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September 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.

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P.J. v. Conn. State Bd. of Educ

2019 U.S. App. LEXIS 22234 (2d Cir. July 25, 2019)

The Second Circuit holds that counsel's post judgment work to safeguard the scope of relief afforded by a consent decree may qualify for an award of statutory attorney's fees, even if counsel does not obtain additional court-ordered relief.

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DEFAULT JUDGMENT

Appeal

Prime Rate Premium Fin. Corp. v. Larson

2019 U.S. App. LEXIS 20615 (6th Cir. July 11, 2019)

The Sixth Circuit holds that a Rule 60(b) motion to vacate a default judgment is not a jurisdictional prerequisite to an appeal from the judgment.

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PROCEEDINGS IN FORMA PAUPERIS

Three-Strikes Rule

Taylor v. Grubbs

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The Fourth Circuit holds that a dismissal that constitutes a third strike under the Prison Litigation Reform Act does not bar in forma pauperis status for an appeal of the dismissal itself.

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Kenneth Strickland, Solutions Consultant

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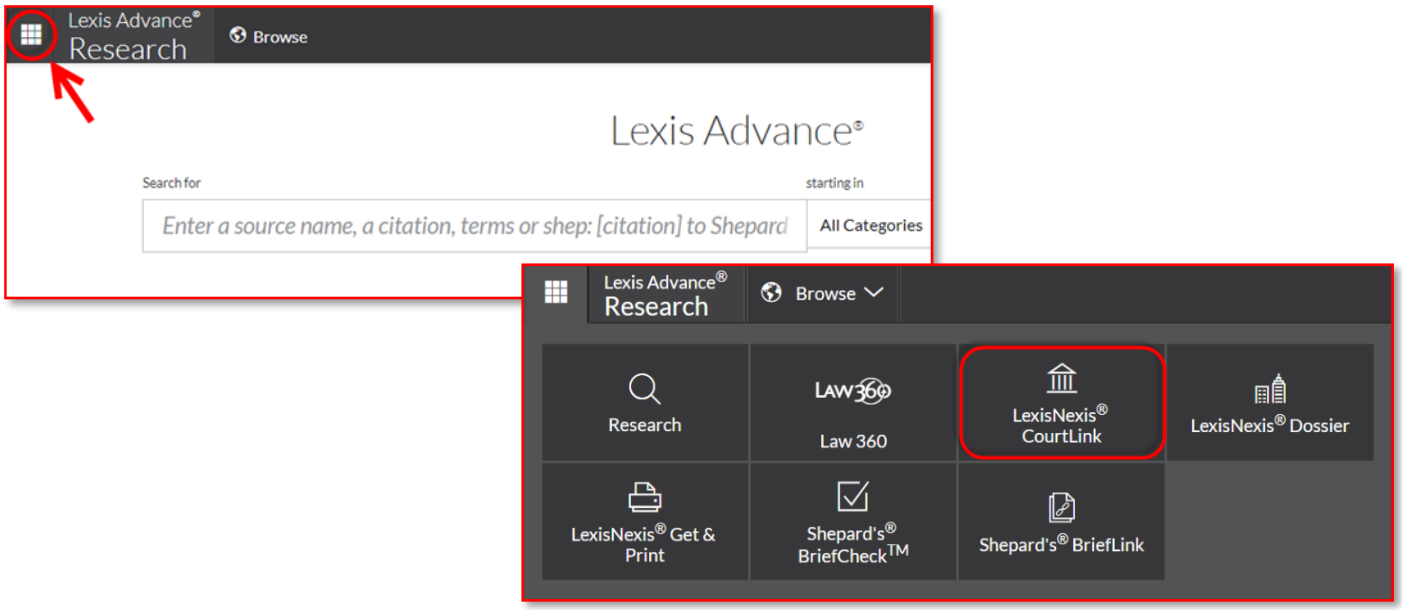

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Samantha Chassin, Regional Solutions Consultant

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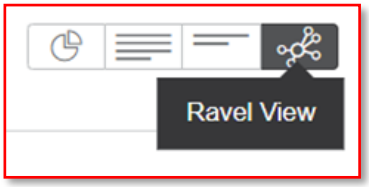

