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February 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.

DISMISSAL

Voluntary Dismissal Without Prejudice

Dunster Live, LLC v. Lonestar Logos Mgmt. Co., LLC

908 F.3d 948, 2018 U.S. App. LEXIS 32139 (5th Cir. Nov. 13, 2018)

The Fifth Circuit holds that a voluntary dismissal without prejudice under Rule 41(a) does not make a party a "prevailing party" for purposes of a statute authorizing attorney's fees to the prevailing party.

Jump to full summary

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2018 U.S. App. LEXIS 35429 (10th Cir. Dec. 18, 2018)

The Tenth Circuit holds that, after a scheduling order deadline, a party seeking leave to amend must demonstrate both good cause for seeking modification under Rule 16(b)(4), and satisfaction of the more liberal Rule 15(a) standard.

Jump to full summary

STANDING

Amended Pleading

Scahill v. District of Columbia

909 F.3d 1177, 2018 U.S. App. LEXIS 34544 (D.C. Cir. Dec. 7, 2018)

The D.C. Circuit holds that a plaintiff may cure an Article III standing defect through an amended pleading alleging facts that arose after the initial complaint was filed.

Jump to full summary

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Marie Kaddell, Senior Information Professional Consultant

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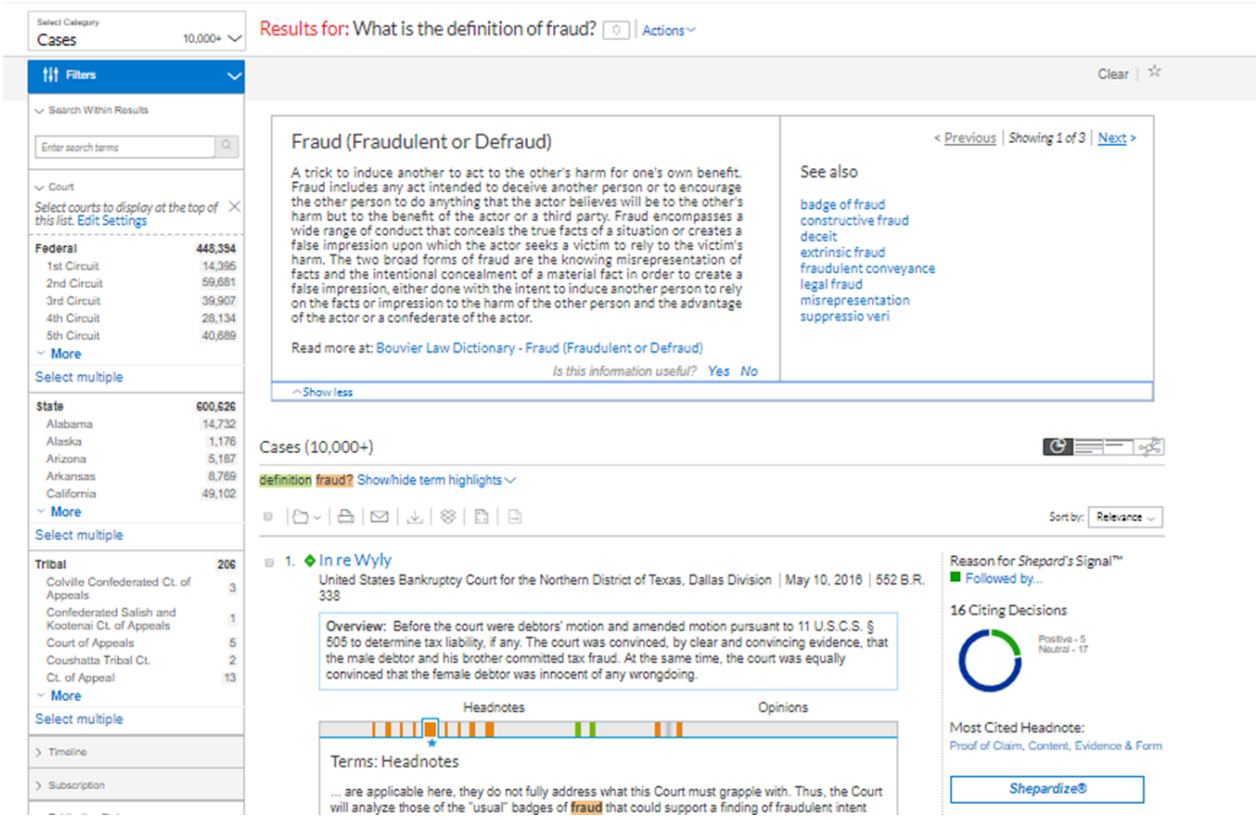

