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LITIGATION INSIGHTS

Moore's Federal Practice & Procedure

Wagstaffe's Civil Procedure Before Trial

May 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.

FEDERAL TORT CLAIMS ACT

Mailbox Rule

Cooke v. United States

918 F.3d 77, 2019 U.S. App. LEXIS 6822 (2d Cir. Mar. 7, 2019)

The Second Circuit holds that the mailbox rule does not apply to claims under the Federal Tort Claims Act.

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INTERVENTION

Intervention of Right

Adam Joseph Res. (M) Sdn. Bhd. v. CNA Metals Ltd

2019 U.S. App. LEXIS 9007 (5th Cir. Mar. 26, 2019)

The Fifth Circuit has held that a law firm had a right to intervene to protect its contingent-fee interest after its client made a collusive settlement with the opposing party designed to cut off the law firm's fee entitlement.

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PROCEEDING IN FORMA PAUPERIS

Appeals

Samarripa v. Ormond

917 F.3d 515, 2019 U.S. App. LEXIS 6511 (6th Cir. Mar. 4, 2019)

The Sixth Circuit holds that a district court may grant a motion to proceed on appeal in forma pauperis by requiring the movant to prepay a portion of the appellate filing fee.

Jump to full summary

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Chet Lexvold, Regional Solutions Consultant

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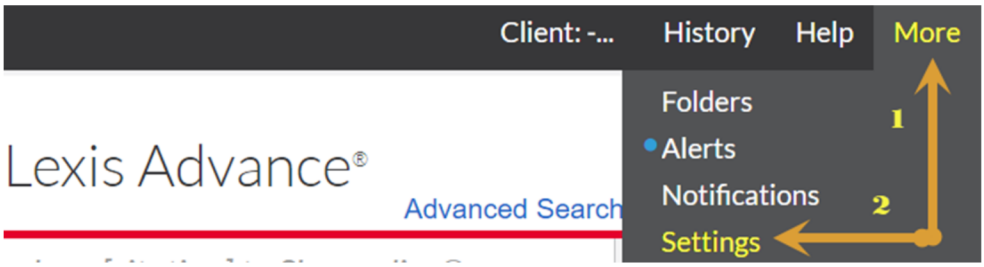
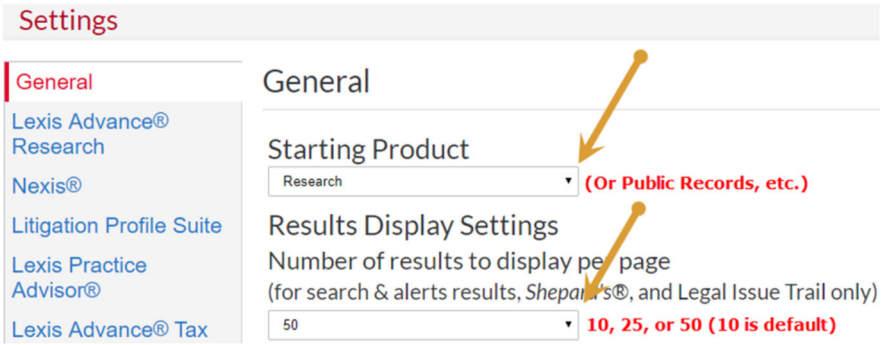
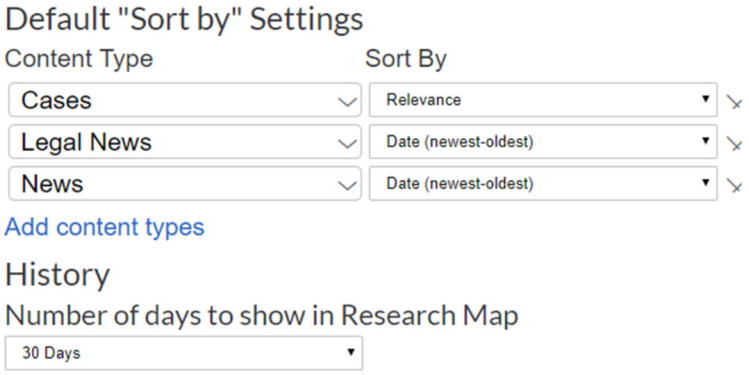




I would **highly recommend increasing the "Results Display" from the default of 10 per page to 25 or 50** results per page (I set mine to 50). This is helpful in many contexts, but I find it most helpful when *Shepardizing* statutes/codes/ regulations by subsection, as it allows me to more quickly find the *Shepard's report for 18 USCS 922 (g)(1)*, for example.

Further down the page you'll find two more I recommend looking at: the "Default 'Sort by'" and "History – Number of days to show in Research Map" settings. "Cases" should be listed, with a default "Sort By" of "Relevance." I prefer this setting, but some researchers confident in their Terms-and-Connectors skills may prefer to switch this setting to "Court (highest) by date (newest)." Users can add additional content types to change default Sort Bys. For example, I have both Legal News and News defaulted to Sort By "Date (newest-oldest)."



Also, I highly recommend increasing the "History: Number of days to show in Research Map" from the default of 7 Days to 30 Days, as Research Map is a very useful tool to jump back to a particular step of your research, saving you valuable time!

