

# LITIGATION INSIGHTS

Moore's Federal Practice & Procedure  
Wagstaffe's Civil Procedure Before Trial

## April 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.

#### ABSTENTION

##### **Younger Abstention**

*Aaron v. O'Connor*

914 F.3d 1010, 2019 U.S. App. LEXIS 3069 (6th Cir. Jan. 30, 2019)

The Sixth Circuit has held that a district court properly abstained in a case seeking to disqualify a state judge and the chief justice of a state supreme court from acting in connection with state malpractice litigation.

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#### SPECIFIC PERSONAL JURISDICTION

##### **Purposeful Availment**

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Adam Dietz, Solutions Consultant






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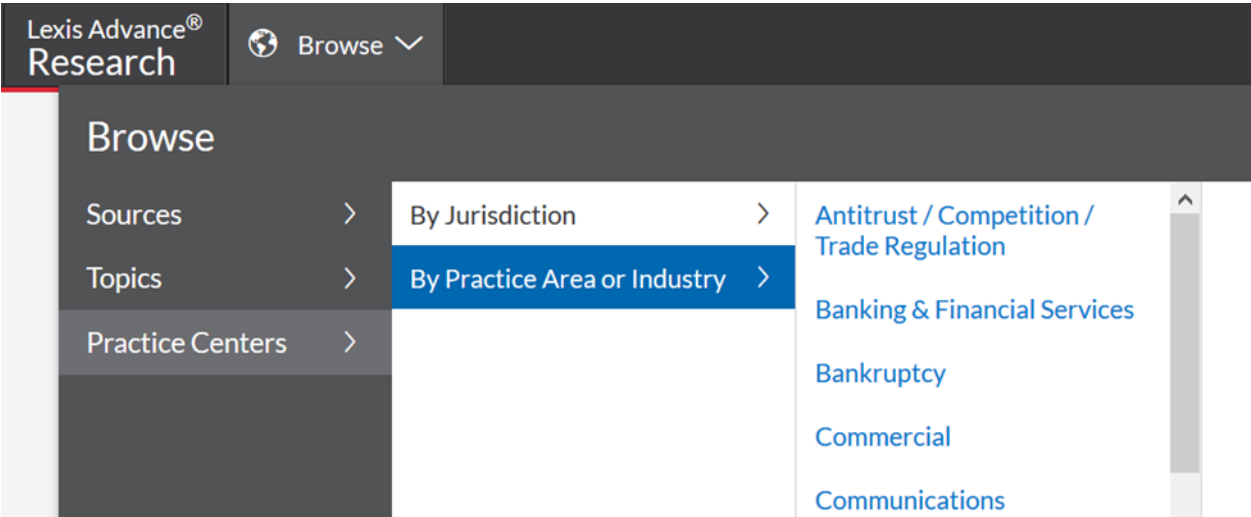
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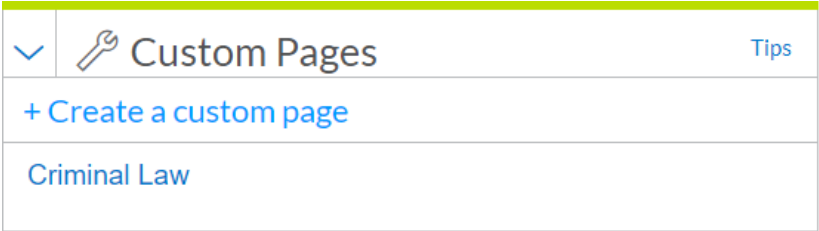


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Adam Dietz, Solutions Consultant

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## NEW FROM JIM WAGSTAFFE

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Jim Wagstaffe is working on a few new projects, we will have a new article next month!