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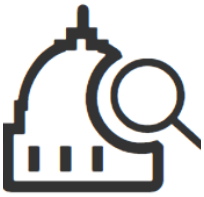

SOURCE SPOTLIGHT: LARSON ON EMPLOYMENT DISCRIMINATION

Heather Robinson, Regional Solutions Consultant

For labor and employment law practitioners, Larson on Employment Discrimination is a must-have resource. The premier treatise on the subject of job-related discrimination, it is available exclusively on Lexis Advance. This Matthew Bender publication is updated regularly with new and revised content, most recently in November 2018.

With its comprehensive 69 chapters, including appendices and forms, Larson provides coverage that keeps pace with the ever-changing law relating to employment discrimination based on race, sex, religion, national origin, age, disability and union membership. It is filled with analysis from leading experts in the field and is an enlightening source for practitioners on any side of an issue. With its breadth of information and detail, Larson on Employment Discrimination is unrivaled in its application and exists in a league all its own.

If you are new to employment discrimination, Larson will be immensely helpful in understanding the topic and determining a starting point for your additional research. The treatise uses hypotheticals and examples which assist a reader in their mastery of the subject. More seasoned practitioners will also find Larson to be an invaluable tool. It is searchable on Lexis Advance by typing the name into the Red Search Box and adding as a search filter. Its table of contents is both searchable and browsable, which allows for individual users to access this invaluable source via whichever method best suits their research needs.

Each edition includes a What's New section that highlights recent cases of interest and updates. The following chapters were revised and updated in the latest edition: Chapters 27 through 31, addressing test validation, nonobjective selection devices, and various other aspects of disparate treatment theory; Chapters 34 and 35, addressing retaliation; Chapters 36 and 37, addressing employment agencies and labor organizations; and Chapters 63 through 65, addressing Federal employment. In addition, developments affecting other areas of employment discrimination law are incorporated throughout the treatise.

For more information about Larson on Employment Discrimination or to schedule training, please contact your Solutions Consultant.

NEW FROM JIM WAGSTAFFE

THE THINGS THEY DON'T TEACH YOU IN LAW SCHOOL

By: Jim Wagstaffe

Just over a century ago the study of law migrated from young lawyers apprenticing at the feet of their wise elders to academic study in a three-year law school curriculum. See S. Kotcher, *Legal Training in the United States: A Brief History*, Winter 2009 Wisconsin International Law Journal 335. And just maybe we left something behind: the torch of lawyerly wisdom passing from generation to generation.

Now entering my fortieth year of practice, I am keenly struck by the large number of things they don't teach in law school. You will forgive me if, based on these forty years of litigation and trials, combined with simultaneously teaching civil procedure and writing practice guides, I choose here to share my 25 maxims for a successful and fulfilling legal career.

It Starts with The Client—Always

As lawyers we must never forget that we are in a service profession based on guiding, counseling and representing our clients. My first five "wise old lawyer" maxims appropriately are directed towards the care and feeding of clients.

1. In the first client interview always ask, "Tell me the worst fact that if I learn it 6 months from now I'll be unhappy I didn't know it".
2. Also, in the initial client interview always say and mean "We will take care of you."
3. When interviewing clients trust but verify.
4. When selecting clients (and getting hired) remember the maxim: "Don't borrow money from someone who cried at the end of the movie Scarface".
5. When evaluating clients beware large red flags: (i) fired prior lawyers, (ii) has money to pay you but it is currently in escrow, and (iii) it's everyone else's fault.

Talking About Money Sensibly

While lawyering is also a business, it is interesting that in law school virtually nobody talks about money or fee agreements. My next three maxims highlight ways to have the money issues not interfere with good client relations.