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FEDERAL CONTRACT MANAGEMENT

Irene Reeves, Solutions Consultant

For those in the area of procurement, Federal Contract Management is a well-regarded treatise published by Matthew Bender & Company covering a broad perspective of the federal government contracting process, from basic concepts to sophisticated strategies. As with other treatises you can find a bottomless reservoir of insights, practical advice and tips covering successful bidding for contracting work with governmental agencies, and guidance relevant to managing contract performance. This publication offers practical and in-depth discussions of:

- Skills and functions of the contract administrator
- Role of the contracting officer
- Control of contract performance
- Negotiation tactics and strategies
- Bidding process and protest procedures
- Social policy requirements
- Dispute resolution
- Ethical considerations

To locate this treatise, use the red search box to retrieve it or find this treatise in the *Offices of General Counsel* or *Government Contracts* Practice Centers. Federal Contract Management on Lexis Advance .

As with other treatises, there is the ability to structure a search or browse. Utilize the table of contents to open one of the 20 chapters in your area of interest or check the box beside the chapter to run a search within only the one selected chapter. Alternatively, click on the ⊞ to open directly to the section.

Within the chapters, including sample documents and forms, this treatise provides updated coverage with ever-changing needs in this area of law. For example, there are discussions of the new regulations regarding the Section 8(a) small business development or discussions regarding Buy America requirements in the context of the American Recovery and Investment Act. Updates for this treatise are annual.

For more information about Federal Procurement Management or to schedule training, please contact your Solutions Consultant.

FAVORITES

Samantha Chassin, Regional Solutions Consultant

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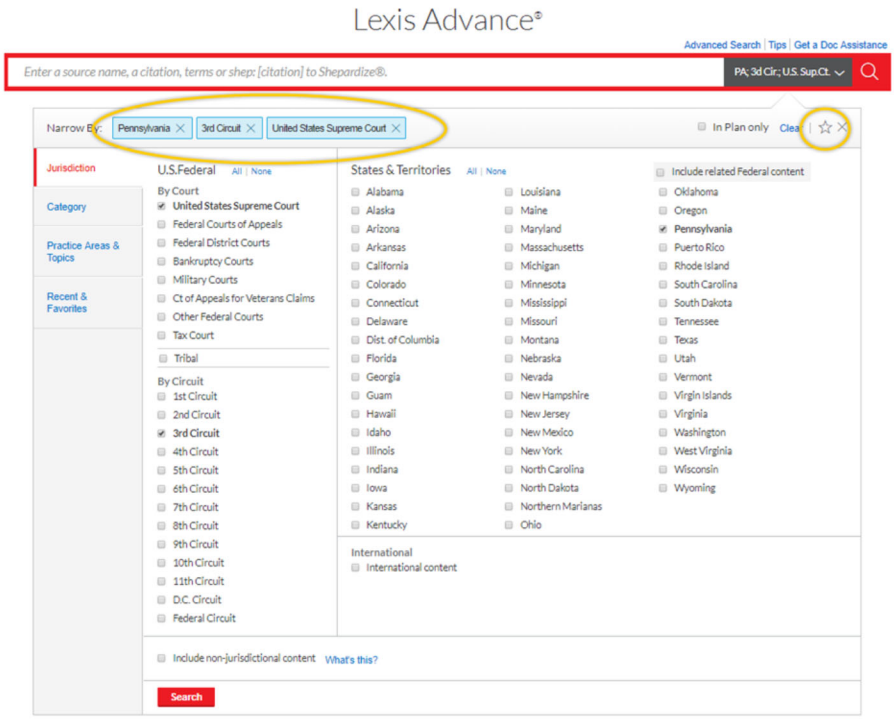
Creating Jurisdiction Favorites:

Open your search filter by clicking "Everything" in the red search box on the homepage. Use the check boxes to select the jurisdictions (federal and/or state) that you want to search. You will see your selections line up at the top of the box. When you are ready to capture your selections as a Favorite, click on the ☆.