## MOORE'S FEDERAL PRACTICE—TOP THREE HIGHLIGHTS—Continued

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### ABSTENTION

#### *Younger Abstention*

*Aaron v. O'Connor*

914 F.3d 1010, 2019 U.S. App. LEXIS 3069 (6th Cir. Jan. 30, 2019)

**The Sixth Circuit has held that a district court properly abstained in a case seeking to disqualify a state judge and the chief justice of a state supreme court from acting in connection with state malpractice litigation.**

**Facts and Procedural Background.** Over 500 plaintiffs sued a doctor and several hospitals for medical malpractice in Ohio state courts. The claims were litigated in numerous cases for over five years before several judges. Eventually the Chief Justice of the Ohio Supreme Court (“the Chief Justice”) appointed a Hamilton County Court of Common Pleas Judge (“the Judge”) to oversee the cases.

Plaintiffs’ counsel filed a combined affidavit of disqualification with the Ohio Supreme Court Clerk, alleging that the Chief Justice and the Judge were biased and prejudiced against the plaintiffs and their claims. Plaintiffs sought to disqualify the Judge and asked that a justice other than the Chief Justice rule on the affidavit of disqualification. Three days later, the plaintiffs sued the Chief Justice and the Judge in federal district court, alleging due process violations under 42 U.S.C. § 1983. They sought an injunction preventing the Chief Justice from ruling on the disqualification affidavit and preventing the Judge from taking any action on their cases before there was a ruling on the affidavit. Eight days later, the district court abstained under *Younger*, dismissing the case with prejudice. The Sixth Circuit affirmed the decision to abstain but remanded the case with instructions to dismiss without prejudice.

**Claims Are Not Moot.** The Judge argued that the disqualification claims were moot because the Chief Justice had already ruled on and dismissed 17 disqualification affidavits, and the Judge was currently presiding over the underlying medical malpractice actions. The Sixth Circuit disagreed, holding that the claims fell within the “capable of repetition, yet evading review” exception to mootness. That exception applies when (1) the challenged action was so short in duration that it could not be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation the same complaining party would be subjected to the same action again. The court noted that the Chief Justice denied the disqualification affidavits almost immediately after the district court entered judgment, before the case could reach the court of appeals. In addition, there was a reasonable expectation the plaintiffs would file another disqualification affidavit for the Judge and request the recusal of the Chief Justice, and the Chief Justice would again rule on the affidavit. In fact, the plaintiffs had already filed such affidavits, and the Chief Justice had denied them. The Sixth Circuit concluded the plaintiffs had carried their burden to demonstrate that both requirements of the exception were satisfied.

***Younger Abstention Was Appropriate.*** *Younger* abstention is appropriate in only three “exceptional circumstances”: (1) state criminal prosecutions, (2) certain civil enforcement proceedings, and (3) civil proceedings involving certain orders that are uniquely in furtherance of the state courts’ ability to perform their judicial functions [*Sprint Communs., Inc. v. Jacobs*, 571 U.S. 69, 78, 134 S. Ct. 584, 187 L. Ed. 2d 505 (2013)]. The Sixth Circuit concluded that the ability of Ohio courts to determine when recusal of a judge or justice is appropriate and to administer the recusal decision process in accordance with state law falls within the third category. It did not matter that at the time of abstention there was not yet an Ohio court order or judgment that would be implicated by the district court’s exercise of jurisdiction.

If a court determines that a case falls within one of the *Younger* abstention categories, it then considers the three *Middlesex* factors: whether there were (1) currently pending state proceedings (2) that involved an important state interest, and (3) that would provide the federal plaintiff an adequate opportunity to raise constitutional claims [*Middlesex Cty. Ethics Comm. v. Garden State Bar Ass’n*, 457 U.S. 423, 432, 102 S. Ct. 2515, 73 L. Ed. 2d 116 (1982)]. The parties agreed the first two factors were satisfied, but the plaintiffs argued that they did not have an adequate opportunity to raise constitutional claims in the state-court proceeding. The Sixth Circuit disagreed, pointing out that (1) plaintiffs made the same constitutional arguments regarding their due process rights to an unbiased adjudication in the disqualification affidavit and motion to disqualify the Chief Justice as they made in the federal case, and (2) they could appeal any potential adverse final decision of the state trial court, alleging that the Judge’s and the Chief Justice’s bias tainted the proceedings.

