 2009, when electronic filing began, until 2015, the clerk's office printed out electronically filed complaints as they were received and allowed reporters to view them along with the paper complaints. In January 2015, the office began withholding electronically filed complaints until administrative processing was completed and they were officially accepted by the court, when they were posted online. According to the Court Clerk, this is required by a circuit-court administrative order and the Illinois Supreme Court's electronic filing standards and principles, which both state that electronically submitted documents shall be considered filed "if not rejected" by the Clerk's office.

Electronic filing became mandatory in Cook County Circuit Court in 2018. According to Courthouse News Service (CNS), which reports on civil litigation in thousands of state and federal courthouses across the country, almost 40 percent of complaints electronically filed in that court are now inaccessible on the day they are filed. According to the Court Clerk, 90.9 percent of such complaints are publicly available within one business day, 94.7 percent are available within two business days, and 96.8 percent are available within three business days.

CNS sued the Court Clerk, seeking an injunction requiring her to release newly filed complaints to the press at the moment of receipt by her office. The Clerk argued that the First Amendment presumption of access to documents filed in court did not require immediate access, the accept/reject process was important to prevent confidential information from being exposed, and confusion might result if a complaint were reported on and later rejected by the Clerk's Office for failure to comply with court rules. Finally, she argued that federal courts should abstain from hearing the case because CNS was asking a federal court for injunctive relief against a state official who was acting pursuant to a state court's standing order.

The district court granted a preliminary injunction requiring the Clerk to implement within 30 days "a system that will provide access to newly e-filed civil complaints contemporaneously with their receipt by her office." The court reasoned that *Younger* abstention was inappropriate because there were no ongoing state judicial proceedings with which the injunctive relief might interfere. On the merits, the court determined that CNS had a First Amendment right of access that, pursuant to Seventh Circuit precedent, had to be immediate and contemporaneous. The Seventh Circuit reversed, ordering the action dismissed without prejudice.

Qualified Right of Access Recognized. Courts recognize a general right, rooted in common law, to inspect and copy public records and documents, including judicial records and documents. In addition, the Supreme Court holds that the First Amendment protects access to criminal trials, and federal courts of appeals widely agree that this First Amendment right extends to civil proceedings and associated records and documents. However, the press's right of access to court documents is not unlimited.

The Seventh Circuit described the delays at issue in this case as minimal. The court also noted that neither the Seventh Circuit nor the Supreme Court provides instant access to electronically filed court documents, which would make it unusual, and perhaps hypocritical, for the Seventh Circuit to order a state-court clerk to do so based on the same Constitution that applies to federal courts. Ultimately, however, the Seventh Circuit did not decide whether

failure to do so impermissibly infringed on the plaintiff's First Amendment rights, holding instead that the district court should have abstained so the issue could be decided in the first instance by the state courts.

***Younger* and Related Cases.** Under *Younger v. Harris*, federal courts must abstain when a criminal defendant seeks a federal injunction to block his or her state-court prosecution on federal constitutional grounds [Younger v. Harris, 401 U.S. 37, 40–41, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971)]. This doctrine has been extended to civil proceedings in limited circumstances [*see, e.g.*, Huffman v. Pursue, Ltd., 420 U.S. 592, 603–604, 95 S. Ct. 1200, 43 L. Ed. 2d 482 (1975)]. In *O'Shea v Littleton*, the Court further extended *Younger* principles to a suit complaining that a municipal court system was intentionally discriminating against African Americans in setting bail and in sentencing, cautioning against injunctions that would lead to an ongoing federal audit of state criminal proceedings: that would accomplish indirectly the kind of interference that *Younger* and related cases sought to prevent [O'Shea v. Littleton, 414 U.S. 488, 500, 94 S. Ct. 669, 38 L. Ed. 2d 674 (1974)].