6. Write your fee agreements clearly so that a 10-year-old could understand them.
7. Never let clients get behind in payments—arrange generous retainers, insist on full and timely payment of the first bills and engage in realistic contingency fee analyses.
8. Be generous with pro bono work (but when you don't get paid have it be by choice).

Getting Off to a Good Start

It is important to successfully transform the client interview into the initial phases of the lawsuit. Getting started could mean telling a story in pleadings or settling the case at the outset. Here are my next four maxims.

9. Jurisdiction first! Figure out subject matter and personal jurisdiction at the outset to avoid big wastes of time and money later.
10. Tell a story with your pleadings but don't outrun your factual and legal narrative.
11. Motions to dismiss can be playpens for infant lawyers—dismiss-proof your complaints and file motions to dismiss only if there's a reasonable chance you'll win.
12. Think fair settlement early because there will always be other cases and clients.

Figure It Out with Discovery

Discovery in lawsuits is frankly the most important and sometimes the most tedious part of the case. Maybe it bores law professors but it is the lifeblood of figuring out the case so it can be settled or tried. Here are the next five maxims.

13. Utilize GPS-like tools to guide your litigation, especially, may I say, The Wagstaffe Group's Federal Practice Guide.
14. Don't be caught with your "new case or rule" pants down—follow Current Awareness in The Wagstaffe Group Practice Guide.
15. Plan your discovery with an eye toward economy, future motions and trial—don't be like an ant aimlessly walking on the kitchen floor.
16. Get and master the documents—all of them--from your client in advance so you're ahead of the other side at the outset.
17. Use written discovery (e.g. interrogatories) sparingly and only when the answers will absolutely help you (e.g. for details not for contentions).

Essential to Survival is Getting Along

Law school is filled with fighting and war metaphors for litigation (e.g. litigation battles). Perhaps ironically in real life it is just the opposite because getting along is the key to survival. Here are four maxims for civility.

18. Particularly with discovery (and in settlement discussions) apply the golden rule with opposing counsel—meaning keep a civil tongue in your head.
19. Interact with the opposing counsel like raising a teenager: listen through tone.
20. When speaking with opposing counsel or participating in mediation, listen! You are given two ears and one mouth for the right ratio.
21. When approaching settlement, pay attention to both sides' interests and realistically assess risks and benefits

Cases Rarely Go to Trial—Depositions Are Where It's At

My brother the district attorney teases me that I am not a trial lawyer but a "litigator". The statistics generally prove him right. Thus, another thing they don't teach you in law school is how to handle depositions. Here are some maxims for success.

22. Spend more time preparing witnesses for deposition than the deposition will last itself.
23. In preparing deposition witnesses, hold a pen and ask: "Do you know what this is?" When they say a pen, inform them of the lesson of only answering the question asked.
24. Make sure the witness in the deposition knows you don't win cases at that point, only lose them.
25. In defending witnesses, you are a potted plant except for privilege, harassment preven tion and enforcing court-orders limiting discovery.

Some Bonus Maxims in Case You Do Go to Trial

In these last 40 years, I have proved my brother slightly wrong as I have tried many, many jury and court trials (to say nothing of lengthy arbitrations). Here are some bonus maxims in case you get that far.

Extra Credit 1: Twelve jurors rarely miss anything: so, no sleight of hand and shine your shoes.

Extra Credit 2: The trial system almost always works: justice is done even if you must appeal immediately.

The most important part of practicing law is to replace the fear with fun. I often share the story of the great Irish poet Seamus Heaney's passing away some years ago in Ireland. He was in the hospital in what proved to be his deathbed. While awaiting an immediate surgery that was not to be and almost certainly knowing that he was going to die, Heaney texted his wife moments before passing. He posted the phrase "Noli Timere". In that most graceful way he reminded his wife, as he reminds all young and old lawyers, be not afraid.