Even when all the prerequisites for *Younger* abstention are present, a court should not abstain if there is an extraordinarily pressing need for immediate federal equitable relief. However, the plaintiffs did not argue that this exception applied until they filed their reply brief in the Sixth Circuit. The Sixth Circuit concluded that the plaintiffs waived this argument by not raising it in the district court.

**Dismissal Should Have Been Without Prejudice.** Finally, the Sixth Circuit held that the district court erred in dismissing the plaintiffs’ claims with prejudice. A dismissal based on *Younger* must always be without prejudice because it is not an adjudication on the merits and does not bar the plaintiffs from bringing the same claims again.

## DISMISSAL

### Voluntary Dismissal Without Court Order

*Welsh v. Correct Care, L.L.C.*

915 F.3d 341, 2019 U.S. App. LEXIS 3872 (5th Cir. Feb. 7, 2019)

**The Fifth Circuit holds that the filing of an amended complaint does not revive the plaintiff's absolute right to dismissal under Rule 41(a)(1)(A)(i).**

**Background.** Plaintiff filed a state court action against Correct Care, L.L.C., Marsha McLane, Michael Searcy, and others, in which he alleged constitutional violations and other wrongs inflicted on him while he was in the custody of the Texas Civil Commitment Office. After removing the case to federal court, defendants McLane and Searcy filed a partial motion to dismiss. McLane also filed an answer. Plaintiff then filed an amended complaint, which no defendant answered.

Months later, plaintiff moved to dismiss his action without prejudice. The court entered a *nunc pro tunc* order dismissing the case "with prejudice" on the ground that at least one defendant had answered. Plaintiff appealed, arguing that he was entitled to voluntary dismissal without prejudice and without a court order.

**Amended Complaint Does Not Revive Plaintiff's Right to Dismiss Without Court Order.** <D>A plaintiff may unilaterally dismiss an action without prejudice by filing a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment [Fed. R. Civ. P. 41(a)(1)(A)(i)]. If the defendant has filed an answer or a motion for summary judgment, however, Rule 41(a)(2) permits dismissal at the plaintiff's request "only by court order, on terms that the court considers proper" [Fed. R. Civ. P. 41(a)(2)]. Unless otherwise stated in the order, a dismissal under either subdivision of the rule is without prejudice.

The Fifth Circuit explained that Rule 41(a)(1)(A)(i) granted plaintiff an absolute right to dismiss his lawsuit before the defendant filed an answer or a summary judgment motion. Defendant McLane filed an answer to plaintiff's earlier complaint, but he did not answer the later-filed amended complaint. Therefore, the court considered whether filing an answer to the earlier complaint, but not to the amended complaint, was sufficient to preclude the plaintiff from voluntarily dismissing his claim as a matter of right under Rule 41(a)(1)(A)(i).

Although the Fifth Circuit had not yet addressed this issue, courts in other circuits have determined that a plaintiff is barred from unilaterally dismissing a complaint under Rule 41(a)(1)(A)(i) when a defendant filed an answer to the plaintiff's original complaint but not to the amended complaint [see, e.g., *Armstrong v. Frostie Co.*, 453 F.2d 914, 916 (4th Cir. 1971)]. The reasoning is that Rule 41(a)(1)(A)(i) is designed to permit a unilateral dismissal by the plaintiff only in the early stages of a suit, before the defendant has expended time and effort in the preparation of the case, and the filing of an amended complaint increases rather than nullifies the defendant's burden.

