LexisNexis®

LITIGATION INSIGHTS

MOORE'S FEDERAL PRACTICE & PROCEDURE
WAGSTAFFE'S CIVIL PROCEDURE BEFORE TRIAL

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.

APPEAL

Jump to full summary

Time for Appeal

United States v. Segal

938 F.3d 898, 2019 U.S. App. LEXIS 27779 (7th Cir. Sept. 16, 2019)

The Seventh Circuit holds that a court-approved settlement of a criminal-forfeiture case is essentially a contract, so that subsequent litigation seeking to modify the settlement is treated as a civil matter for purposes of calculating the time to file a notice of appeal.

ERIE DOCTRINE

Jump to full summary

State Anti-SLAPP Statutes

Klocke v. Watson

936 F.3d 240, 2019 U.S. App. LEXIS 25343 (5th Cir. Aug. 23, 2019)

The Fifth Circuit holds that the Texas anti-SLAPP statute does not apply to state-law claims in a federal action, because it is in direct conflict with the federal rules governing the adequacy of pleadings, the propriety of dismissal for failure to state a claim, and federal summary-judgment standards.

INTERSYSTEM PRECLUSION

Jump to full summary

Rooker-Feldman Doctrine

Malhan v. Sec'y U.S. Dep't of State

938 F.3d 453, 2019 U.S. App. LEXIS 28047 (3d Cir. Sept. 18, 2019)

The Third Circuit holds that the Rooker-Feldman doctrine does not apply when state-court proceedings have neither ended nor led to an order that is reviewable by the U.S. Supreme Court.

