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Wagstaffe's Civil Procedure Before Trial

June 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.

FORUM NON CONVENIENS

Public and Private Interest

Fresh Results, LLC v. ASF Holland, B.V.

921 F.3d 1043, 2019 U.S. App. LEXIS 11598 (11th Cir. Apr. 22, 2019)

The Eleventh Circuit holds that a court abuses its discretion when it rules on a motion for forum non conveniens dismissal without considering the relevant public interest factors.

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REMOVAL

Costs and Attorney's Fees

League of Women Voters v. Pennsylvania

921 F.3d 378, 2019 U.S. App. LEXIS 12124 (3d Cir. Apr. 24, 2019)

The Third Circuit holds that a defendant sued in an official capacity cannot be held personally liable for costs and attorney's fees awarded for improper removal.

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RULES OF COURT

Appeals

Appellate and Evidence Rules Amendments

The Supreme Court has adopted amendments to the Federal Rules of Appellate Procedure and Federal Rules of Evidence, to take effect December 1, 2019.

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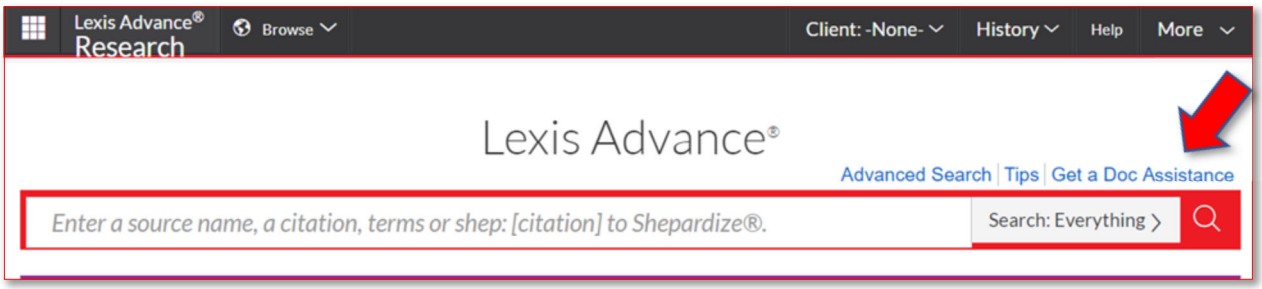

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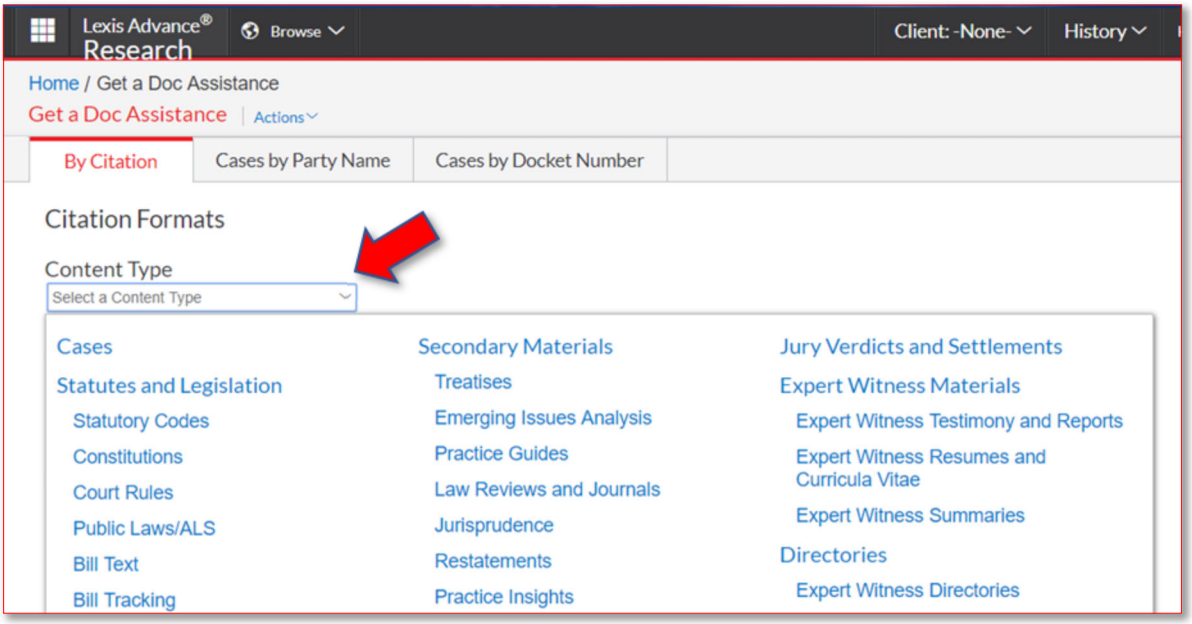