The Fifth Circuit agreed with this reasoning and held that the filing of an amended complaint does not revive the plaintiff's absolute right to dismissal under Rule 41(a)(1)(A)(i). In this case, because McLane filed an answer to plaintiff's earlier complaint, plaintiff could not use Rule 41(a)(1)(A)(i)'s voluntary dismissal without a court order as to that defendant. However, the Rules permit voluntary dismissal by notice and without a court order of any defendant who has not served an answer, which in this case was all defendants except McLane. Therefore, plaintiff was entitled to dismissal by notice under Rule 41(a)(1)(A)(i) without prejudice and without a court order against all defendants other than McLane.

**District Court Erred in Dismissing With Prejudice.** The court then explained that, because McLane filed an answer, the district court's dismissal of the complaint fell under Rule 41(a)(2), which allows the court to impose conditions on the dismissal. The district court dismissed the complaint with prejudice. A plaintiff typically has the option to refuse a Rule 41(a)(2) voluntary dismissal and to proceed with its case if the conditions imposed by the court are too onerous. Thus, before requiring a Rule 41(a)(2) dismissal to be with prejudice, a court must allow a plaintiff the opportunity to retract the motion to dismiss rather than accept the dismissal with prejudice. When the plaintiff was not given the chance to withdraw the motion and reject the condition of dismissal with prejudice, an appellate court generally will remand. Therefore, the Fifth Circuit found that the district court abused its discretion when it dismissed the complaint with prejudice without giving plaintiff the chance to reject or accept the dismissal.

**Conclusion.** For these reasons, the Fifth Circuit ruled that, as to all non-answering defendants, plaintiff was entitled to unconditional dismissal by notice, without prejudice and without court order. As to defendant McLane, plaintiff was entitled to dismissal under Rule 41(a) "on terms that the court considers proper," but with the opportunity to retract the motion to dismiss should he find the court's conditions too onerous.



## SPECIFIC PERSONAL JURISDICTION

### Purposeful Availment

*Knox v. MetalForming, Inc.*

914 F.3d 685, 2019 U.S. App. LEXIS 3078 (1st Cir. Jan. 30, 2019)

**The First Circuit has concluded the purposeful availment prong of the jurisdictional analysis was satisfied based on a foreign company's regular course of sales in the forum through a separate distributor, when the company initiated an ongoing relationship with its in-forum purchasers.**

**Background.** The plaintiff's hand was badly injured while he was operating a metal-bending machine in the course of his employment at a location in Massachusetts. The machine was manufactured by a German company that maintained no operations in the United States but sold its machines through a separate and independently owned U.S. distribution company. The purchaser (here the employer) placed an order with the distribution company, which then acquired the machine from the German company, manufactured to the purchaser's specifications. The German company delivered the machine to the distributor, and the distributor then installed the machine at the employer's site and trained the employer's personnel in the proper use of the machine. The German company provided a one-year warranty, as well as documentation and manuals, including instructions for sending inquiries to and ordering additional machine parts from the German company directly.

The plaintiff sued both the German company and the distributor in Massachusetts state court, alleging negligence, breach of warranty, and other claims. The distributor removed the case to federal court, where the German company moved to dismiss the claims against it for lack of personal jurisdiction. The district court granted the motion to dismiss.

**Personal Jurisdiction Analysis.** For the exercise of personal jurisdiction to be constitutional, a defendant must have certain minimum contacts with the forum state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice [*Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945)]. This constitutional inquiry is highly fact-specific; the test is not susceptible of mechanical application. The jurisdictional analysis has three components: relatedness, purposeful availment, and reasonableness. That is, the plaintiffs must show that (1) their claims directly arise out of or relate to the defendant's forum activities; (2) the defendant's forum contacts represent a purposeful availment of the privilege of conducting activities in that forum, thus invoking the benefits and protections of the forum's laws and rendering the defendant's involuntary presence in the forum's courts foreseeable; and (3) the exercise of jurisdiction is reasonable.

The German company's counsel conceded that the first and third requirements were met, and the court of appeals agreed. To show relatedness, a plaintiff must demonstrate that the cause of action either arises directly out of, or is related to, the defendant's forum-based contacts. This "flexible, relaxed standard" requires only that the claim have a demonstrable nexus to the defendant's forum contacts. This requirement was easily met here.