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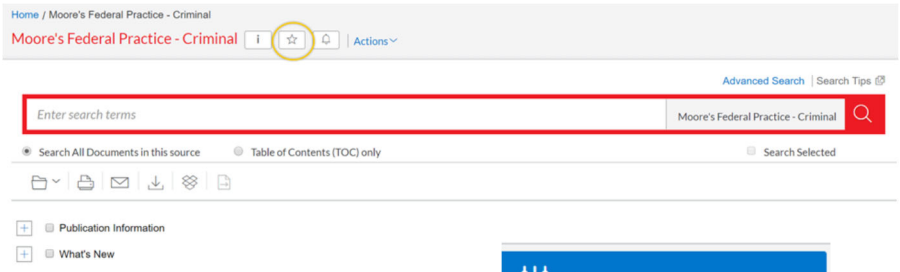
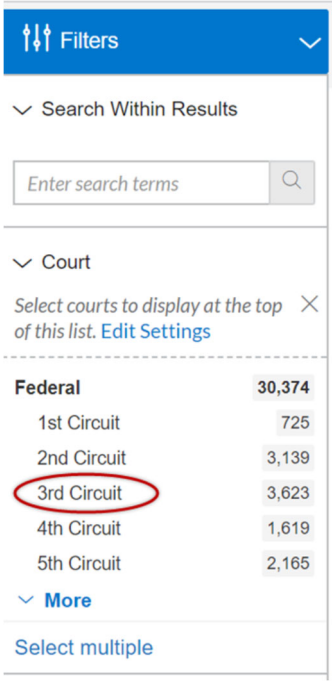
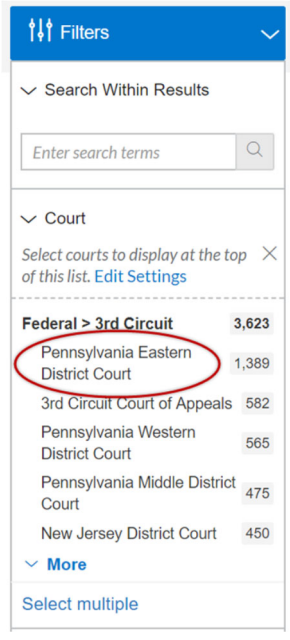
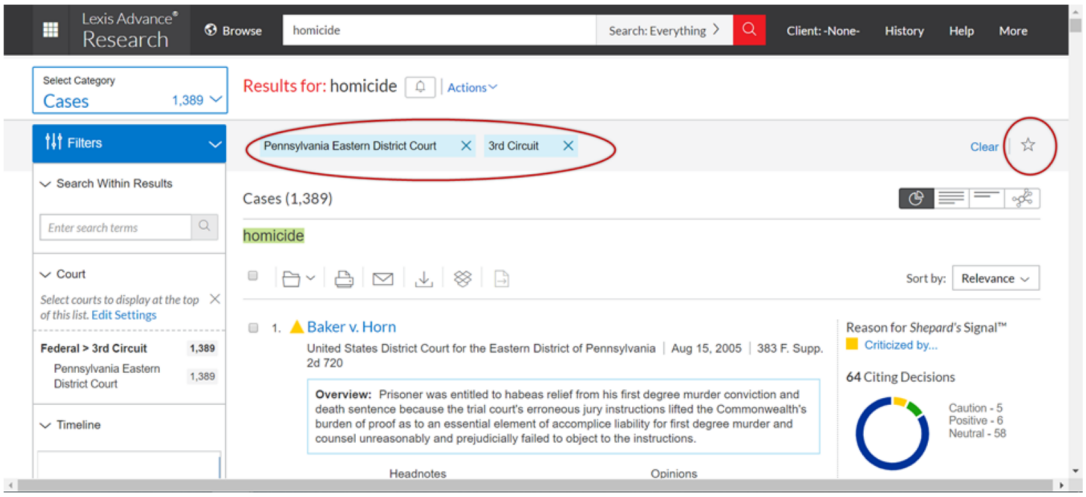


Setting up a Favorite for a District Court:

Run a broad search in the red search box. First, narrow down your search results by the corresponding Circuit Court. Once you click on the Circuit Court, you will see a list of the District Courts within that circuit. Select the District Court that you want to save as a Favorite. Next, click on the Favorites star at the top of the page.







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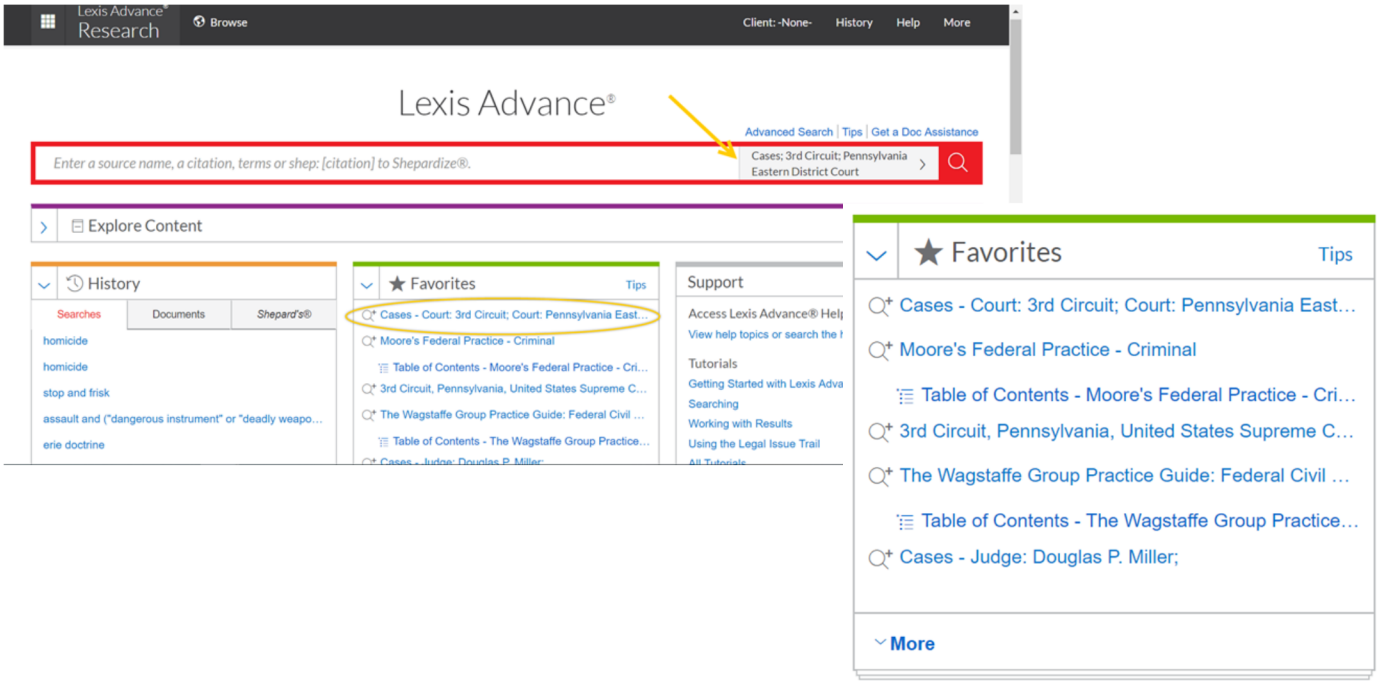

NEW FROM JIM WAGSTAFFE

SUPREME COURT'S STEALTH REVOLUTION IN CIVIL PROCEDURE

By: Jim Wagstaffe

The U.S. Supreme Court steadily and without fanfare has been revolutionizing multiple areas of civil procedure to provide litigants with a battleplan to win their cases. The stealth procedural weapons include personal jurisdiction, venue forum selection clauses, gatekeeping rules for pleadings, arbitration protections for businesses and placement of limits on class actions.