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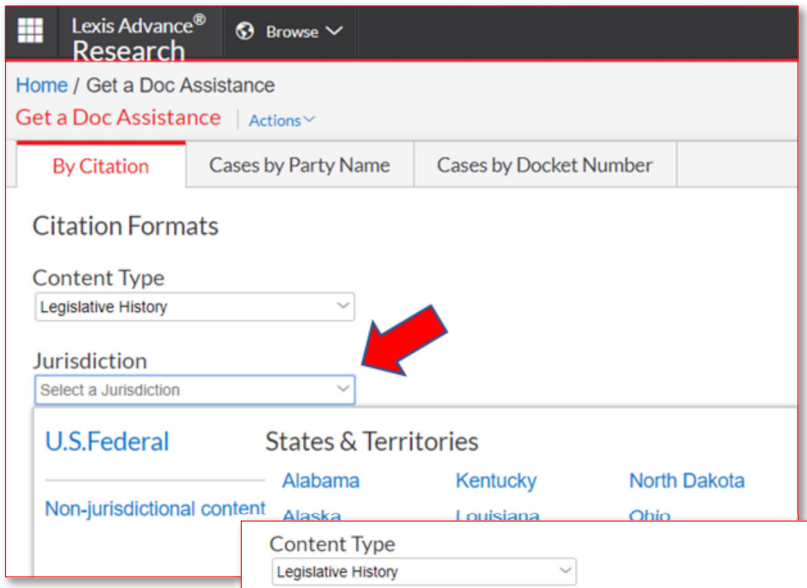

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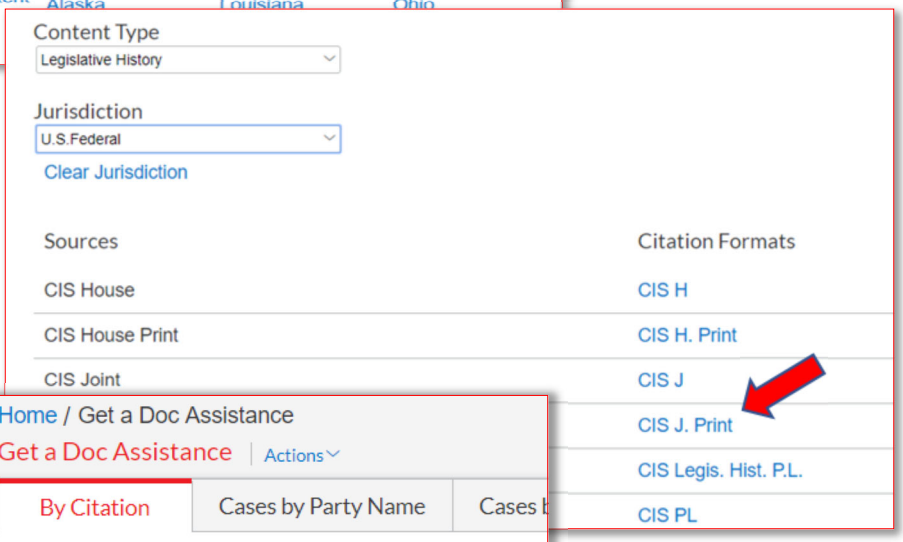

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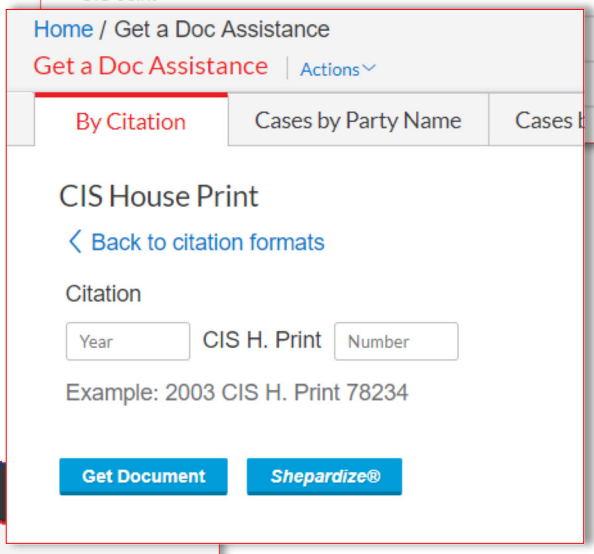