Reasonableness is analyzed under five "gestalt" factors: (1) the defendant's burden of appearing in the forum, (2) the forum state's interest in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the judicial system's interest in obtaining the most effective resolution of the controversy, and (5) the common interests of all sovereigns in promoting substantive social policies. The court of appeals acknowledged that Massachusetts litigation would impose some burden on the German company and its employees, but this burden (which could be mitigated) was not enough to make the exercise of jurisdiction unreasonable. When minimum contacts are established, often the interests of the plaintiff and the forum will justify even serious burdens on an alien defendant.

**Purposeful Availment.** Because the other requirements were easily met, this case turned on the purposeful availment prong of the jurisdictional analysis. To meet this requirement, a plaintiff must demonstrate that the defendant has purposefully availed itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. The purposeful availment requirement ensures that the exercise of jurisdiction is essentially voluntary and foreseeable and is not premised on a defendant's random, fortuitous, or attenuated contacts.

The district court had found that the German company had not designated Massachusetts for special attention and had not targeted buyers within Massachusetts. Using those two tests, the district court held that the company had not purposefully availed itself of the privilege of conducting business in Massachusetts. However, the court of appeals noted that these are not the exclusive tests to establish purposeful availment. Depending on the facts, a defendant's regular flow or regular course of sales in the forum could make the exercise of jurisdiction foreseeable to the defendant, or jurisdiction could be foreseeable based on "something more" than this, evidencing an intent to serve the forum [*see Plixer Int'l, Inc. v. Scrutinizer GmbH*, 905 F.3d 1, 10 (1st Cir. 2018)]. "Something more" might include, for example, designing the product for the market in the forum state, advertising in the forum state, establishing channels for providing regular advice to customers in the forum state, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum state [*see Asahi Metal Indus. Co., Ltd. v. Superior Court of Cal.*, 480 U.S. 102, 111–112, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987) (opinion of O'Connor, J.)].

Voluntary acts by the German company led to a regular flow or regular course of sales in Massachusetts. Over 16 years, it had sold 45 machines in Massachusetts, and provided 234 parts to purchasers in Massachusetts, amounting to \$1.5 million of Massachusetts sales. The German company argued that the court should discount its Massachusetts sales because those sales were part of a nationwide sales effort. However, the question is not whether a defendant sells its product across the United States, but whether a defendant's forum connection is such that the exercise of jurisdiction is essentially voluntary and foreseeable.

The court of appeals did not address whether the mere volume of sales in Massachusetts, standing alone, would suffice to support jurisdiction, as it found additional supporting facts. The German company individually approved and manufactured according to purchaser-provided specifications each of the nearly 50 machines it sent to Massachusetts purchasers. Its relationship with purchasers in Massachusetts did not end when it delivered its machines to the distributor; it required the distributor to include, with each machine, materials that instructed that purchaser to contact the German company directly, both to purchase replacement parts and to obtain assistance with any problems. Because hundreds of parts were delivered to Massachusetts, the inference was plausible that Massachusetts purchasers did use the established channels both as to spare parts and as to troubleshooting. These channels established a direct link to Massachusetts purchasers and constituted efforts to continue and perhaps expand the company's relationship with Massachusetts purchasers, thereby bolstering the conclusion that the exercise of jurisdiction here was foreseeable.

This case, the court of appeals said, involved a manufacturer that could direct where its products go, that sold dozens of expensive products into the forum over nearly two decades, and that initiated an ongoing relationship with its in-forum purchasers. The German company noted that the distributor took title to the machines in Germany. First Circuit law, the court of appeals said, has long found this argument irrelevant to the jurisdictional analysis. The fact that title passes in a foreign country is beside the point, because an interstate or international business may not shield itself from suit by a careful but formalistic structuring of its business dealings.

The court of appeals concluded that the exercise of personal jurisdiction over the German company comported with due process, and reversed and remanded for further proceedings.