In *Rizzo v. Goode*, the Court applied *Younger* principles to a suit alleging a pattern of unconstitutional police mistreatment of minority civilians in Philadelphia. The district court issued an injunction requiring city officials to come up with a comprehensive program for dealing with civilian complaints pursuant to the court's detailed guidelines. The Third Circuit affirmed. Describing the injunction as "a sharp limitation on the [police] department's latitude in the dispatch of its own internal affairs," the Supreme Court reversed. The Court noted that when "the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the 'special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law'" [Rizzo v. Goode, 423 U.S. 362, 378, 96 S. Ct. 598, 46 L. Ed. 2d 561 (1976) (citing *Stefanelli v. Minard,* 342 U.S. 117, 120, 72 S. Ct. 118, 96 L. Ed. 138 (1951), quoted in *O'Shea v. Littleton*, 414 U.S. 488, 500, 94 S. Ct. 669, 38 L. Ed. 2d 674 (1974))].

In *SKS & Assocs. v. Dart*, the Seventh Circuit relied on *Younger* principles in declining to exercise jurisdiction over a § 1983 action against the Chief Judge and the Sheriff of Cook County. The Chief Judge had ordered the Sheriff not to carry out residential evictions during a two-and-a-half-week period in December and during periods of extreme cold weather. A residential property manager sought a federal injunction requiring the Sheriff to speed up the eviction processes in state court. The district court dismissed the case, and the Seventh Circuit affirmed, explaining that it was important for federal courts to have "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways."). The court concluded that principles of equity, comity, and federalism prevented the federal courts from undertaking the requested supervision of state-court operations [SKS & Assocs. v. Dart, 619 F.3d 674, 682 (7th Cir. 2010)].

The Seventh Circuit acknowledged that this case did not present a traditional *Younger* scenario, because the plaintiff did not seek to enjoin an individual, ongoing state proceeding. Nor was the case exactly like *O'Shea* or *Rizzo.* The case was, however, very similar to *SKS & Associates.*

Abstention Required Under General Principle of Comity. Underlying all of the *Younger* abstention cases, the Seventh Circuit found "a deeper principle of comity: the assumption that state-courts are co-equal to the federal courts and are fully capable of respecting and protecting the plaintiff's substantial First Amendment rights." According to the Seventh Circuit, this principle takes on special force when federal courts are asked to decide how state courts should conduct their business. The court concluded that Illinois courts are best positioned to interpret their own orders and to craft an informed and proper balance between their legitimate institutional needs and the public's and the media's First Amendment interest in timely access to court filings.

Split With Ninth Circuit. The Ninth Circuit reached the opposite conclusion in *Courthouse News Serv. v. Planet*, in which the same plaintiff sued the Court Executive Officer/Clerk of the Ventura County Superior Court. As in this case, the plaintiff complained of the court's failure to provide same-day access to newly filed civil complaints. Unlike in this case, the district court in *Planet* abstained, and the Ninth Circuit reversed. The Ninth Circuit reasoned that the claims raised novel and important First Amendment questions that should be decided in the federal courts and that an injunction requiring the court to provide same-day access to unlimited civil complaints would only minimally interfere with the state's administration of its judicial system [Courthouse News Serv. v. Planet, 750 F.3d 776, 793 (9th Cir. 2014)].

The Seventh Circuit disagreed. The court reasoned that if the state-court clerk refuses or fails to comply with a federal court injunction, or complies only partially, the federal court's involvement will continue as it oversees implementation of the order. In addition, the court presumed the plaintiff would use a success in this case to try to force the hand of other state courts that do not provide immediate press access to court filings, likely leading to more litigation in federal courts.

FEDERAL QUESTION JURISDICTION

Modification or Vacatur of Arbitration Award

McCormick v. Am. Online, Inc.

2018 U.S. App. LEXIS 33460 (4th Cir. Nov. 29, 2018)

The Fourth Circuit holds that federal question jurisdiction over a motion to modify or vacate an arbitration award is determined by the nature of the underlying claim.