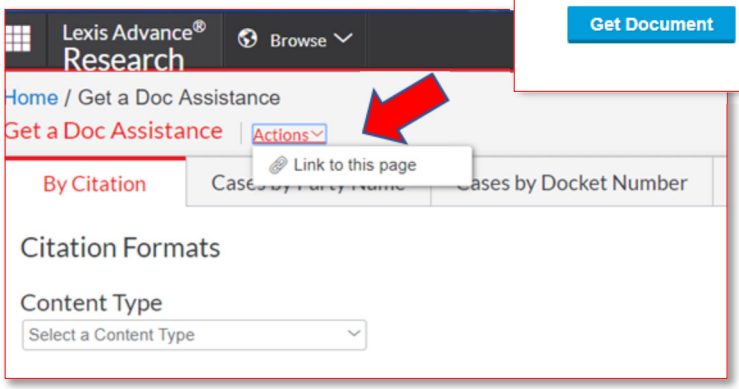

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NEW FROM JIM WAGSTAFFE

FIVE ESSENTIAL TIPS FOR SURVIVING THE SUPREME COURT'S TECTONIC CHANGES TO THE MEANING OF "JURISDICTION" AND THE SPOKEO STANDING EARTHQUAKE

By: Jim Wagstaffe

When Dorothy reacted to the earthshaking storm by telling Toto they weren't in Kansas anymore, she was expressing what litigators may feel when examining the tectonic changes underway in the U.S. Supreme Court as to what is meant by "subject matter jurisdiction" and Article III standing. And make no mistake about it, surviving these tremblors means more than a quick reading of the hot-off-the-press June 2019 decision in *Fort Bend County* as the latest word on jurisdiction and other recent cases addressing the *Spokeo* juggernaut.

"Jurisdiction" – the Word With Limited Meaning under *Fort Bend County*

It's late in the case (maybe even after an appeal and remand) and for the first time you've spotted a "defect" in the plaintiff's Title VII case: she failed to file a claim with the EEOC and the statute bars the employment claim for failure to exhaust administrative remedies. And you took Civil Procedure in law school and remember that if the defect is "jurisdictional" it can be raised at any time free from waiver, estoppel or forfeiture.[1]

Not so fast. The Supreme Court, in its sparkling new decision with just these facts in *Fort Bend County, Texas v. Davis*, 2019 U.S. LEXIS 3891 (June 3, 2019), now definitively has ruled that exhaustion rules are not jurisdictional unless Congress expressly so provides. Rather, such requirements are mere "claims-processing" rules subject to forfeiture if not timely raised.

In *Fort Bend,* Justice Ginsburg writing for the Court reaffirmed that "the word 'jurisdictional' generally is reserved for prescriptions delineating the classes of cases a court may entertain (subject-matter jurisdiction) and the persons over whom the court may exercise adjudicatory authority (personal jurisdiction)." In contrast, reasoned the Court, an exhaustion requirement—even if mandated by statute—is a claims-processing rule that will be enforced if properly raised, but one that may be forfeited if the party waits too long to raise the point.

Thus, the High Court continued its attack on what it calls the "profligate use" of the term "jurisdiction" in situations where Congress did not expressly and clearly describe the requirement as jurisdictional in nature.[2] It is only when a rule is characterized as jurisdictional (e.g. complete diversity, amount in controversy), Justice Ginsburg reasoned, that the "unique" and "harsh" consequences of subject matter jurisdiction come into play, i.e.,

- Its absence may be raised at any time,
- A party cannot waive, forfeit or otherwise be estopped from raising the subject matter jurisdiction challenge, and
- The Court has an obligation *sua sponte* to raise such a subject matter jurisdictional defect.

The *Fort Bend* court stressed that merely because a statute mandates certain actions (e.g. filing within a prescribed statute of limitations) only means that the court will enforce its mandate if properly raised by the attacking party. If, as in *Fort Bend*, the party impermissibly delayed raising the exhaustion defense, it was waived. Significantly, the Court noted it had previously ruled in an array of cases that mere claims-processing rules will not be found to be jurisdictional in nature. These non-

[1] *See The Wagstaffe Group Practice Guide: Federal Civil Procedure Before Trial, § 2-II (LexisNexis 2019) for a full discussion of the non-waivability of subject matter jurisdiction issues.*