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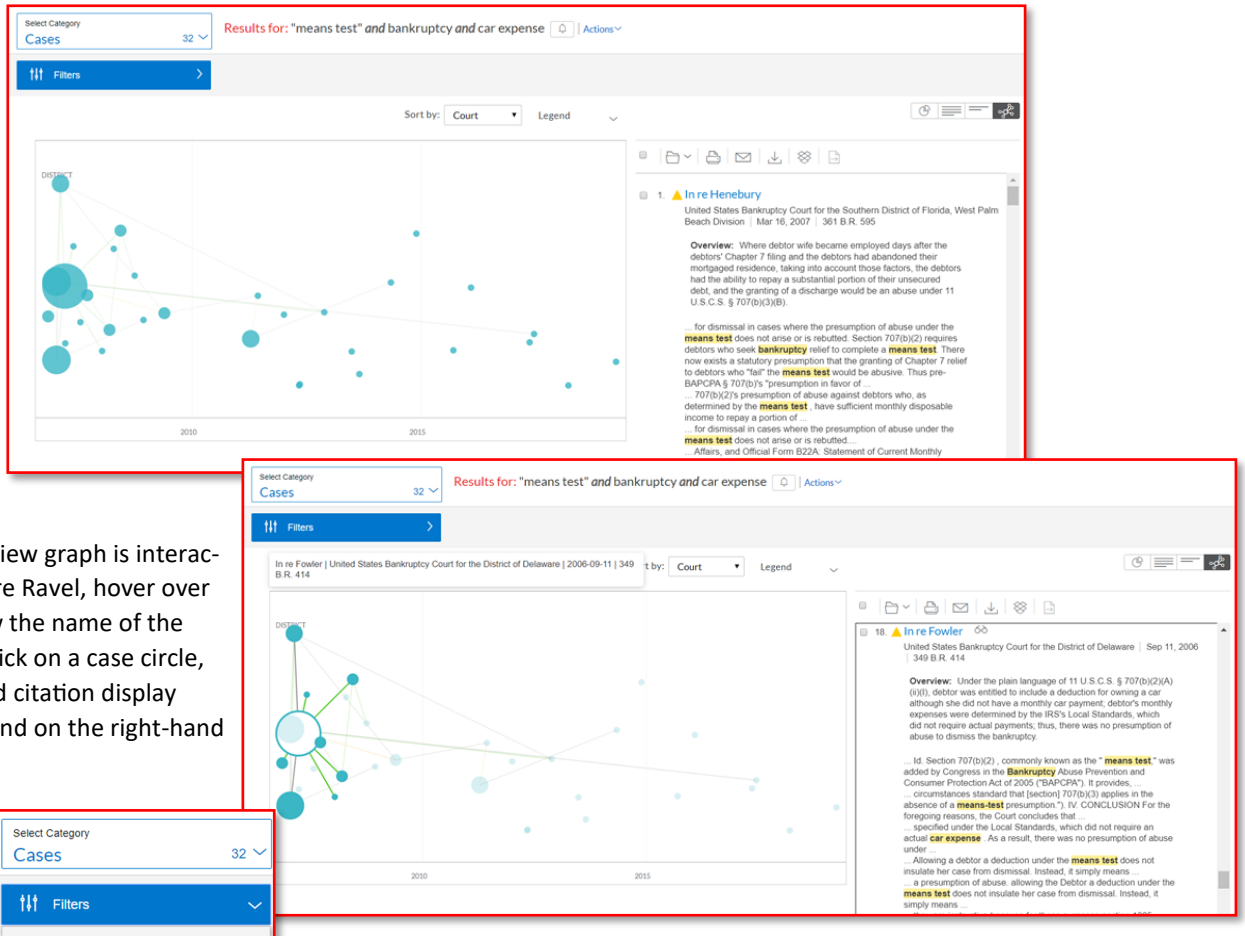

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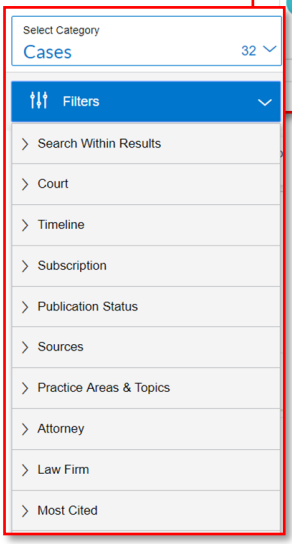

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ATTORNEY'S FEES

Monitoring of Consent Decree

P.J. v. Conn. State Bd. of Educ.