Assessing the fairness of this revolution depends on where you sit. For plaintiffs and consumers the viewpoint is that the high court is limiting access to justice and arming opponents and businesses with powerful procedural tools. For defendants, particularly corporations, the Roberts Court is seen as responding to a wave of litigiousness and erecting procedural hedgerows against oppressive case costs and exposures.

One thing is for sure: you better know these new procedural battleplans and cases if you want to win what have often become the wars of civil litigation. And, may I say, you can get a GPS for such planning by reading The Wagstaffe Group Practice Guide and our weekly Current Awareness feature that highlights the newest in case decisions.

I. Personal Jurisdiction: Has International Shoe Been Untied?

Almost seventy-five years ago in the *International Shoe* case[1], the Supreme Court took a benign view of personal jurisdiction, ruling that out-of-state-defendants could force defendants to answer lawsuits if they had minimum contacts even with a distant forum. Such contacts could consist of the transmission of mail, launching advertising or causing an effect there from afar.

In the *Nicastro* case[2], the high court in an opinion little noted outside legal circles, began to alter the jurisdictional landscape when it held that a foreign manufacturer of an expensive metal shearing machine that caused serious injury to Mr. Nicastro in New Jersey was not subject to personal jurisdiction there. The Court reasoned, albeit in a plurality opinion, that while the British manufacturer used an American distributor (in Ohio) to sell one or more of these finger-cutting machines to Nicastro's employer in New Jersey, it did not expressly target that state and would not be called to answer for the injuries suffered there.

The stealth ruling was not lost on large companies who locate elsewhere (even overseas) and layer their distribution to avoid exposure to personal jurisdiction in faraway states. Having not issued a significant personal jurisdiction decision for decades, the Supreme Court recently has issued six significant personal jurisdiction opinions, each of which has held the defendant is not subject to litigation in the forum chosen by the plaintiff.

In *Daimler*[3], for example, the Court held that even if the corporation does a billion dollars of business in the forum (there with voluminous car sales and multiple dealerships), if the cause of action arose elsewhere and the company tactically elects to locate its headquarters out-of-state, it will not be subject to general jurisdiction. And in *Bristol Myers*[4], the Court continued the trend in immunizing mega-corporations from general jurisdiction adding that no amount of independent statewide activity (there selling hundreds of millions of allegedly defective pills to others in the forum) would subject the company even to specific jurisdiction if the plaintiffs in question and the product sales were located elsewhere—no matter how much judicial efficiency might be achieved by a consolidated action.

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[1] *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945).
[2] *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011).
[3] *Daimler AG v. Bauman*, 571 U.S. 117 (2014); *see also BNSF Ry. v. Tyrrell*, 137 S.Ct. 1549 (2017).
[4] *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017).

As a practical matter and even if would-be defendants have interactions with forum-based plaintiffs, entities and persons can avoid far away litigation exposure if the misconduct did not directly take place there. The *Walden v. Fiore* case[5](where the individual plaintiffs from Nevada were damaged by alleged misconduct taking place in Georgia) provides an excellent jurisdictional battle map for defendants: if the alleged responsible party commits acts while physically located elsewhere the mere fact the plaintiff happens to be located in the forum state standing alone will not authorize personal jurisdiction. And the Circuit courts have picked up the revolutionary message as they often strip plaintiffs of the choice of suing in their home state.[6]

These decisions self-consciously limit defense exposure to the geographical challenges of distant litigation. The revolutionary war map drawn by the Supreme Court harkens to the *Pennoyer* years where physical presence and direct impacts are the ones that create the real exposure to jurisdiction in distant sovereigns. Out-of-state defendants ignore such a defense to their own procedural detriment.

II. Capturing the Venue Flag Planted in Forum Selection Clauses

A good argument can be made that the Court's decision in *Atlantic Marine*[7] is the most significant procedural decision of the last 10 years. At a minimum, the court's decision there provided enormous litigation advantage to a contracting party who can control location through a tactically-inserted forum selection clause.

In *Atlantic Marine*, the Court held that a valid forum selection clause is presumptively enforceable, it trumps the plaintiff's choice of venue and eliminates any judicial reliance on the private interest factors including even the convenience of third-party witnesses or the location of evidence in the forum. Simply paraphrased, Justice Alito's ruling in *Atlantic Marine* in essence emphasized that when it comes to forum selection clauses "a contract is indeed a contract."

The battle grounds for this revolutionary development since *Atlantic Marine* have been on (1) whether the clause is enforceable, (2) whether it violates any public policy considerations under state law, and (3) what to do if there are other parties in the case that are not signatories to the clause.[8] Moreover, a party can even prevent a defendant from removing an action to federal court with a contractual clause exclusively designating state court as the designated forum.[9]

The forum selection battles are so intense because where the action goes forward so very often controls the result and the parties' amenability to settling the matter. Civil procedure matters.

III. Gatekeeping at the Pleading Stage Through Twombly/Iqbal

The "Twiqbal" revolution has been the most transparently impactful. It used to be that Rule 8 and its notice pleading aspect meant that federal cases were dismissed only if there was some legal defect with the theory of the claim for relief. It was often said that motions to dismiss were "playpens for infant lawyers."