[2] *Fort Bend, supra, citing Sebelius v. Auburn Regional Medical Center, 568 U.S. 145, 153 (2013); see also The Wagstaffe Group Practice Guide: Federal Civil Procedure Before Trial, § 2-IV (LexisNexis 2019).*

jurisdictional defects include:

- The Copyright Act's requirement that parties register the copyright,[3]
- Title VII's limit of covered employers to those with more than 15 employees,[4] and
- Rule 23(f)'s time limit for filing a discretionary appeal from a class certification ruling.[5]

***Spokeo* and its Progeny: Standing is Jurisdictional**

Not ironically, but at the same time, the Supreme Court has triggered a reverse jurisdictional earthquake with its decision in *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1547 (2016). In *Spokeo*, the Court ruled that if a party alleges bare procedural credit reporting violations but has suffered no concrete and particular injury, there is no standing. As such, what might previously have seemed like a simple absence of proof of damages is now treated as a lack of Article III standing stripping the court of, you guessed it, subject matter jurisdiction.

There was nothing particularly new or earth shattering in the *Spokeo* majority's recitation of the "injury in fact" rule. To establish Article III standing, a plaintiff "must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.[6] However, the *Spokeo* progeny has emphasized that the rule can now best be summarized as "no harm, no foul." In other words, what might previously have seemed like a no-damages case subject to a *Twombly/Iqbal* Rule 12(b)(6) dismissal, is now a jurisdictional defect to be raised at any time free of forfeiture.[7]

Simply put, there is no subject matter jurisdiction due to a lack of standing unless the plaintiff can show that he or she suffered some actual—not theoretical—injury. "After *Spokeo,* the courts know there is no such thing as an anything-hurts-so-long-as-Congress-says-it-hurts theory of Article III injury."[8]

Five Essential Principles to Survive the Supreme Court Jurisdictional Earthquakes

In light of these tectonic no jurisdiction/jurisdiction Supreme Court decisions, survival in federal litigation requires knowledge of five essential principles. For at bottom, litigants suffer greatly if either (1) the statutory defect is not jurisdictional and hence is forfeited for failure to preserve it, or conversely (2) subject matter jurisdiction is lacking and is raised for the first time late in the case after great expenditures of time and money.

1. See if Congress Describes the Defect as Jurisdictional

As shown above and per the new *Fort Bend County* case, if Congress does not describe in statutory language that a defect in a claim is jurisdictional, then ordinarily it is not. In other words, the courts "leave the ball in Congress' court."[9] Therefore, the litigator's survival tip is to check both the legislative language and history, while at the same time consulting resources like my federal practice guide that sets forth the many, many statutory requirements on which courts have already ruled.[10]

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[3] *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 157 (2010).
[4] *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 503-504 (2008).
[5] *Neutraceutical Corp. v. Lambert*, 139 S. Ct. 710 (2019) (no jurisdictional consequences to procedural rule but nevertheless waived for alternative reasons).
[6] See *Spokeo, Inc. v. Robins, supra,* 136 S.Ct. at 1547; see also *Frank v. Gaos,* 139 S. Ct. 1041 (2019).
[7] See, e.g., *Casillas v. Madison Ave. Assoc.*, 2019 U.S. App. LEXIS 16797 (7th Cir. June 4, 2019) (no standing in Fair Debt Collection Practices Act simply because debtor nominally violated the statute by failing to notify consumer about process for verifying debt when no proof of actual injury resulting therefrom).
[8] *Huff v. Telecheck Servs.*, 2019 U.S. App. LEXIS 13367 (6th Cir. May 3, 2019) (no standing in consumer's Fair Credit Reporting Act ("FCRA") suit for defendant's failure to include statutorily required information in credit check when no evidence any of consumer's transactions were dishonored).
[9] *Arbaugh v. Y & H Corp., supra,* 546 U.S. at 515-516.
[10] The Wagstaffe Group Practice Guide: Federal Civil Procedure Before Trial, § 2-IV (LexisNexis 2018).