2019 U.S. App. LEXIS 22234 (2d Cir. July 25, 2019)

The Second Circuit holds that counsel's postjudgment work to safeguard the scope of relief afforded by a consent decree may qualify for an award of statutory attorney's fees, even if counsel does not obtain additional court-ordered relief.

***Delaware Valley* Case.** In *Pennsylvania v. Delaware Valley Citizens' Counsel for Clean Air*, the Supreme Court considered an award of attorney's fees to an organization that had sued under the Clean Air Act to compel Pennsylvania to implement a vehicle inspection and maintenance program. In response to the suit, Pennsylvania agreed to a consent decree in which it committed to establishing such a program in several counties within the next two years. However, implementation of the program did not proceed smoothly, and the plaintiff was forced to defend the consent decree in court and before both state and federal administrative agencies. After the district court awarded fees for this post-decree work, Pennsylvania ultimately appealed to the Supreme Court. To analyze the award of attorney's fees, the Court divided the post-decree work by the plaintiff's attorneys into phases such as the plaintiff's successful motions for contempt, its defense against motions to modify the decree, and its time spent commenting on proposed regulations and in hearings before the Environmental Protection Agency [Pennsylvania v. Delaware Valley Citizens' Counsel for Clean Air, 478 U.S. 546, 549–553, 106 S. Ct. 3088, 92 L. Ed. 2d 439 (1986)].

The Supreme Court in *Delaware Valley* acknowledged that certain categories of work performed by the plaintiff's attorneys were not "judicial." Nevertheless, the Court found the fees appropriate because the attorneys' nonjudicial work had been as necessary to the attainment of adequate relief for their client as all of their earlier work in the courtroom to secure the plaintiff's initial success in obtaining the consent decree [Pennsylvania v. Delaware Valley Citizens' Counsel for Clean Air, 478 U.S. 546, 558, 106 S. Ct. 3088, 92 L. Ed. 2d 439 (1986)]. The Court pointed out that the post-decree administrative-agency work, aimed at protecting the full scope of relief afforded by the consent decree, was necessary to enforce the remedy ordered by the district court [Pennsylvania v. Delaware Valley Citizens' Counsel for Clean Air, 478 U.S. 546, 558–559, 106 S. Ct. 3088, 92 L. Ed. 2d 439 (1986)].

The *Delaware Valley* Court also noted the similarity between the fee-shifting provisions contained in the Clean Air Act and 42 U.S.C. § 1988, which provides for attorney's fees in certain categories of civil-rights litigation. Both provisions, for example, are intended to promote citizen enforcement of important federal policies by authorizing fee awards to prevailing parties. The Court thus cited with approval § 1988 cases in which courts had deemed fees for postjudgment monitoring of consent decrees appropriate even in contexts not resulting in additional court-ordered relief [Pennsylvania v. Delaware Valley Citizens' Counsel for Clean Air, 478 U.S. 546, 559–560, 106 S. Ct. 3088, 92 L. Ed. 2d 439 (1986)].

***Buckhannon* Case.** In *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, the Supreme Court considered the "catalyst theory," under which a plaintiff who achieved his or her desired result in a case, but did so because of voluntary conduct by the defendant rather than because of a win in court, could nevertheless be deemed a "prevailing party" for purposes of fee-shifting statutes [Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 601–602, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)]. The *Buckhannon* Court rejected the catalyst theory, concluding that to qualify as a prevailing party, a plaintiff must have obtained a judicially sanctioned change in the parties' legal relationship by virtue of an award of some relief by the court. This relief could be a judgment on the merits, or a court-ordered consent decree [Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 603–605, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)]. But accepting the catalyst theory would impermissibly transform a request for attorney's fees into a second major litigation, because a district court would be required to analyze a defendant's subjective motivations for any change of conduct and determine whether the change was really a re-

sponse to the plaintiff's meritorious legal claims [Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 609–610, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)].