DISMISSAL

Voluntary Dismissal Without Prejudice

Dunster Live, LLC v. Lonestar Logos Mgmt. Co., LLC

908 F.3d 948, 2018 U.S. App. LEXIS 32139 (5th Cir. Nov. 13, 2018)

The Fifth Circuit holds that a voluntary dismissal without prejudice under Rule 41(a) does not make a party a "prevailing party" for purposes of a statute authorizing attorney's fees to the prevailing party.

Background. Plaintiff and defendants used to be members of the same limited liability company. The company had a contract with the state to construct and install the blue signs on Texas highways that advertise food, lodging, and gas stations located at approaching exits. In the months leading up to the contract expiration in 2016, defendants formed a new company without plaintiff. The new company won the state contract for the signs.

Plaintiff sued in federal court, claiming defendants stole proprietary software and a database in violation of the Defend Trade Secrets Act [18 U.S.C. § 1836]. The complaint also alleged related state law claims. Plaintiff sought a preliminary injunction to stop defendants from taking over the contract and using the alleged trade secrets. The district court denied the request. Plaintiff then sought court permission to dismiss the case without prejudice under Fed. R. Civ. P. 41(a)(2). It explained that it no longer wished to pursue the federal trade secret claim, which was the only basis for subject matter jurisdiction. Defendants opposed the motion on the ground that plaintiff was engaging in "bad faith" by seeking to avoid an adverse-merits ruling and liability for substantial attorney's fees. The district court nonetheless allowed the dismissal without prejudice.

After dismissal, defendants sought over $600,000 in attorney's fees as the prevailing party under the Defend Trade Secrets Act. The district court denied the fee request, concluding that a dismissal without prejudice does not make the defendant a prevailing party because the plaintiff is "free to resurrect its claims against the defendant and may prevail at a later date." In fact, after the dismissal plaintiff filed essentially the same lawsuit in state court except for the federal claim. Defendants appealed the denial of their request for attorney's fees.

No Prevailing Party After Dismissal Without Prejudice. The Fifth Circuit explained that most federal fee statutes allow a court to award fees only to a prevailing party. A dismissal without prejudice means no one has prevailed; the litigation is just postponed with the possibility of the winner being decided at a later time in a new forum. In other words, a dismissal that allows for refiling does not result in a material alteration of the legal relationship of the parties. Thus, a dismissal without prejudice does not make any party a prevailing one.

Defendants asserted that this rule allows plaintiffs to evade paying fees by strategically seeking a dismissal without prejudice once a plaintiff realizes the suit is doomed. The Fifth Circuit countered that a dismissal without prejudice requires court approval unless it occurs very early in the lawsuit [*see* Fed. R. Civ. P. 41(a)(2)], and one of the reasons a court may deny a request for a voluntary dismissal is bad faith on the plaintiff's part. If a court finds bad faith, it can require a dismissal with prejudice. When a court requires that prejudice attach to the dismissal because the plaintiff has sought to escape an unfavorable determination on the merits, the defendant may well be a prevailing party.

The court also noted that Rule 11 provides a check on the behavior defendants were concerned about. Rule 11 sanctions can be imposed against a party litigating in bad faith even if there is no prevailing party. Defendants asserted that, based on the language of the Act, what is true of Rule 11 is also true of the Defend Trade Secrets Act attorney's fee provision: a plaintiff's making a bad-faith claim of trade secret misappropriation supports a fee award even if the defendant has not officially prevailed. The statute provides [18 U.S.C. § 1836(b)(3)(D)]:

> [I]f a claim of the misappropriation is made in bad faith, which may be established by circumstantial evidence, a motion to terminate an injunction is made or opposed in bad faith, or the trade secret was willfully and maliciously misappropriated, [a court may] award reasonable attorney's fees to the prevailing party.

The Fifth Circuit found that allowing bad faith alone to support a fee award would improperly read the concluding language—"the prevailing party"—out of the statute. Instead, the statute makes prevailing a necessary requirement for fees. To be eligible, the party seeking fees (1) must prevail, and (2) it must do so in one of the three listed scenarios that also require a showing of bad faith or malice. "Prevailing party" is a term of art that Congress has used in

numerous attorney's fees statutes. Courts have consistently interpreted the term in laws ranging from the Civil Rights Act and Americans with Disabilities Act to the Copyright Act and Petroleum Marketing Practices Act.