The *Twombly/Iqbal* decisions[10] changed all that allowing judges, in the court's words, to gatekeep at the pleading stage foreclosing reliance on conclusory or implausible allegations. And the Court emphasized that judges can rely on their experience when measuring plausibility.

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[5]*Walden v. Fiore*, 571 U.S. 277, (2014).

[6]*See, e.g., Brook v. McCormley*, 873 F.3d 549 (7th Cir. 2017) (no jurisdiction against out-of-state attorney simply by representing in-state party); *Axiom Foods, Inc.v. Acerchem Int'l, Inc.,* 874 F.3d 1064 (9th Cir. 2017) (sending infringing newsletter to some forum residents insufficient for jurisdiction); *Waite v. All Acquisition Corp.,* 901 F.3d 1307 (11th Cir. 2018) (forum plaintiff injured elsewhere does not trigger jurisdiction over out-of-state defendant); The Wagstaffe Group Practice Guide: Fed. Civ. Pro. Before Trial, § 10.258.

[7]*Atlantic Marine Constr. Co. v. U.S. Dist. Ct.,* 571 U.S. 49 (2014).

[8]*See, e.g., Sun v. Advanced China Healthcare, Inc.*, 901 F.3d 1081 (9th Cir. 2018) (no violation of state public policy to enforce forum selection clause); *In re Howmedica Osteonics Corp.*, 867 F.3d 390 (3d Cir. 2017) (enforcement rules as against non-signatories).

[9]*See, e.g. Bartels v. Saber Healthcare Group, LLC*, 880 F.3d 668 (4th Cir. 2018); *Medtronic Sofamor Danek, INc. v. Gannon*, 913 F.3d 704 (8th Cir. 2019).

[10]*Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *Aschcroft v. Iqbal*, 556 U.S. 662 (2009).

Don't get me wrong—the well pled allegations are still accepted as true and leave to amend is freely given to correct technical defects. However, the revolutionary case law following Twiqbal has resulted in the weeding out of facially weak claims using the analytic weapons of implausibility and deficiency.[11]

IV. Arbitration Frustration

The arbitration revolution also has been hatching in recent Supreme Court jurisprudence. Concededly, the high court has stressed for some fifty years that the alternative dispute resolution mechanism of arbitration is highly favored.[12] And it is no surprise that plaintiffs generally detest and defendants generally love the arbitration model as it can truncate discovery, avoid the risk of jury sympathy and at least nominally trigger the sense of a predisposed factfinder in favor of the repeat players in the corporate world.

The not road so stealth revolution in arbitration picked up pace in Supreme Court battles starting with the *Concepcion* case[14] and its progeny. The high court in a series of consistent decisions in the last five years, including just recently in *Lamps Plus*[15], has provided a Star Wars defense to entities and corporations to avoid class actions by inserting arbitration clauses in individual consumer contracts that preclude just such a joinder procedure.

The area of arbitration, like personal jurisdiction and venue, has produced multiple defense-supportive decisions from the high court. Uniformly, the Supreme Court revolution, at least for now, seems to be siding with he notion that litigation barricades must be erected against overzealous plaintiffs who arguably use litigation and the expense of discovery to extract unfair settlements.

V. The Bygone Era of Mass Plaintiff Class Actions

There indeed was a revolution with the implementation of the "modern" class action in Rule 23—only that was then (50+ years ago) and this is now. However, starting with the *Wal-Mart* case[16] and then its progeny, the Roberts Court is narrowing the interpretation of the Rule 23(a) commonality requirement. Lower courts, following the *Wal-Mart* lead are more and more often denying class certification reasoning that the variations in class members' claims outweigh those that are common and typical. While class actions were and remain a somewhat boutique industry, the old-time notion of filing a class, getting it certified and negotiating a large settlement (with even larger legal fees at times) is fighting with the techniques of the last war. The courts seem to be saying "no more" to lawyers who are viewed as planting fruit trees in their own class action gardens.

Concluding Thoughts

High court revolutions-even in the field of civil procedure—are by no means unprecedented in the annals of judicial history in this country. Supreme Court historians have talked about the "revolution" of the *Lochner* era, the *Erie Railroad* progressive response to the corporate bias of general federal common law, the Warren Court's judicial activism and now the stealth procedural revolution. For litigators, however, there is nothing academic about all this -- the battle strategies are to identify these weaponizing decisions and utilize them in the best interest of our clients. Thus, harnessing the power of these decisions and rigorously tracking developments at the battalion level (i.e. Federal circuit and district court decisions) is monumentally vital. I am very proud that my practice guide and its Current Awareness component provide helpful maps in this regard.

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[11] *See, e.g., Wysong Corp. v. Apri, Inc.*, 889 F.3d 267 (6th Cir. 2018) (implausible allegation that product consumers confused); *Munro v. Lucy Activewear*, 899 F.2d 585 (8th Cir. 2018) (inadequate allegation of promissory fraud).

[12] *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

[14] *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

[15] *Lamps Plus, Inc. v. Varela*, 2019 U.S. LEXIS 2943 (April 24, 2019).

[16] *Wal-Mart Store, Inc. v. Dukes*, 564 U.S. 338 (2011).

FEDERAL TORT CLAIMS ACT

Mailbox Rule

Cooke v. United States

918 F.3d 77, 2019 U.S. App. LEXIS 6822 (2d Cir. Mar. 7, 2019)

The Second Circuit holds that the mailbox rule does not apply to claims under the Federal Tort Claims Act.