Continue on next page

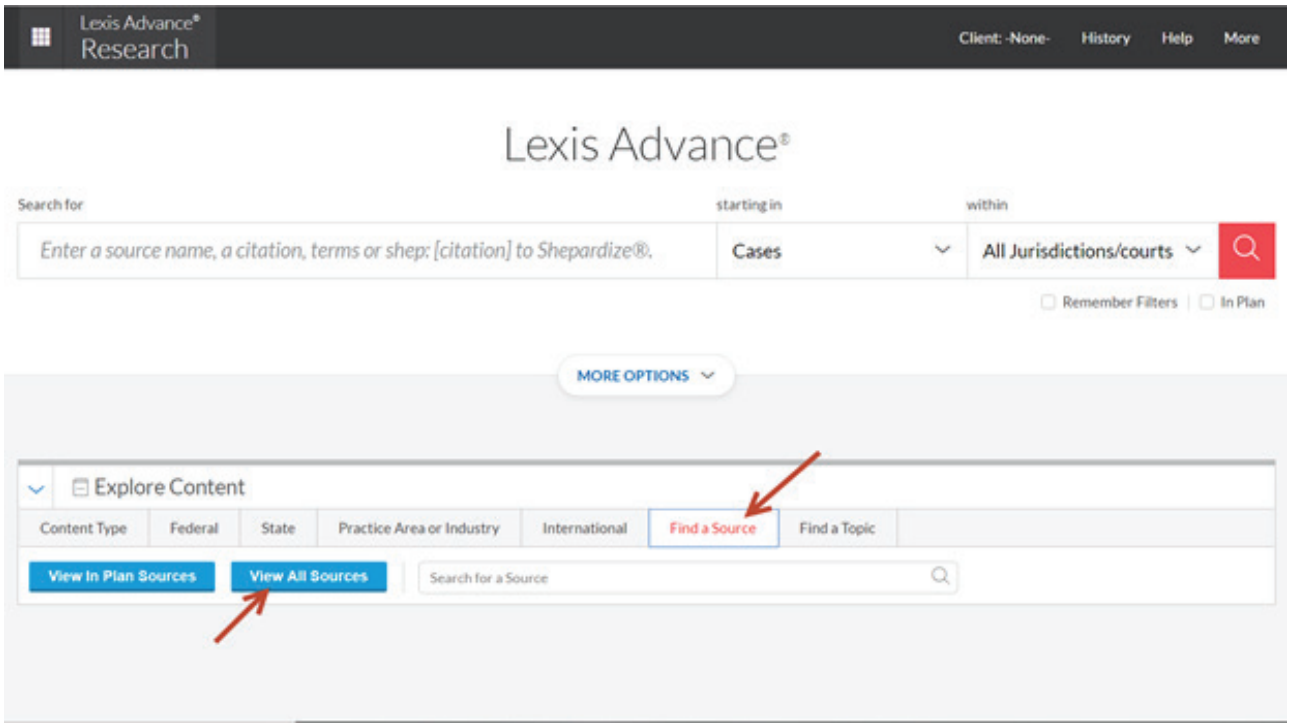
Find a Source and Find a Topic

Candace Kelly, Regional Solutions Consultant

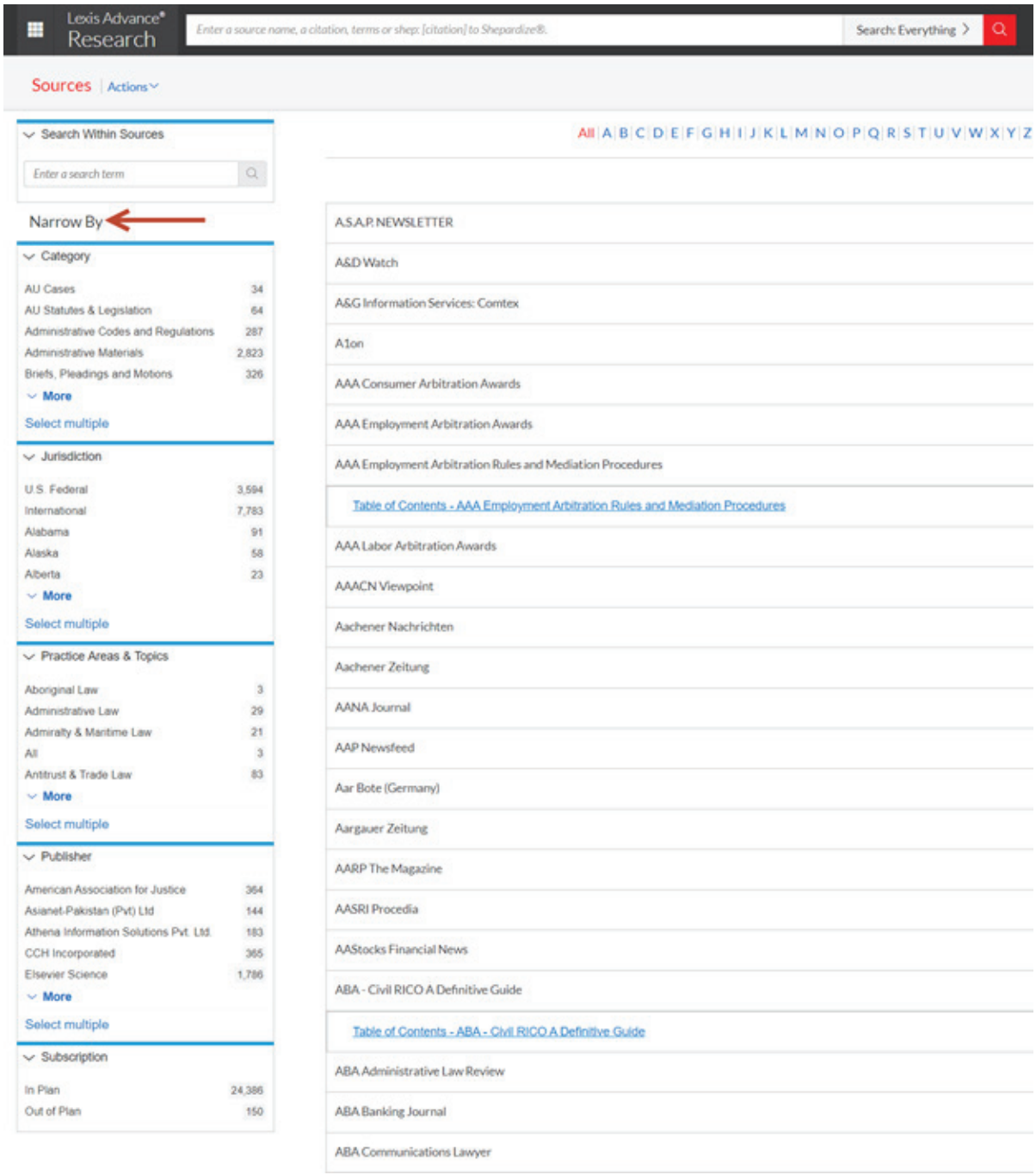
Do you ever need to conduct research in a practice area you know nothing about? The research task can seem like finding a needle in a haystack! Lexis Advance has a simple solution: "Find a Source" and "Find a Topic." Both unique features are in the "Explore Content" box on your home page. Let's dive a bit deeper!