Yet defendants argued that if prevailing is a requirement for fees under the Defend Trade Secrets Act, then the court should interpret "prevailing party" to mean something different from what it means in all these other laws. This is because, they argued, the federal trade secrets law is modeled after the Uniform Trade Secrets Act, and many states that have adopted the language of that model act have taken a broader view of prevailing-party status in trade secret cases. One problem with this argument is that those decisions do not seem to turn on anything special about trade secret law, but rather rely on general state attorney's fees law that more liberally awards fees. The bigger problem for defendant's attempt to import state law was that "prevailing party" status in a federal statute is a question of federal law. And when Congress repeats a term of art like "prevailing party" in a new statute like the Defend Trade Secrets Act, it knows and adopts the previous judicial interpretations of that term. In addition to this fundamental textual reason for interpreting prevailing party to mean the same thing in the Defend Trade Secrets Act that it does in other fee statutes, setting uniform rules for the numerous federal fee statutes makes it more efficient for district courts to process the substantial numbers of fee motions they receive.

Defendants also argued that even if the dismissal did not make them a prevailing party, they achieved that status earlier in the case when they defeated the request for a preliminary injunction. However, prevailing-party status is ordinarily determined at the end of the case. The court acknowledged an exception that allows fees when a court grants a preliminary injunction because of a likelihood of success on the merits and that injunction causes the defendant to change its conduct thus mooting the case [*see* Dearmore v. City of Garland, 519 F.3d 517, 524 (5th Cir. 2008)]. That principle is consistent with the overarching "prevailing party" requirement of judicial action that changes the parties' relationship. In contrast, the denial of an injunction does not change the status quo; it preserves it.

Conclusion. Therefore, the Fifth Circuit ruled that the district court properly denied the request for attorney's fees because there is no prevailing party when a matter is voluntarily dismissed without prejudice.

PRETRIAL CONFERENCES

Modification of Pretrial Orders

Husky Ventures, Inc. v. B55 Invs., Ltd.

2018 U.S. App. LEXIS 35429 (10th Cir. Dec. 18, 2018)

The Tenth Circuit holds that, after a scheduling order deadline, a party seeking leave to amend must demonstrate both good cause for seeking modification under Rule 16(b)(4), and satisfaction of the more liberal Rule 15 (a) standard.

Background. Husky Ventures, Inc. ("Husky") sued B55 Investments Ltd. ("B55") and its president, Christopher McArthur, in state court for breach of contract and tortious interference under Oklahoma law. Husky sought a declaratory judgment on the contract-interpretation dispute between it and B55 and to quiet title to leases affected by that dispute. It also sought a permanent injunction prohibiting B55 and Mr. McArthur from contacting several of its business partners, and damages for the harms arising from the interference and breach of contract claims. B55 counterclaimed for breach of contract, declaratory judgment, and fraud.

The suit was removed to federal court under diversity jurisdiction. B55 initially filed counterclaims against Husky on February 4, 2015. During the early stages of the case, it twice received leave to amend. The first grant of leave to amend came in June 2015, and B55 timely filed an amended pleading. Several months later, B55 again sought leave to amend. The district court granted that request in part on February 17, 2016, advising that failure to submit proposed amended filings by February 24, 2016, would limit B55 to proceeding on the basis of the existing amended answer and counterclaims. At the same time, recognizing the lengthy pendency of the case, the district court granted Husky's request to set the case for a status and scheduling conference and announced that "as of today's date, the time has passed for permitting amendments under the liberal standards of [Federal Rule of Civil Procedure] 15."

B55 did not submit an amended filing before February 24 (the court's deadline), and on March 1, 2016, the district court issued a scheduling order. In the space for setting a deadline for motions to amend the pleadings, the district court entered "N/A [i.e., Not Applicable]." The order set the deadline for discovery as October 15, 2016, and the trial for November 2016. In October 2016, about eight months after the scheduling order issued, B55 inserted a number of never-before-seen allegations of fraud into the final pretrial report, to which Husky objected. The district court construed this attempt to add new allegations to the final pretrial report as the equivalent of requesting leave to amend B55's counterclaims, which the court then denied. Because the window to submit amendments un-

der Rule 15 had closed back in February, the district court determined that B55 had to show good cause under Rule 16(b)(4) before it could modify the scheduling order. Finding that B55 offered no arguments to justify its tardiness, the district court sustained Husky's objections and excluded the belated fraud allegations.