Facts and Procedural Background. The plaintiff alleged that agents of the U.S. Customs and Border Protection Agency (CBP) violently and forcibly assaulted and tased her during a highway checkpoint stop on May 7, 2015. She sued the United States on February 17, 2017, asserting claims under the Federal Tort Claims Act (FTCA) for assault and battery, common-law negligence, and failure to intervene. The government moved to dismiss for lack of subject-matter jurisdiction, on the ground the plaintiff did not first present the claim to the appropriate federal agency, as required by 28 U.S.C. § 2675. In support of the motion to dismiss, the government presented evidence that all claims received by CBP are entered into CBP's Chief Counsel Tracking System. A search of the system did not turn up any records of a claim filed by the plaintiff under the FTCA. In response, plaintiff's counsel stated that he filed a civil rights complaint with the Department of Homeland Security's Office of Civil Rights and Civil Liberties (CRCL) on April 1, 2016, sending a copy to the Attorney General in Washington D.C., with a copy to the CRCL Compliance Branch in Washington. On May 31, 2016, he sent an administrative "Claim for Damage, Injury, or Death, Standard Form 95" (SF-95) by first-class mail to the same CRCL office, although the street number was missing. The affidavit of service by mail was not executed until almost a year later. The attorney acknowledged that the Form 95 had been "misdirected" to the CRCL instead of to the CBP. By letter dated June 22, 2016, the CRCL acknowledged receipt of the civil rights complaint, but not the Form 95. The district court granted the government's motion to dismiss, and the Second Circuit affirmed.

Mailbox Rule Does Not Apply. The plaintiff argued that she administratively exhausted her FTCA claim when she mailed her SF-95 to the CRCL. She did not argue that the CRCL (or the CBP, for that matter) actually received notice of the claim. Instead she relied on "the mailbox rule," a rebuttable, common-law presumption that a piece of mail, properly addressed and mailed in accordance with regular office procedures, has been received by the addressee.

The Second Circuit held that the mailbox rule does not apply to FTCA claims. The court pointed out that a waiver of U.S. sovereign immunity must be strictly construed, in terms of scope, in favor of the sovereign, and unequivocally expressed in the statutory text. The FTCA waives sovereign immunity for tort suits against the United States, but only under specified circumstances, one of which is that a suit "shall not be instituted upon a claim against the United States . . . unless the claimant shall have first presented the claim to the appropriate Federal agency" [28 U.S.C. § 2675(a)]. A plaintiff satisfies this requirement when "a Federal agency *receives* from a claimant . . . an executed Standard Form 95 or other written notification of an incident" [28 C.F.R. § 14.2 (court's emphasis)]. The court concluded that the statute and the regulation make clear that mere mailing of a notice of claim does not satisfy the FTCA's presentment requirement, and applying the mailbox rule would be inconsistent with the requirement that waivers of sovereign immunity be strictly construed and limited in scope in favor of the sovereign.

In so holding, the Second Circuit joined the majority of the courts of appeals to have considered the issue. The Third, Fifth, Seventh, Eighth, and Tenth Circuits have all held that the mailbox rule does not apply to FTCA claims [*see* Flores v. United States, 719 Fed. Appx. 312, 317 n.1 (5th Cir. 2018); Lightfoot v. United States, 564 F.3d 625, 628 (3d Cir. 2009); Moya v. Department of Veteran's Affairs, 35 F.3d 501, 504 (10th Cir. 1994); Bellencourt v. United States, 994 F.2d 427, 430 (8th Cir. 1993); Drazan v. United States, 762 F.2d 56, 58 (7th Cir. 1985)]. The only circuit holding to the contrary is the Eleventh [*see* Barnett v. Okeechobee Hosp., 283 F.3d 1232, 1238–1239 (11th Cir. 2002)].

INTERVENTION

Intervention of Right

Adam Joseph Res. (M) Sdn. Bhd. v. CNA Metals Ltd.

2019 U.S. App. LEXIS 9007 (5th Cir. Mar. 26, 2019)

The Fifth Circuit has held that a law firm had a right to intervene to protect its contingent-fee interest after its client made a collusive settlement with the opposing party designed to cut off the law firm's fee entitlement.

Background. The plaintiff, a Malaysian business, sued a Texas corporation in the Southern District of Texas, invoking federal diversity jurisdiction and asserting breach-of-contract claims. The district court granted the defendant's motion to stay the litigation and compel arbitration under the parties' arbitration agreement, which was subject to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention") [*see* 9 U.S.C. § 201 et seq.]. The plaintiff was represented in the arbitration by Brown Sims, a Houston law firm, under a retention agreement that assigned Brown Sims a 37-percent interest in any recovery obtained for the plaintiff.

After the arbitrator awarded the plaintiff $503,943.56, Brown Sims moved the district court to lift the stay and enter a judgment confirming the arbitration award. In the meantime, unknown to Brown Sims, the plaintiff and defendant agreed to settle the case for $395,000. The settlement was intended to cut out Brown Sims's fee, thereby costing the defendant less ($395,000 instead of $503,943.56) and providing the plaintiff with a greater net recovery ($395,000 instead of $317,500) than under the arbitral award.

Unaware of the settlement, the district court confirmed the arbitration award. The defendant then moved the district court to set aside the award and enter judgment in accordance with the settlement. Brown Sims responded with a Rule 60(b)(6) motion for relief from judgment and a Rule 24(a) motion to intervene of right, in order to protect its interest in receiving the contingent fee provided by the retention agreement with the plaintiff.