Facts and Procedural Background. An America Online (AOL) subscriber agreed to binding arbitration of a dispute concerning AOL's provision of information about him to a police department without a warrant, subpoena, or consent, and deletion of his emails, for which he requested $74,999 in damages. The arbitrator denied the claims. The subscriber then filed a motion in district court requesting the arbitration award be vacated or nullified under §§ 10 and 11 of the Federal Arbitration Act (FAA) [9 U.S.C. §§ 10, 11]. He alleged that his damages would exceed $75,000 and asserted jurisdiction under the Stored Communications Act [18 U.S.C. § 2707(a)–(c)], federal question jurisdiction [28 U.S.C. § 1331], and diversity jurisdiction [28 U.S.C. § 1332]. The district court dismissed the case, concluding the subscriber failed to demonstrate diversity jurisdiction because the damage claim presented to the arbitrator was only $74,999. The district court did not address federal question jurisdiction. The Fourth Circuit held that the district court had federal question jurisdiction, vacated the district court's dismissal, and remanded the case.

Independent Jurisdictional Basis Required. The FAA establishes procedural mechanisms for enforcement of contracts providing for arbitration, including procedures for vacating or modifying arbitration awards. However, the Act does not create federal jurisdiction for litigation of arbitration controversies. An independent jurisdictional basis, such as diversity or federal question jurisdiction, must exist.

"Look-Through" Jurisdiction for Motions to Compel Arbitration. In *Vaden v. Discover Bank*, the Supreme Court held that federal question jurisdiction over a petition to compel arbitration is determined by "looking through" the petition to the underlying dispute and determining whether that dispute arises under federal law [Vaden v. Discover Bank, 556 U.S. 49, 62–65, 129 S. Ct. 1262, 173 L. Ed. 2d 206 (2009)]. Such petitions are filed under § 4 of the FAA, which authorizes petitions to compel arbitration in "any United States district court which, *save for such agreement*, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties" (emphasis added) [9 U.S.C. § 4]. Relying on the "save for such agreement" language, the Court reasoned that when the underlying dispute arises under federal law, a party may petition for arbitration in federal court without first initiating a federal question suit, because if there were no arbitration agreement, the dispute could be litigated in federal court.

Circuit Split Concerning Motions to Confirm, Modify, or Vacate Arbitration Awards. Some courts hold that because *Vaden* relied on the "save for such agreement" language, the look-through approach does not apply to motions to confirm, modify, or vacate arbitration awards under §§ 9, 10, and 11, which do not include such language [*see* 9 U.S.C. §§ 9–11; Goldman v. Citigroup Global Mkts., Inc., 834 F.3d 242, 252–255 (3d Cir. 2016); Magruder v. Fid. Brokerage Servs. LLC, 818 F.3d 285, 287–289 (7th Cir. 2016)]. Reasoning that the difference in language is not dispositive, other courts hold that the look-through approach does apply to motions under §§ 9, 10, and 11 [*see* Ortiz-Espinosa v. BBVA Sec. of P.R., Inc., 852 F.3d 36, 42–47 (1st Cir. 2017); Doscher v. Sea Port Grp. Sec., LLC, 832 F.3d 372, 381–388 (2d Cir. 2016)].

Fourth Circuit Opts for Uniform Approach. The Fourth Circuit joined those courts holding that the look-through approach applies to motions under §§ 10 and 11. If the district court would have had jurisdiction over a § 4 petition, it has jurisdiction over § 10 and § 11 motions. Thus, the FAA establishes a comprehensive procedural alternative to litigation, giving effect to the Act's purpose of favoring arbitration over litigation when the parties have agreed to arbitration. This also avoids encouraging parties to file unnecessary federal question suits and § 4 petitions merely to obtain federal jurisdiction. This reasoning would presumably apply to § 9 motions as well.

Conclusion: District Court Had Jurisdiction. Absent the arbitration agreement, the district court would have had federal question jurisdiction over the plaintiff's claim under the Stored Communications Act. Therefore, applying the look-through approach, the district court should have exercised jurisdiction over his motions under §§ 10 and 11. The Fourth Circuit remanded the case to the district court to resolve those motions.