FIND A SOURCE:

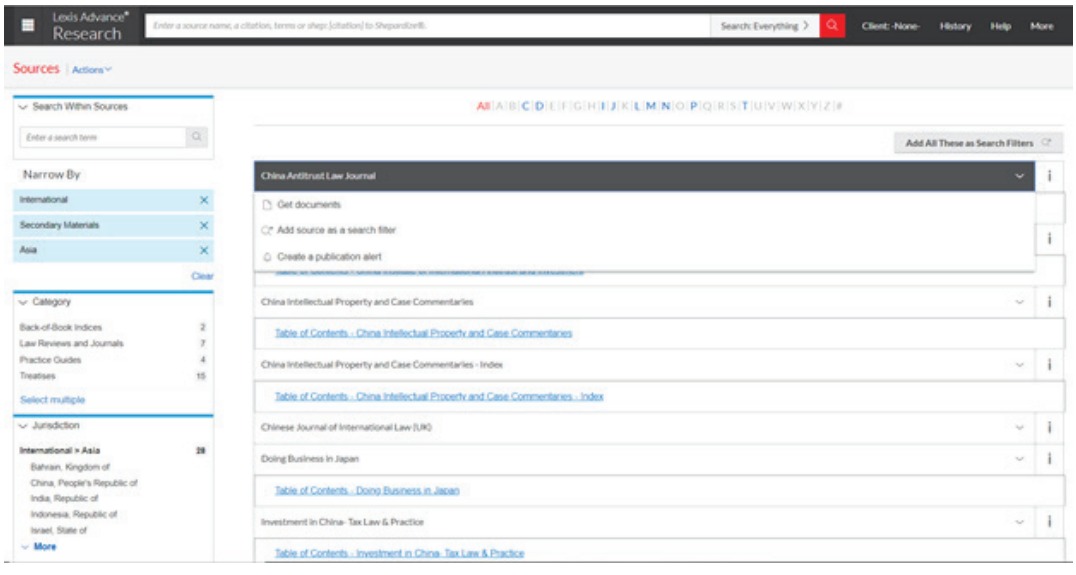
"Find a Source" shows you an alphabetical list of your available sources on Lexis Advance. Once you click on "View All Sources," you can narrow down the list with the following filters: category, jurisdiction, practice area, publisher, and subscription. Whether you are looking for an international secondary source with an Asia focus or a law review journal focused on criminal law, "Find a Source" will compile a list of sources!



Continue on next page



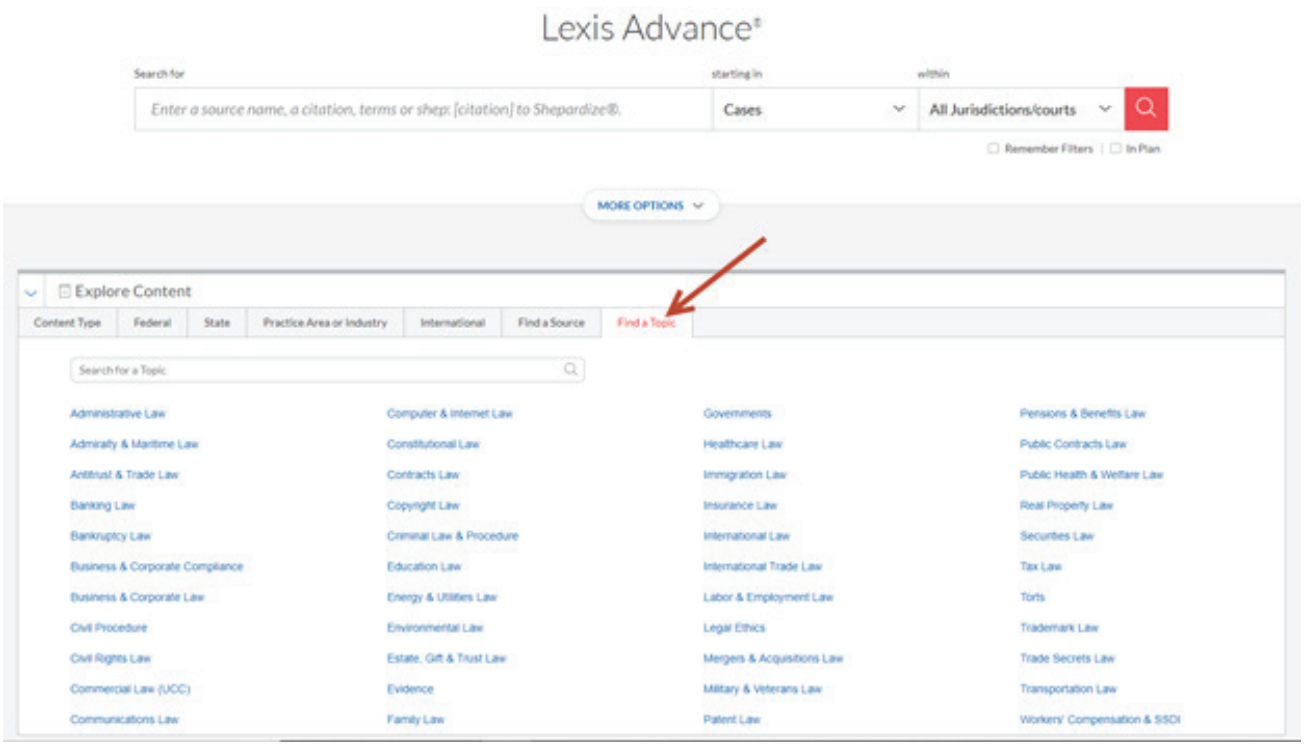
In “Find a Source” you can also seek source information, set a publication alert or jump to the table of contents. “Find a Source” is a great way to find that source that might just be that needle in a haystack!