The district court denied Brown Sims's motions, concluding that treating Brown Sims as a party would have destroyed diversity and thus deprived the court of subject-matter jurisdiction. The court then granted the defendant's motion and vacated its judgment confirming the arbitration award. After the district court denied Brown Sims's renewed motion to intervene and a Rule 59(e) motion to alter or amend the judgment, Brown Sims appealed.

District Court Had Subject-Matter Jurisdiction. As a threshold matter, the Fifth Circuit panel held that allowing Brown Sims to intervene would not have deprived the district court of subject-matter jurisdiction. Although the presence of Brown Sims as a party would have destroyed complete diversity (both Brown Sims and the defendant had Texas citizenship), diversity was not the only source of jurisdiction in this case. The court of appeals explained that under its precedent, the Convention serves as a basis for a federal court to exercise subject-matter jurisdiction if (1) there is an arbitration agreement or award that falls under the Convention, and (2) the parties' dispute relates to that agreement. And an attorney's attempt to assert a claim against a defendant to obtain the attorney's interest in a final arbitral award or to reform a final judgment confirming an award to reflect the attorney's contingent-fee interest "relates to" the arbitration agreement and award for this purpose [*see* Stemcor USA Inc. v. CIA Siderurgica Do Para Cosipar, 895 F.3d 375, 378, 381 (5th Cir. 2018)]. The court of appeals therefore concluded the Convention conferred jurisdiction on the district court to address and resolve Brown Sims's claim in the present case.

Settlement Did Not Bar Consideration of Motion to Intervene. The Fifth Circuit panel next considered Brown Sims's motion to intervene of right. The court of appeals noted that courts often consider post-settlement motions to intervene of right, even though such motions are generally disfavored. The proper inquiry into post-settlement intervention is one of timeliness under Rule 24, rather than mootness, when a real party in interest is attempting to insert itself into a still-pending case after settlement and the district court has subject-matter jurisdiction to adjudicate the claim in intervention [*see, e.g.,* United Airlines, Inc. v. McDonald, 432 U.S. 385, 393 n.14, 97 S. Ct. 2464, 53 L. Ed. 2d 423 (1977)].

Requirements for Intervention of Right. To be entitled to intervene of right, Brown Sims had to demonstrate that it timely applied for intervention, and that (1) it had an interest relating to the property or transaction that was the subject of the case, (2) disposition of the case would practically have impaired or impeded its ability to protect its interest, and (3) it was not adequately represented by the existing parties [*see* Fed. R. Civ. P. 24(a)].

Motion to Intervene Was Timely. The relevant factors for determining timeliness of a motion to intervene are (1) the length of time during which the movant actually knew or reasonably should have known of its interest in the case, (2) the extent of prejudice to the existing parties to the litigation, (3) the extent of prejudice to the movant, and (4) any unusual circumstances [*see* Stallworth v. Monsanto Co., 558 F.2d 257, 264–266 (5th Cir. 1977)]. The Fifth Circuit panel in this case found that all four timeliness factors weighed in favor of allowing intervention.

First, Brown Sims attempted to intervene as soon as it learned that its interest might be in peril.

Second, any prejudice to the arbitrating parties was of their own making; the court of appeals noted that "equity is not on their side." The court acknowledged that allowing Brown Sims to intervene to protect its interest would cause the parties "the prejudice of possibly dismantling their scheme," but prejudice in this context must be measured by the delay in seeking intervention, not by the inconvenience to the existing parties of allowing the intervenor to participate in the litigation.

The third timeliness factor—the extent of prejudice to Brown Sims if intervention were denied—weighed heavily in favor of allowing intervention. The disposition of this matter without Brown Sims would have greatly impeded its ability to protect its interest for a number of practical reasons, such as (1) requiring Brown Sims to institute a new proceeding in a court unfamiliar with the dispute and uncertain to obtain personal jurisdiction over both original parties, (2) a potential statute of limitations defense, and (3) forcing Brown Sims to incur substantial expenses associated with a separate lawsuit.

The court of appeals found that the fourth timeliness factor—unusual circumstances—"certainly falls toward Brown Sims." The parties to this case had settled surreptitiously to decrease their liability by cutting Brown Sims out of its contingent fee. Because Brown Sims had been purposefully kept in the dark, the court saw no merit in the argument that the motion to intervene should have been made before the settlement.

Other Requirements for Intervention of Right Were Met. The Fifth Circuit went on to find that Brown Sims met the three substantive requirements to intervene of right: (1) it had an interest relating to the property or transaction that was the subject of the case, (2) disposition of the case would practically have impaired or impeded its ability to protect its interest, and (3) it was not adequately represented by the existing parties [*see* Fed. R. Civ. P. 24(a)]. In analyzing these requirements, the court of appeals relied heavily on its decision in *Gaines v. Dixie Carriers, Inc.*, in which the court held that a law firm that had been discharged by its client must be allowed to intervene as of right in a suit to protect its contingent fee interest in any recovery by its former client [*Gaines v. Dixie Carriers, Inc.*, 434 F.2d 52 (5th Cir. 1970)].

Since *Gaines*, the Fifth Circuit has consistently held that an attorney's contingent fee is a sufficient interest relating to the property or transaction that is the subject of the action for purposes of intervention.

Moving on to the second requirement, the court of appeals easily concluded that a denial of intervention would have impaired or impeded Brown Sims's ability to protect its interest. Although a denial of intervention would not have prevented Brown Sims from bringing a separate action to collect its contingent fee, such a suit would have entailed potential difficulties, such as (1) requiring Brown Sims to institute a new proceeding in a court unfamiliar with the dispute and uncertain to obtain personal jurisdiction over both original parties, (2) a potential statute of limitations defense, and (3) forcing Brown Sims to incur substantial expenses associated with a separate lawsuit. The court of appeals emphasized that its analysis of this issue must focus on practical consequences of a denial of intervention. Therefore, the fact that denying intervention would have required Brown Sims to institute subsequent litigation to protect its interest was a decisive argument in favor of finding Brown Sims's interest to be impaired.