On October 27, 2016, 12 days after the discovery cutoff set by the scheduling order, B55 moved for time in which to amend the counterclaims—this time through a formal motion under Rule 16—and asked to postpone trial for four months. In addition to pressing the previously excluded fraud allegations, B55 sought to add ten new parties and to depose several individuals allegedly associated with Husky's fraud scheme. The court held a hearing on the matter and, citing B55's lack of diligence in conducting discovery and pursuing the proposed amendments, denied the motion in a ruling from the bench.

After a trial, a jury reached a verdict in Husky's favor, awarding $4 million in compensatory damages against both B55 and Mr. McArthur and $2 million in punitive damages against just Mr. McArthur; the jury also rejected the counterclaims presented to it. In further proceedings, the district court entered a permanent injunction and a declaratory judgment in Husky's favor. After the court entered final judgment, B55 and Mr. McArthur filed a notice of appeal from that judgment. They also moved for a new trial under Federal Rule of Civil Procedure 59(a) or, in the alternative, to certify a question of state law to the Oklahoma Supreme Court. The court denied the motion.

On appeal, B55 and Mr. McArthur contended that the district court erred in denying their motion for a new trial and again moved to certify a question of state law to the Oklahoma Supreme Court. In addition, they appealed the permanent injunction and declaratory judgment and argued that the district court erred in refusing to grant leave to amend the counterclaims. The Tenth Circuit dismissed B55 and Mr. McArthur's claims relating to the motion for a new trial for lack of appellate jurisdiction and denied their motion to certify the state law question as moot. The appellate court affirmed the district court's judgment on the remaining issues. The only issue discussed below is whether the trial court should have granted leave to file amended counterclaims against the plaintiffs.

District Court Applied Correct Legal Standard to Requests to Amend Pleadings. The Tenth Circuit first noted that the district court applied the correct legal standard to the challenged attempts at amendment. The court explained that, after a scheduling order deadline, a party seeking leave to amend must demonstrate (1) good cause for seeking modification under Fed. R. Civ. P. 16(b)(4), and (2) satisfaction of the Rule 15(a) standard. B55 and Mr. McArthur contended that the district court should have applied only the more lenient Rule 15 standard to B55's attempt to amend by way of the final pretrial report. The Tenth Circuit disagreed, finding that B55's additions to the pretrial report effectively constituted an attempt to amend the scheduling order. Thus, Rule 16, which specifically governs amendments to scheduling orders, applied.

The court explained that Rule 16(b)(4) is more stringent than Rule 15, permitting scheduling order amendments only for good cause and with the judge's consent. In practice, the Rule 16(b)(4) standard requires the movant to show the scheduling deadlines cannot be met despite the movant's diligent efforts. Because Rule 16 requires diligence, defendants cannot establish good cause if they knew of the underlying conduct but simply failed to raise the claims.

The Tenth Circuit found that the district court did not abuse its discretion in ruling that both attempts to amend the counterclaims failed to satisfy the Rule 16(b)(4) standard. The amendment-via-pretrial-report was "easily disposed of" because, as the district court observed, B55 made absolutely "no arguments to show good cause for late amendment of the pleadings." Because good cause obligates the moving party to provide an adequate explanation for any delay, the district court did not abuse its discretion by refusing to permit amendment at that juncture.

As to the formal motion to amend, defendants argued that the amendments should have been permitted based on newly obtained information that was unearthed through discovery. Defendants asserted that although they made every effort to pursue discovery "in a diligent fashion," their "discovery of the fraud was made more difficult due to Husky's obstreperous behavior during document discovery and depositions." Thus, it was not until after "depositions of key witnesses" in mid-October 2016 that they could confirm "what it had only previously suspected—primarily that Husky had been engaged in fraud."