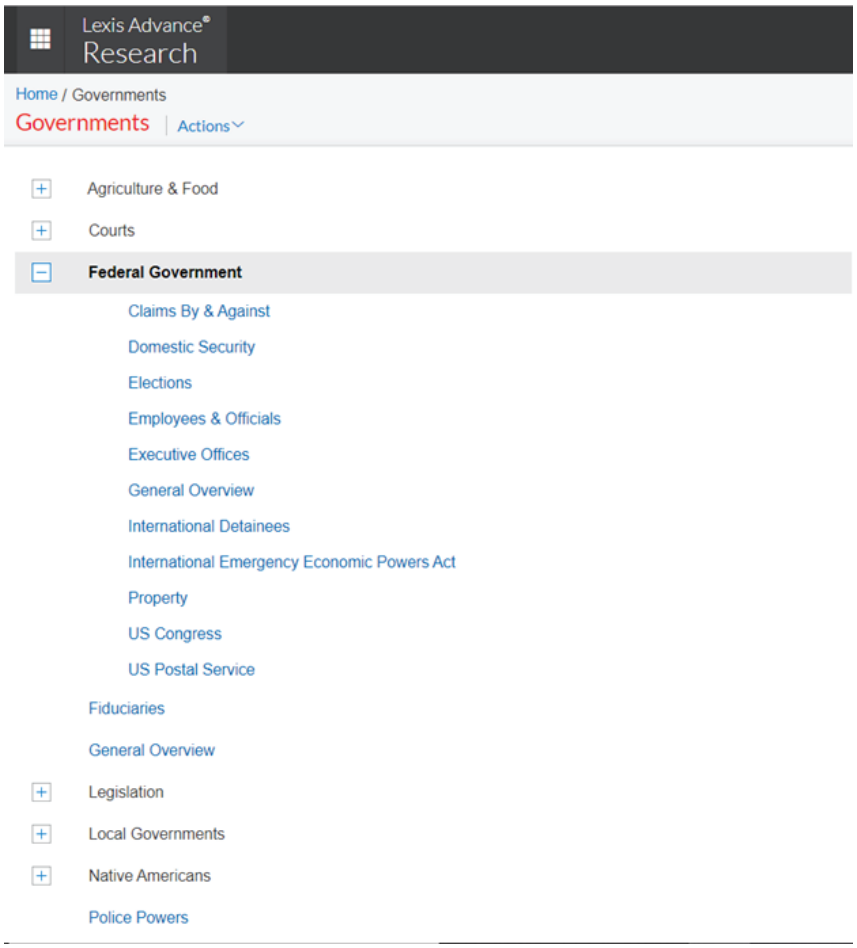


Continue on next page

FIND A SOURCE:

When you come across a topic you have never searched before and want a little extra help, let Lexis build a search for you! "Find a Topic" allows users to build a search within a variety of practice areas. When you use, "Find a Topic," you do not have to worry about using natural language or terms & connectors, all you have to do is find your topic and narrow down your search! Once you click on the broader starting topic, simply open the sub-topics until you are ready to run your search.