Finally, the Fifth Circuit found that the original parties to the lawsuit would not adequately have represented Brown Sims's interest in its contingent fee. The court forcefully rejected an argument that this finding should be affected by the fact that the motion to intervene came after the defendant had already paid the settlement funds to the plaintiff. That Brown Sims should somehow have moved to protect its interest before the unknown and collusive settlement agreement was consummated was "[a] little too much for us to accept."

Conclusion and Disposition. On the record before it, the Fifth Circuit panel concluded that Brown Sims had met all of the criteria for intervention as of right. The court of appeals remanded for the district court to grant Brown Sims's intervention motion and to consider the merits of Brown Sims's claims.

PROCEEDING IN FORMA PAUPERIS

Appeals

Samarripa v. Ormond

917 F.3d 515, 2019 U.S. App. LEXIS 6511 (6th Cir. Mar. 4, 2019)

The Sixth Circuit holds that a district court may grant a motion to proceed on appeal in forma pauperis by requiring the movant to prepay a portion of the appellate filing fee.

Statutory Background. Indigent individuals may seek permission in the district court to appeal adverse judgments in forma pauperis, that is, without prepaying appellate filing fees. Specifically, 28 U.S.C. § 1915(a)(1) provides that "any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person," based on the court's review of the person's assets and claim [28 U.S.C. § 1915(a)(1)].

Issue in This Case. This case involved consolidated appeals by habeas-corpus petitioners in which the district courts required prepayment of a portion, but not all, of the appellate court's filing fee. The question for the Sixth Circuit was whether the statute permits a court to require partial prepayment of fees or requires an all-or-nothing-at-all approach. The court of appeals began by noting that the key language of § 1915(a)(1)—"may authorize" and "without prepayment of fees"—does not answer the question. A court that excuses all fees or some fees still allows a filing "without prepayment of fees." If § 1915(a)(1) said that a court "shall authorize" a litigant to proceed "without prepayment of any fees," that would clarify that Congress limited a court to choosing between requiring prepayment of the full amount or zero, with nothing in between. Or if the statute said that a court "may" allow a litigant to proceed "without prepayment of some or all fees," that would clarify that a court could permit partial prepayments depending on a litigant's particular financial situation. But absent such textual guidance from the words of the statute, the Sixth Circuit looked elsewhere for guidance.

The court of appeals noted that Federal Rule of Appellate Procedure 24 does not provide the necessary clarification. Rule 24 sets out a procedure for seeking pauper status on appeal, requiring a motion in the district court [Fed. R. App. P. 24(a)(1)]. If the district court grants the motion, the party may proceed as a pauper on appeal without prepayment [Fed. R. App. P. 24(a)(2)]. If the district court denies the motion, the party may file the motion in the court of appeals, in effect challenging the district court's decision [Fed. R. App. P. 24(a)(5)]. The Rule contemplates granting or denying these motions, but it does not address whether a court has discretion to require partial payment of fees.

Legislative History. Turning to the legislative history, the Sixth Circuit found it significant that as of 1996, every circuit to address the issue had allowed courts to require partial prepayment of fees under § 1915(a), which had been in place since 1892. When Congress amended § 1915 in 1996, it did not meaningfully change the text of § 1915(a)(1). The Sixth Circuit therefore inferred that Congress did not wish to change what had become a uniform practice of permitting courts to require indigent litigants to prepay some but not all of the filing fee.

The court of appeals also found it significant that the 1996 legislation also included the Prison Litigation Reform Act (PLRA), which took away judicial discretion when a prisoner "brings a civil action or files an appeal in forma pauperis" [28 U.S.C. § 1915(b)(1)]. In such a case, § 1915(b) requires that a prisoner proceeding in forma pauperis pay the full amount of any filing fee, usually in monthly installments [28 U.S.C. § 1915(b)]. Congress's limit of discretion in this one area, while leaving § 1915(a)(1) substantially the same, suggests that Congress intended no alteration to the court's discretion to require partial prepayment in other cases under § 1915(a)(1).

District Court May Require Partial Payment. Based on the legislative history and context, the Sixth Circuit concluded that district courts may require partial prepayment of filing fees under § 1915(a)(1). In so holding, the Sixth Circuit joined the Seventh Circuit [*see* Longbehn v. United States, 169 F.3d 1082, 1083 (7th Cir. 1999)].

Unresolved Question: Application of PLRA to Habeas Appeals. The Sixth Circuit closed by noting that neither it nor the district courts in this case had applied the PLRA provisions discussed above, because courts have uniformly held that habeas cases do not qualify as "civil" cases subject to the PLRA provisions [*see, e.g.,* Kincade v. Sparkman, 117 F.3d 949, 951 (6th Cir. 1997)]. However, the court pointed out that the relevant PLRA provision eliminates judicial discretion when a prisoner "brings a civil action or files an appeal in forma pauperis" [28 U.S.C. § 1915(b)(1)]. In the quoted clause, the word "civil" could be read as modifying "action" but not "appeal"; under that reading, the PLRA's limitation on judicial discretion might apply to habeas appeals. However, the Sixth Circuit left this question for "another day and another case, one in which the parties squarely present the arguments below."