2. Be Aware: An Absence of Injury Triggers a *Spokeo* Standing Challenge

In many cases, the plaintiff's complaint will identify a statutory violation that can lull defense counsel into the belief that statutory violations themselves confer standing. Wrong. A mere, nominal violation of statute (even if resulting in conduct prohibited by Congress) does not support Article III standing and subject matter jurisdiction without proof and allegations of actual injury. For example, a defendant's application website might be challenged under the ADA by a visually-impaired person as failing to have otherwise required enhancements; however, absent a showing the plaintiff otherwise was qualified to be so admitted, the bare statutory violation fails the *Spokeo* test.[11]

3. Know the "Clap" in the *Clapper* Decision

In a case that presaged *Spokeo*, the Supreme Court in *Clapper v. Amnesty Int'l USA,* 133 S. Ct. 1138 (2013) held there was no standing based on a case alleging future governmental interception of telephone calls. The High Court reasoned that a possible, but not certain, violation does not satisfy Article III standing. Thus, the "clap" sound of this case (as emphasized later in *Spokeo*) is that the absence of concrete and particularized injury is more than an elemental defect in the complaint—it is jurisdictional. Be sure on the plaintiff's side that such allegations and proof support the claim.

4. Don't Get Carried Away with Big Data Cases

In these modern times of big data and electronic privacy concerns, there are more and more federal statutes protecting plaintiffs (e.g. FCRA, TCPA, etc.). However, the *Spokeo* "no harm, no foul" standing rule has been applied with special focus to calm this storm of consumer litigation. Again, be sure that in each such case, your plaintiff has shown both a statutory violation and injury that resulted from that particular wrongdoing.[12]

5. Pay Particular Attention to *Spokeo* in Class Actions

Since the named plaintiffs must have standing for a class action to be certified,[13] practitioners must pay special attention to the *Spokeo* standing rule or risk a jurisdictional dismissal of the case even after much work has been performed in the action. Class actions have become a well-used tool in consumer privacy cases, and standing may be the primary challenge.

You need read no further than the Supreme Court decision this term in *Frank v. Gaos,* 139 S. Ct. 1041 (2019) to see how an asserted absence of standing can cause an unintended earthquake of its own in class actions. There, the plaintiff class sued Google under a state privacy statute for allegedly sharing private search term data with companies being searched. After granting certiorari with the focus of the parties aimed at the pivotal *cy pres* issue, the High Court called for further briefing and remanded for consideration of a *Spokeo* standing issue, i.e., the possible absence of any actual injury on behalf of the plaintiffs in the class. This can be no small problem as the case law attests. [14]

Conclusion

Jurisdiction and standing are not just civil procedure professors' intellectualisms—they can prove the difference between winning and losing your case in federal court. Buy "earthquake insurance" by mastering these new cases and staying on top of it all with resources like our federal practice guide.

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[11] *Griffin v. Dept. of Labor Federal Credit Union,* 912 F.3d 649 (4th Cir. 2019).

[12] See, e.g., *Casillas v. Madison Ave. Assoc., supra* (no standing if FDCA violation without injury); *Huff v. Telecheck Servs., supra* (same); *Hutton v. Nat'l Bd. of Examiners in Optometry, Inc.,* 892 F.3d 613 (4th Cir. 2018) (no standing for breach of consumer's statutory privacy without showing of actual injury); *St. Louis Heart Center v. Nomax,* 899 F.3d 500 (8th Cir. 2018) (same).

[13] *NEI Contracting and Engineering, Inc. v. Hanson Aggregates Pacific Southwest, Inc.,* 2019 U.S. App. LEXIS 16885 (9th Cir. June 5, 2019).

[14] See, e.g., *NEI Contracting and Engineering, Inc. v. Hanson Aggregates Pacific Southwest, Inc., supra; Beck v. McDonald*, 848 F.3d 262 (4th Cir. 2017).

FORUM NON CONVENIENS

Public and Private Interest

Fresh Results, LLC v. ASF Holland, B.V.

921 F.3d 1043, 2019 U.S. App. LEXIS 11598 (11th Cir. Apr. 22, 2019)

The Eleventh Circuit holds that a court abuses its discretion when it rules on a motion for forum non conveniens dismissal without considering the relevant public interest factors.

Background. The plaintiff, a U.S. company, arranged bulk shipments of blueberries from South American producers for the defendant, a Dutch company that repacks wholesale produce to sell to European customers. The plaintiff filed a complaint in the Southern District of Florida, alleging that the defendant had falsified reports as to the shipments and thereby fraudulently deflated the price owed to the plaintiff. The defendant moved to dismiss on the grounds that the Netherlands was a more convenient forum, asserting that important evidence and witnesses were in the Netherlands and that the Netherlands and the United States had no treaty for the reciprocal enforcement of judgments. The district court concluded that the interests of the litigants (the "private factors") favored dismissal, and that it need not consider the "public factors" because the private factors were not "in equipoise or near equipoise." The court therefore dismissed the case so that litigation could proceed in the Netherlands.