Both courts rejected this argument. The record indicated that B55, through Mr. McArthur, knew of the allegedly "new" information months before the motion to amend. As the district court observed, Mr. McArthur's threats of lawsuits against various people, including those later proposed as counterclaim defendants, made clear that B55 was aware of litigation possibilities against these people months before the requests for amending the pleadings. For example, Mr. McArthur opined in an email dated April 15, 2016, that Mr. Gregg McDonald, who was listed as a potential new defendant in the formal motion to amend, might be subject to suit. Yet, the formal motion was not filed until October 2016, more than six months later. Similar emails from May 2016 also evinced B55's knowledge of potential claims against at least three other persons also identified as proposed new parties in the motion.

The court also noted that even if B55 had not known the full extent of these litigation possibilities earlier, it should have diligently investigated the facts necessary to bring them. A movant is required to show that the scheduling deadlines could not be met despite the movant's diligent efforts. The parties were advised in March 2015 that they could begin discovery immediately. In the scheduling order issued almost one year later in March 2016, the district court clearly informed the parties that the discovery cutoff was October 15, 2016. Despite the ample time granted by these deadlines, no motion to compel was filed as to any discovery issue until October 15th, the day discovery was set to close. The motion to amend, submitted October 27, 2016, on the eve of trial, was even more tardy. Under these circumstances, the district court found, in effect, that B55's showing of good cause was inadequate because it had failed to exercise reasonable diligence in acquiring the supposedly newly discovered information that formed the basis of its motion to amend. The Tenth Circuit agreed.

Conclusion. For these reasons, the Tenth Circuit held that the district court acted within its discretion to deny B55's motion to amend, because it had ample time to comply with the deadline established in the scheduling order.

STANDING

Amended Pleading

Scahill v. District of Columbia

909 F.3d 1177, 2018 U.S. App. LEXIS 34544 (D.C. Cir. Dec. 7, 2018)

The D.C. Circuit holds that a plaintiff may cure an Article III standing defect through an amended pleading alleging facts that arose after the initial complaint was filed.

Facts and Procedural Background. The D.C. Alcoholic Beverage Control Board conditioned a restaurant's liquor license on the restaurant's compliance with certain restrictions pertaining to a former part-owner. Specifically, the restaurant was required to bar the former owner from the premises for five years and to notify the Metropolitan Police Department if he entered or accessed the premises. The restaurant was also prohibited from transferring or trying to transfer ownership of the business to the former owner, providing him access or control over the business's financial accounts, or employing him at the restaurant.

The restaurant and the former owner attempted to have the license conditions set aside on statutory grounds. The D.C. Court of Appeals dismissed the restaurant's petition for review for lack of standing, holding that the restaurant was not aggrieved. That court also rejected the former owner's claims on the merits, holding the Board acted within its discretion.

The restaurant and the former owner sued the District of Columbia in federal district court, arguing that the conditions violated their First and Fifth Amendment rights. The district court ruled that issue preclusion prevented the restaurant from relitigating its standing in view of the D.C. Court of Appeals' determination that it was not aggrieved by the license order. The district court also ruled that the plaintiffs failed to allege sufficient facts to support the remainder of their claims.

The restaurant moved for reconsideration and for leave to file an amended complaint. The amended complaint alleged that in retaliation for the restaurant's exercise of its First Amendment rights, the Board fined the restaurant $4,000 for alleged violation of the conditions. The district court agreed that the fine was an injury-in-fact but ruled that it did not trigger the curable-defect exception to issue preclusion because it was imposed nine months after the original complaint was filed, which was too late to confer standing [Scahill v. District of Columbia, 286 F. Supp. 3d 12, 18 (D.D.C. 2017)]. The court also denied the motion for leave to file as futile because the retaliation claim would still be inadequate. The D.C. Circuit held that the district court erred in rejecting the amended complaint, which would have cured the standing defect, but affirmed dismissal of the claims on the merits.