***Buckhannon* Did Not Overrule *Delaware Valley*.** In the present case, the Second Circuit faced the question whether the Supreme Court's *Buckhannon* decision abrogated its earlier holding in *Delaware Valley* that, in appropriate circumstances, postjudgment monitoring of a consent decree is a compensable activity for which counsel is entitled to a reasonable fee. The defendants in this case contended that pursuant to *Buckhannon*, a party to a consent decree cannot be considered the prevailing party in the post-decree phase unless that party prevails in post-decree *litigation*. Because the plaintiffs in this case had not prevailed in any of their many post-decree motions, including motions seeking a determination that defendants were in substantial noncompliance with the decree, the defendants argued that the plaintiffs could not recover additional fees and costs.

The Second Circuit rejected the defendants' argument and held that *Buckhannon* did not limit or overturn *Delaware Valley*. The court of appeals reasoned that under the rule announced in *Buckhannon*, a consent decree is a judicially sanctioned change in the parties' legal relationship such that the recipient of such an order is a prevailing party. And *Delaware Valley* affirms, without reference to any requirement of additional court-ordered relief, that appropriate efforts by counsel to safeguard the scope of relief that a consent decree affords may be compensable. The court of appeals thus concluded that *Delaware Valley* was not abrogated *sub silentio* by *Buckhannon*, and there is no categorical requirement of additional court-ordered relief for attorneys to be eligible for fees during the post-consent decree phase.

In so holding, the Second Circuit joined the majority of circuits that have considered the question [*see, e.g.,* Prison Legal News v. Schwarzenegger, 608 F.3d 446, 451 (9th Cir. 2010); Johnson v. City of Tulsa, 489 F.3d 1089, 1108 (10th Cir. 2007); Cody v. Hillard, 304 F.3d 767, 773 (8th Cir. 2002)]. By contrast, the Seventh Circuit has held that unless a consent decree itself provides for the award of post-consent decree fees, *Buckhannon*'s definition of a "prevailing party" generally bars such fees absent a subsequent court order in that party's favor [*see* Alliance to End Repression v. City of Chicago, 356 F.3d 767, 772 (7th Cir. 2004); *see also* United States v. Tennessee, 780 F.3d 332, 339 (6th Cir. 2015) (finding that Sixth Circuit "need not . . . take sides in the circuit split," but nonetheless requiring court order as part of its three-part test for awarding post-decree fees)].

Guidance for Future Application of *Delaware Valley*. The Second Circuit cautioned that under the proper application of *Delaware Valley*, the mere entry of a consent decree does not afford a prevailing party's lawyers a guarantee of income for bringing and losing a series of actions to enforce the decree while charging the expense to the other side. To assist district courts in applying *Delaware Valley*, the court of appeals outlined several guiding principles.

First, although additional court-ordered relief is not a condition precedent to an award of post-decree fees, a court assessing a request for such fees should always consider the results obtained. Post-decree work need not necessarily result in a new court order to be eligible for fees, but it must have effectively served to protect the full scope of relief afforded by the consent decree [*see* Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 558, 106 S. Ct. 3088, 92 L. Ed. 2d 439 (1986)]. And hours dedicated to severable unsuccessful claims should be excluded from any award calculation.

Second, a district court must consider a post-decree fee request with an eye to whether the work was useful and of a type ordinarily necessary to secure the final result obtained from the litigation [*see* Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 561, 106 S. Ct. 3088, 92 L. Ed. 2d 439 (1986)]. In the case of a consent decree directed toward systemic relief, this means work protecting the fruits of the decree, not simply any work directed at the same problem at which the decree was aimed [*see* Johnson v. City of Tulsa, 489 F.3d 1089, 1108–1109 (10th Cir. 2007)].

Lastly, a district court must always ensure that hours spent on post-decree work are reasonable in degree. The court of appeals explained that "[t]he more clearly a district court can set expectations at the outset of a decree regarding the amount and type of post-decree work that would be reasonable, the better." The best option would be a provision in the parties' agreement about what, and how much, post-decree work will be compensable. But in the absence of such contractual specificity, "district and magistrate judges are well advised to work with parties to avoid being forced to parse a large volume of requests at the end of the litigation process when the task could have been simpler if engaged with at some point earlier in the life of the decree."

DEFAULT JUDGMENT

Appeal

Prime Rate Premium Fin. Corp. v. Larson

2019 U.S. App. LEXIS 20615 (6th Cir. July 11, 2019)

The Sixth Circuit holds that a Rule 60(b) motion to vacate a default judgment is not a jurisdictional prerequisite to an appeal from the judgment.