Continue on next page

Using Terms & Connectors to Increase Relevant Search Results

What is your preferred search style on Lexis Advance? Are you a natural language researcher or do you use terms & connectors (T&C)? When it comes to simple web searches, many of us tend to open a browser and toss a question into a search engine like Google without giving much thought to search logic. But, imagine that you have a complex research project to complete on Lexis Advance that includes multiple components. How do you ensure that your search results on Lexis Advance identify items that match the topic you are seeking? While the natural language or "Google-style" method mentioned above is an option, using T&C may return a set of results closer to the content you need as it allows you to truncate words and connect words/phrases within a certain proximity.

Perhaps you are searching for items which discuss whether student loans can be discharged in bankruptcy. By using T&C instead of natural language you give greater direction to how your search runs and may reduce research time by avoiding results which do not include substantive discussion of the topic. An example of a simple T&C search for this topic is as follows: "student loan" /10 bankrupt! A more complex search is: ((student or education) /5 (loan or debt)) /10 bankrupt! or discharge!

The most commonly used T&C are listed below, and a full list of T&C recognized on Lexis Advance can be found by clicking the Advanced Search link located on the mid-left side of the home page.

Connector	What It Does
" "	Finds the exact phrase
and	All words must be found and can be located anywhere in the document (alternative: **&**)
or	One or more words may be included, but not required
and not	Exclude documents containing the word or phrase; should be the last connector
/n	First word must be located within "n" words of the second (alternatives: **w/n** or **near/n**)
!	Find all word variations using the same root word (alternative: *****)

You Lexis consultant is also available to help with T&C research. Please feel free to reach out for training or assistance with your searches!

Continue on next page

Boilerplate Ain't Boilerplate No More

By Jim Wagstaffe

Lawyers--young and old—have varying experiences drafting and reading contracts, yet all the while focusing on the main "deal points" (e.g. price, quantity, delivery). In doing such work, we intuitively sense reaching what we were told years ago in law school was the boilerplate provisions, *i.e.*, the "standard" paragraphs at the end that often broker no debate between parties wearied at the end of extended back-and-forth negotiations.

However—and thanks in no small part to a stealth judicial revolution--boilerplate ain't boilerplate no more. For these "end of contract" clauses recently have been infused with strength and extraordinary meaning, addressing where and who will be the dispute resolver, the law that will govern the matter, and what rules of interpretation and remedies will or won't be in play.

These clauses, seemingly innocuous in their inception, often provide the fulcrum for success or failure in ensuing litigation. They include the following types of provisions: forum grabbers (consent to jurisdiction and forum selection), alternative dispute resolution commands (mediation and arbitration), law trumpers (governing law and remedy door closers) and rules for interpretation (e.g. non-contra preferendum clauses). And amazingly, there is even new case law on the hardly-noticed "approved as to form" clauses adorning the very end of such documents.

As a long time trial attorney (and author of the widely used LexisNexis federal practice guide), I have many times litigated and now regularly write about the meaning of such clauses, and have come to understand that increasingly such provisions are not boilerplate at all. See The Wagstaffe Group Practice Guide: Fed. Civil Proc. Before Trial (LN 2019). The impact of what we previously thought were "minor" contractual paragraphs now can be quite dramatic, often becoming absolute litigation game changers.

Pre-Designating the Dispute Forum Ain't No Small Thing

Anyone who says it's "no big deal" *where* the contract-dispute litigation will take place and before whom has never litigated a major case to its completion. In fact, there has been a judicial revolution in the last few years as to the enforcement of what I call "forum grabber" clauses such as consent to jurisdiction and venue forum selection clauses.ortant under a host of new federal court decisions.