District Court Erred in not Considering Public Factors. Under the doctrine of forum non conveniens, a district court may decline to exercise its jurisdiction when a foreign forum is better suited to adjudicate the dispute. A defendant bears the burden of justifying dismissal based on forum non conveniens. To satisfy this burden, the defendant must establish that (1) an adequate alternative forum is available, (2) the public and private factors weigh in favor of dismissal, and (3) the plaintiff can reinstate the suit in the alternative forum without undue inconvenience or prejudice. The second step, the balancing of the private and public factors, is a comparative inquiry that requires the district court to weigh the relative advantages and disadvantages of each respective forum. The private factors pertain to the interests of the participants in the litigation, while the public factors pertain to the relative interests of the two fora.

The district court had failed to consider all relevant public factors because it concluded that the private factors were not in equipoise. The equipoise standard, the Eleventh Circuit noted, came from dictum in Eleventh Circuit caselaw. In *La Seguridad v. Transytur Line*, the court stated that "[i]f the trial judge finds [the] balance of private interests to be in equipoise or near equipoise, he must then determine whether or not factors of public interest tip the balance in favor of a trial in a foreign forum" [La Seguridad v. Transytur Line, 707 F.2d 1304, 1307 (11th Cir. 1983)]. But this sentence was of no particular relevance in the context of the discussion, and the equipoise standard was not part of the court's holding. In other cases, the Eleventh Circuit has explained that, while the private factors are generally considered more important than the public factors, the public factors are not superfluous, even when the private factors are far from equipoise. Hence, the better rule is to consider both types of factors in all cases [Leon v. Millon Air, Inc., 251 F.3d 1305, 1310–1311 (11th Cir. 2001)].

The Eleventh Circuit therefore expressly disavowed the equipoise standard. The court noted that the D.C. Circuit has also abandoned this standard [Nemariam v. Fed. Democratic Republic of Ethiopia, 315 F.3d 390, 393 (D.C. Cir. 2003)]. A district court must consider all relevant public factors when conducting a forum non conveniens analysis.

The Eleventh Circuit vacated the dismissal and remanded for the district court to consider all relevant private and public factors.

REMOVAL

Costs and Attorney's Fees

League of Women Voters v. Pennsylvania

921 F.3d 378, 2019 U.S. App. LEXIS 12124 (3d Cir. Apr. 24, 2019)

The Third Circuit holds that a defendant sued in an official capacity cannot be held personally liable for costs and attorney's fees awarded for improper removal.

Facts and Procedural Background. The League of Women Voters and a group of Pennsylvania Democratic voters challenged Pennsylvania's 2011 congressional districting map in Pennsylvania Commonwealth Court, alleging Republican lawmakers drew the map to entrench Republican power in Pennsylvania's congressional delegation and to disadvantage Democratic voters. The defendants included various state officials, including the Senate President Pro Tempore ("the Senator") and the Speaker of the Pennsylvania House of Representatives ("the Speaker"), all in their official capacities, the Commonwealth, and the General Assembly. Four months later, the Commonwealth Court granted the motion of some of the defendants to stay the case. The Pennsylvania Supreme Court then granted the plaintiffs' request to assume extraordinary jurisdiction to resolve the case before the 2018 congressional elections, because the "case involve[d] issues of imme-

diate public importance," vacated the stay, and ordered "expeditious" proceedings below. On November 13, 2017, the Commonwealth Court issued an expedited scheduling order, with trial set for December 11, 2017.

The next day, the Senator removed the case to the U.S. District Court for the Eastern District of Pennsylvania. The underlying petition included only state-law claims, but he contended there was federal-question jurisdiction based on the Governor's issuance of a Writ of Election to set a special election for a newly vacant seat in Congress. In the removal notice, the Senator averred that the Speaker and the General Assembly had consented to removal and that consent of the other defendants was not required because of their nominal status.

Within 24 hours of learning of the removal, the plaintiffs filed an emergency motion to remand to state court. The district court scheduled a hearing for that afternoon. Right before the hearing, the Senator filed his own emergency motion seeking remand, explaining that there was a misunderstanding and the Speaker did not consent to removal.

The district court granted the Senator's motion. Finding that he had no basis for believing removal was timely, the district court also awarded costs and attorney's fees under 28 U.S.C. § 1447(c). Without explanation, the court also found that the Senator "should personally be liable for these fees and costs."