A district court may penalize a litigant who violates the court's rules or orders [*see* National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 643, 96 S. Ct. 2778, 49 L. Ed. 2d 747 (1976) (per curiam)]. For example, Federal Rule of Civil Procedure 16(f) authorizes a district court to issue "just orders," including the sanctions listed in Rule 37(b), for failure to follow a scheduling or other pretrial order [Fed. R. Civ. P. 16(f)(1)(C)]. These sanctions may include rendering a default judgment [Fed. R. Civ. P. 37(b)(2)(A)(vi)].

In the present case, the district court entered a default and then a default judgment because of the defendant's failure to appear at trial and refusal to cooperate in trial preparation [*see* Fed. R. Civ. P. 55(a), (b)]. The defendant did not move to vacate the default judgment under Rule 60(b) [*see* Fed. R. Civ. P. 55(c), 60(b)]. Instead, the defendant filed a timely notice of appeal to the Sixth Circuit.

Before reviewing the district court's decision to enter the default judgment, the Sixth Circuit panel considered the threshold question whether it had jurisdiction to do so. The court of appeals noted that there is a circuit split over whether a party may appeal from a default judgment without first moving to vacate the judgment under Rule 60(b), as Rule 55(c) allows [*see* BHTT Entm't, Inc., v. Brickhouse Café & Lounge, L.L.C., 858 F.3d 310, 314 & n.7 (5th Cir. 2017) (collecting cases)]. Some circuits hold that an appellant who has not filed a Rule 60(b) motion in the lower court fails to preserve arguments for overturning a default judgment [see Consorzio Del Prosciutto Di Parma v. Domain Name Clearing Co., LLC, 346 F.3d 1193, 1195 (9th Cir. 2003); Commodity Futures Trading Com. v. Am. Commodity Group Corp., 753 F.2d 862, 866–867 (11th Cir. 1984) (per curiam)]. Other circuits will consider appeals directly from default judgments [*see, e.g.,* City of New York v. Mickalis Pawn Shop, LLC, 645 F.3d 114, 127–129 (2d Cir. 2011)].

The Sixth Circuit acknowledged that it has issued conflicting decisions. It has refused to review a challenge to a default judgment without a Rule 60(b) motion [*see* Nationwide Life Ins. Co. v. Penn-Mont Ben. Servs., 2018 U.S. App. LEXIS 2483, at *14–*15 (6th Cir. Jan. 31, 2018) (unpublished)], but it has also directly reviewed such a judgment despite the lack of a Rule 60(b) motion [*see* Grange Mut. Cas. Co. v. Mack, 270 Fed. Appx. 372, 376 (6th Cir. 2008) (per curiam)]. The appellate panel in this case said that it saw nothing in the Federal Rules that requires a party always to file a Rule 60(b) motion in order to appeal a default judgment. And the panel pointed out that the circuit has not required a party to file a Rule 60(b) motion before appealing the dismissal of a complaint [*see* Carter v. Memphis, 636 F.2d 159, 161 (6th Cir. 1980) (per curiam)].

In this case, the appellate panel found it necessary to decide only that a Rule 60(b) motion is not a *jurisdictional* prerequisite for appeal. The court explained that a federal statute, 28 U.S.C. § 1291, gives it jurisdiction over "final decisions" of the district courts. A final default judgment entered pursuant to Rule 55(b) fits within the terms of the statute and thus may be reviewed by the court of appeals. Any Rule 60(b) exhaustion mandate—which would not flow out of any federal statute—instead would count as a nonjurisdictional claim-processing rule [*see* Hamer v. Neighborhood Hous. Servs., 583 U.S. —, 138 S. Ct. 13, 199 L. Ed. 2d 249, 253–254 (2017)]. Because the plaintiff in this case had not timely raised an objection to the lack of a Rule 60(b) motion, any claim that such a motion is a nonjurisdictional prerequisite to appeal was forfeited.

Because the plaintiff in this case had forfeited any claim that the defendant should have made a Rule 60(b) motion before appealing the default judgment, the Sixth Circuit panel proceeded to the merits of the appeal. The court left "for another day whether a Rule 60(b) requirement actually exists."