Issue Preclusion and the Curable-Defect Exception. Issue preclusion occurs when (1) the same issue was contested by the parties and submitted for judicial determination in a prior case, (2) the issue was actually and necessarily determined by a court of competent jurisdiction in that prior case, and (3) preclusion will not result in basic unfairness to the party bound by the first determination. The D.C. Circuit agreed with the district court that all of these conditions were satisfied with respect to the restaurant's standing to challenge the Board's license order. However, the curable-defect exception to issue preclusion allows relitigation of jurisdictional dismissals when a material occurrence subsequent to the original dismissal remedies the original deficiency.

Standing Defect May Be Cured by Amended Complaint Alleging Subsequent Events. It is generally said that standing is determined as of the time suit is filed. However, the Supreme Court has not weighed in directly on whether a lack of Article III standing at the outset of litigation can be cured by subsequent events alleged in an amended complaint. The closest the Court came may have been in *Mathews v. Diaz*, in which a Medicare applicant

did not file a jurisdictionally required Part B application until after he was joined as a plaintiff in an amended complaint. The Court stated that because the record showed the jurisdictional condition was satisfied, it was not too late to supplement the complaint to allege the application was filed, and the Court would treat the pleadings as so supplemented [Mathews v. Diaz, 426 U.S. 67, 75, 96 S. Ct. 1883, 48 L. Ed. 2d 478 (1976)].

Similarly, in *Rockwell Int'l Corp. v. United States*, the Court made clear that the original complaint is not necessarily dispositive of jurisdiction. The Court stated that "when a plaintiff files a complaint in federal court and then voluntarily amends the complaint, courts look to the amended complaint to determine jurisdiction." In determining jurisdiction in that case, the Court looked to the final pretrial order, which "superseded all prior pleadings" and controlled the subsequent course of action. The Court observed that it did not matter that the pleadings were not formally amended [Rockwell Int'l Corp. v. United States, 549 U.S. 457, 473–474, 127 S. Ct. 1397, 167 L. Ed. 2d 190 (2007)].

Circuits are divided on the issue of whether events subsequent to the filing of the original complaint can cure a standing defect that existed at the time the original complaint was filed. Relying on Federal Rule of Civil Procedure 15(d), some circuits hold that a plaintiff may cure a standing defect through a supplemental pleading alleging facts that arose after the original complaint was filed [*see* United States ex rel. Gadbois v. PharMerica Corp., 809 F.3d 1, 6 (1st Cir. 2015); Northstar Fin. Advisors, Inc. v. Schwab Invs., 779 F.3d 1036, 1044 (9th Cir. 2015); Daniels v. Arcade, L.P., 477 Fed. Appx. 125, 131 (4th Cir. 2012); Prasco, LLC v. Medicis Pharm. Corp., 537 F.3d 1329, 1337 (Fed. Cir. 2008); Travelers Ins. Co. v. 633 Third Assoc., 973 F.2d 82, 87–88 (2d Cir. 1992)]. Under Rule 15(d), on "reasonable notice" and "just terms," courts may permit parties to serve supplemental pleadings "setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented" [Fed. R. Civ. P. 15(d)]. According to the Advisory Committee, this rule was amended to place broad discretion in the district courts to avoid needlessly remitting plaintiffs to the difficulties of commencing a new action even though events occurring after the original action was commenced made the right to relief clear [Fed. R. Civ. P. 15, Advisory Committee Note of 1963]. Nevertheless, some other circuits have affirmed dismissals for lack of jurisdiction even though subsequent events cured the standing deficiency, requiring plaintiffs to file new lawsuits to pursue the claims [*see* Pollack v. United States DOJ, 577 F.3d 736, 743 (7th Cir. 2009); Tracie Park v. Forest Serv. of the United States, 205 F.3d 1034, 1037–1038 (8th Cir. 2000)].

The D.C. Circuit concluded that a plaintiff may cure an Article III standing defect through an amended pleading alleging facts that arose after the original complaint was filed. The alternative, the court noted, would force a plaintiff to go through the unnecessary hassle and expense of filing a new lawsuit when events subsequent to the original filing have fixed the jurisdictional problem. Thus, the restaurant properly invoked the curable-defect exception to issue preclusion based on the $4,000 fine, constituting an injury-in-fact, imposed nine months after the original complaint was filed. The district court should have allowed the restaurant to file the amended complaint including allegations about the fine that would have cured the standing defect.