Removal Was Untimely. Attorney's fees and costs may be awarded against a party who removed a case without an objectively reasonable basis for doing so. In this case, the district court determined that the Senator had no objectively reasonable basis for removal because removal was untimely. Removal must occur within 30 days of defendant's receipt of the initial pleading or a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is removable [28 U.S.C. § 1446(b)(1), (3)]. The court rejected the Senator's argument that the Writ of Election was an "other paper" that could reset the 30-day removal clock, because only documents that address developments within a case constitute "other paper" for purposes of the removal timetable. The Third Circuit concluded that the district court did not abuse its discretion in concluding the Senator lacked an objectively reasonable basis for contending the Writ of Election was an "other paper" under § 1446(b)(3).

Senator Could Not Be Held Personally Liable for Fees and Costs. In the absence of any cited cases directly on point, the Third Circuit looked to the Supreme Court's decision in *Kentucky v. Graham*. In that case, the Supreme Court held that under 42 U.S.C. § 1988 (the fee-shifting provision for federal civil rights suits), fee liability may not be imposed on a governmental entity when the suit is against a government official in his or her personal capacity. The Court reasoned that the losing party clearly bears the cost of an award under the statute, and a governmental entity is not a party to a personal-capacity lawsuit [Kentucky v. Graham, 473 U.S. 159, 167–168, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985)]. Applying the same logic, the Third Circuit held that awards under 28 U.S.C. § 1447(c) must be against losing parties. In a suit against an official in his or her official capacity, that party is the governmental entity, not the official. The court rejected the argument that fees could be awarded against the Senator personally because he acted in bad faith, because the district court did not make a bad-faith finding. The Third Circuit concluded the district court erred in awarding fees against the Senator in his personal capacity.

Amount of Fee and Cost Award Was Appropriate. The Third Circuit found no abuse of discretion in calculating the fee and cost award. The district court applied the lodestar method, multiplying a reasonable hourly billing rate for the lawyers' services by the reasonable number of hours expended on the litigation. It looked to customary Philadelphia legal fees rather than the higher Washington D.C. rates. With respect to the time billed, the court noted that the removal notice presented plaintiffs with an emergency situation and a range of complex legal issues to address in a short amount of time. The district court appropriately awarded fees less a reduction to account for overlap between the work of the various attorneys, for a total fee award of $26,240. The award of $2,185 in costs spent on computer-aided legal research was also upheld.

RULES OF COURT

Appellate and Evidence Rules Amendments

The Supreme Court has adopted amendments to the Federal Rules of Appellate Procedure and Federal Rules of Evidence, to take effect December 1, 2019.

Supreme Court's Orders Amending Rules. On April 25, 2019, the Supreme Court adopted and transmitted to Congress amendments to Federal Rules of Appellate Procedure 3, 5, 13, 21, 25, 26, 26.1, 28, 32, and 39, and Federal Rule of Evidence 807. The Court also adopted and transmitted amendments to the Rules of Bankruptcy Procedure and the Rules of Criminal Procedure. In the absence of action by Congress, the amendments will take effect on December 1, 2019 [*see* 28 U.S.C. § 2074(a)].

Highlights of the amendments to the Appellate and Evidence Rules are summarized below.

Changing "Mail" to "Send." In 2018, Appellate Rule 25 was amended to make electronic filing mandatory in most instances for persons represented by counsel. Appellate Rules 3 and 13 are now amended to reflect the possibility of electronic transmission of documents. Specifically, Appellate Rule 3(d) has been amended to allow the district clerk to serve notice of the filing of a notice of appeal by "sending" rather than "mailing" a copy to other parties or their counsel. And Appellate Rule 13(a)(2) has been amended to authorize a party to file a notice of appeal from the Tax Court by "sending" it to that court's clerk, rather than by mailing it.

Related amendments have been made to several rules. Appellate Rules 5(a)(1) and 21(a)(1) and (c) have been amended to delete references to "proof of service" of petitions requesting permission to appeal or mandamus, prohibition, or other extraordinary writs. Appellate Rule 39(d)(1) has similarly been amended to delete a reference to "proof of service" of a bill of costs. Proof of service is unnecessary when service is completed using the court's electronic filing system. The amended rules therefore require simply that the party filing one of these papers serve it on all other parties.

Appellate Rule 25(d)(1), which covers proof of service generally, has been amended to make its requirements applicable only if a paper is served other than through a court's electronic-filing system.

And Appellate Rule 26(c), which generally adds three days to any time limit for a party to act after being served, has been amended to clarify that it does not apply if service was made electronically without any proof of service.