PROCEEDINGS IN FORMA PAUPERIS

Three-Strikes Rule

Taylor v. Grubbs

2019 U.S. App. LEXIS 21267 (4th Cir. July 18, 2019)

The Fourth Circuit holds that a dismissal that constitutes a third strike under the Prison Litigation Reform Act does not bar in forma pauperis status for an appeal of the dismissal itself.

Legal Background; Prison Litigation Reform Act. In general, indigent federal litigants who cannot afford court costs are entitled to proceed in forma pauperis (IFP) by statute [*see* 28 U.S.C. § 1915]. Because of what was viewed by Congress as a glut of IFP prisoner litigation, the Prison Litigation Reform Act (PLRA) made substantial substantive and procedural changes applicable in actions by prisoners. In particular, IFP status is barred by the "three strikes" rule if the prisoner has brought three or more prior actions or appeals that were dismissed as frivolous, malicious, or for failure to state a claim [28 U.S.C. § 1915(g)].

Facts and Procedural Background. The plaintiff was a state prisoner who filed three separate pro se civil rights actions in the U.S. District Court for the District of South Carolina against various employees of the state's Department of Corrections and a city. In three separate orders issued on the same date, the district court dismissed all three cases for failure to state a claim, so the prisoner accumulated three strikes, and IFP status was prospectively barred. The prisoner appealed in all the cases, and the Fourth Circuit consolidated the appeals.

***Coleman* Decision; Issue Reserved.** Historically, federal courts treated dismissal on one of the PLRA grounds as contingent on the outcome of any appeal, so that the effective date of a strike was postponed until the appeal was resolved. In *Coleman v. Tollefson*, however, the Supreme Court rejected that approach, holding that the PLRA language that a strike occurs when the action "was dismissed" refers to an action taken by a single court, not as a sequence of events involving multiple courts, so a pending appeal is irrelevant to whether a subsequently filed action is barred by the three-strikes rule. The *Coleman* Court expressly reserved, however, the issue presented by this case, i.e., whether a third strike dismissal bars IFP status for an appeal of that very dismissal [Coleman v. Tollefson, 575 U.S. —, 135 S. Ct. 1759, 191 L. Ed. 2d 803, 809–811 (2015)].

Circuit Precedent Addressed Issue. The Fourth Circuit had already decided the issue presented by this case in *Henslee v. Keller* [681 F.3d 538 (4th Cir. 2012)], but noted that its reasoning in that precedent was based on the contingent nature of a dismissal on appeal under the PLRA that was rejected by the *Coleman* Court. Therefore, the circuit precedent was not necessarily binding to the extent the Court's clarification undermined that precedent. Nevertheless, the court of appeals concluded that the same result should be reached under the clarified *Coleman* analysis.

Appeal of Dismissal Is Not "Prior" Occasion. The Fourth Circuit noted that the three-strikes rule of the PLRA applies to dismissals on "prior" occasions. In the context of an appeal, the ordinary meaning of the term *prior* naturally refers to dismissals in other actions, but not in the underlying dismissal that is on appeal. As the court succinctly put it, any appeal of a dismissal is a part of *this* case, not a *prior* case. Any other rule would essentially read the term "prior" out of the PLRA, because the imposition of a strike always occurs before any consequences of that strike. The court also noted that the opposing interpretation would lead to a curious result in this case, because all three strikes were imposed simultaneously, which would have barred IFP status in all three of the consolidated appeals. The Fourth Circuit therefore adhered to its prior position in *Henslee* and held that a third-strike dismissal does not bar IFP status for an appeal of the dismissal itself.

Circuit Split of Authority. The Fourth Circuit's decision is in accord with a published opinion of the Ninth Circuit [Richey v. Dahne, 807 F.3d 1202 (9th Cir. 2015)], and an unpublished decision of the Tenth Circuit [Dawson v. Coffman, 651 Fed. Appx. 840 (10th Cir. 2016) (unpublished)]. The Third Circuit, however, has held that because a dismissal necessarily occurs before the filing of a notice of appeal, a third-strike dismissal is a "prior occasion" and bars IFP status for an appeal of the dismissal itself [Parker v. Montgomery Cty. Corr. Facility/Bus. Office Manager, 870 F.3d 144 (3d Cir. 2017)]. In a dissent in the present Fourth-Circuit case, Circuit Judge Richardson argued for this latter position.

Disposition. The Fourth Circuit granted the appellant's motion for IFP status for the appeal of the third-strike dismissal.