Expanded Disclosure Requirements on Appeal. Appellate Rule 26.1 has been amended. The amended rule continues to require that any nongovernmental corporation that is a party to a proceeding in a court of appeals file a disclosure statement that either (1) identifies any parent corporation and any publicly held corporation that owns 10 percent or more of its stock, or (2) states that there is no such corporation [Fed. R. App. P. 26.1(a)]. Appellate Rule 29 makes the Rule 26.1 disclosure requirement applicable to corporate amici curiae [*see* Fed. R. App. P. 29(a)(4)(A)].

Amended Rule 26.1(a) makes the corporate disclosure requirements applicable to any nongovernmental corporation that seeks to intervene in an appeal.

Rule 26.1 has also been amended to impose new disclosure requirements on certain other participants in appellate proceedings. Conforming amendments have been made to Appellate Rules 28(a)(1) and 32(f) to delete references to "corporate" disclosure statements, reflecting that the disclosure requirements no longer apply just to corporations.

New subdivision (b) of Rule 26.1 requires that in an appeal in a criminal case involving an organizational victim, unless the government shows good cause, it must file a statement identifying any organizational victim of the alleged criminal activity. If the organizational victim is a corporation, the statement must also disclose the information currently required of a nongovernmental corporate party discussed in the preceding paragraph [*see* Fed. R. App. P. Rule 26.1(a)] to the extent it could be obtained through due diligence. These provisions correspond to the disclosure requirement imposed by the Federal Rule of Criminal Procedure 12.4(a)(2). As under the criminal rule, the government may establish good cause to be relieved of filing a disclosure statement if the relevant organizations' interests could not be affected substantially by the outcome of the criminal proceedings [*see* Fed. R. App. P. 26.1, Committee Note to 2019 Amendment; Fed. R. Crim. P. 12.4, Committee Note to 2019 Amendment].

New subdivision (c) of Rule 26.1 requires, in a bankruptcy proceeding, that the debtor, the trustee, or, if neither is a party, the appellant file a statement identifying each debtor not named in the caption. If the debtor is a corporation, the statement must either (1) identify any parent corporation and any publicly held corporation that owns 10 percent or more of the stock of the debtor, or (2) state that there is no such corporation [*see* Fed. R. App. P. 26.1(a)].

Reflecting the addition of new subdivisions (b) and (c), as discussed above, former subdivisions (b) and (c) have been redesignated as (d) and (e), respectively.

Residual Hearsay Exception. Evidence Rule 807 provides a residual hearsay exception for hearsay statements that do not qualify for admission under Evidence Rule 803 or 804. Under the current version of Rule 807, such a hearsay statement is not excluded by the rule against hearsay if four requirements are met: (1) the statement has circumstantial guarantees of trustworthiness equivalent to the standards set by Rules 803 and 804, (2) the statement is offered as evidence of a material fact, (3) the statement is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts, and (4) admitting the statement will best serve the purposes of the Evidence Rules and the interests of justice [Fed. R. Evid. 807(a)]. The current rule also requires that the proponent of the statement give the adverse party "reasonable" pretrial or pre-hearing notice of the intent to offer the statement "and its particulars, including the declarant's name and address" [Fed. R. Evid. 807(a)].

The amendment of Rule 807(a) retains the third of these conditions—the requirement that the proffered statement be more probative than any other evidence the proponent could reasonably obtain. But the other three conditions are replaced by a single requirement that the court determine, after considering the totality of the circumstances under which the statement was made and any corroborating evidence, that the statement is supported by sufficient guarantees of

trustworthiness. Thus, the amended rule does not include any explicit reference to other rules for “equivalent” guarantees of trustworthiness, nor does it require the court to determine that admitting the proffered statement will serve the purposes of the rules or the interests of justice.

Amended Rule 807(b) specifies that the notice of intent to offer the statement must be provided in writing (which can be done electronically) before the trial or hearing. The notice must include the “substance” of the statement (instead of “its particulars”), and the requirement of providing the declarant’s name is retained, but the declarant’s address need not be provided. The amended rule also authorizes the court, for good cause, to allow the notice to be given in any form during the trial or hearing.

The amendments are intended to eliminate problems caused by the lack of a unitary standard of trustworthiness in Rules 803 and 804. A straightforward requirement that the court find the hearsay statement offered under Rule 807 to be trustworthy, based on the circumstances and on any corroborating evidence, is expected to be easier for courts to administer. And the clarification of the notice requirement is intended to minimize disputes about the form and content of the notice, and to enable the trial court to allow late notice if there is good cause to do so.