There is no more important case on this topic than *Atlantic Marine Constr. Co. v. U.S. Dist. Ct.*, a Justice Alito opinion cited over 2,000 times in the past five years.[1] There, the forum selection clause identified Virginia as the designated venue notwithstanding that the underlying dispute was filed in Texas because the payment dispute arose out of construction at Fort Hood located in that state. Although virtually all witnesses and documents were located in Texas, the Supreme Court held that if valid, "a contract is a contract" and don't bother with consideration of the plaintiff's choice of forum, the private interests of witnesses or (except in rare cases) even the interests of justice or the judicial system. As in that case, the party with the superior bargaining power (the Virginia-based entity selecting the local subcontractor) got its way.[2]

Courts have applied the same presumptive enforcement for forum shopping clauses framed as "consent to personal jurisdiction" provisions. Since consent is a traditional basis for jurisdiction untethered by minimum contacts limitations, enforcement of such seemingly boilerplate clauses can indeed provide yet another game changer in terms of winning and losing. For if, as the courts tell us, the clause can be enforceable even if contained in a cruise lines ticket,[3] as part of an online reservation,[4] in a bill of lading,[5] or in a term of use in the shrink wrap,[6] then there is little doubt that such a provision ordinarily will be enforceable in the boilerplate of a written contract itself.

Continue on next page

Further, courts have also now been reading contractual clauses selecting only a state court forum as constituting a waiver of the otherwise existing right to remove the case to federal court on federal question or diversity jurisdiction grounds.[7] Importantly, if only one of the parties to the suit has agreed exclusively to state court, this nevertheless constitutes a waiver of the removal right for *all* parties.[8] Thus, be sure to read (or draft) the clause with an eye to determining its scope and desired applicability to your case or transaction.

ADR and Arbitration Clauses Ain't No Boilerplate

For many decades both state and federal courts have placed their imprimatur on contractual provisions mandating pre-lawsuit procedures (e.g. mediation) and other alternative dispute resolution commands such as compelled arbitration—so much so that all doubts will be resolved in favor of such provisions.[9] Since such a large percentage of contracts, including consumer contracts, compel arbitration as an alternative to a jury trial, it can hardly be argued that such clauses in any way come within the meaning of boilerplate.

A highly prominent series of Supreme Court cases have uniformly been approving and enforcing clauses that mandate individual—rather than class wide—arbitration. In fact, if a class arbitration right is to exist, it must be clear since an ambiguous contract will not suffice.

The "boilerplate" ADR or arbitration provision can be particularly significant because parties generally are free to stipulate to any procedure and to the person or persons who will decide the dispute. As such, litigation might be avoided or deemed not worth it if the chosen approach seems weighted in favor of an overly expedited or industry-friendly process. [11]

Other Formerly Boilerplate Provisions

In addition to forum grabbing and jury-avoiding clauses, the formerly end-of-contract standard provisions also can make a large difference in modern litigation. These include the following:

- Law trumping clauses such as choice of law provisions.
- Remedy door-closing clauses such as provisions limiting or eliminating consequential damages.
- Interpretation changers such as a provision underscor-ing that the contract was drafted by both sides and hence there is no contra preferendum (interpret against the drafter) aspect to later litigation conflicts.[10]

And there is even law now in some jurisdictions that the boilerplate of boilerplate aspect of a contract in the form of an attorney signing solely "to approve as to form and content" might have real meaning. Just this year, the California Supreme Court held that if an attorney signs the contract with this formulaic phrase, e.g. as to compelled confidentiality, it could result in a factual finding that counsel both recommended their clients sign and intended to be bound by the provision themselves.[12]

The Hot Issues Affecting So Much of What Used to Be Boilerplate Provisions

Since the former "boilerplate" provisions affecting forum designation, arbitration and interpretation can be so important, much of the action in recent cases centers on whether such provisions are valid and enforceable. Generally, such clauses will be enforced if they (1) are reasonably communicated to the parties, and (2) would not be unreasonable, unjust or otherwise violate a strong state public policy.[13]

Continue on next page

Many states have enacted statutes that limit the enforceability of selected forum, choice of law or arbitration clauses in certain types of situations and cases (e.g. identified consumer cases, employment contracts, subcontract construction cases, franchisor-franchisee contracts, etc.). So, one must be sure to check your local law as to such state public policies in this area.[14]

And finally, what has become one of the hottest issues regarding what we used to think of as boilerplate clauses is whether they can apply to non-signatories (e.g. third-party beneficiary of a contract). Whether such clauses will apply to such non-signatories as third-party beneficiaries, successors, subsidiaries, or corporate employees and officers often will depend on the severability of the action as well as the relationship between the signing and non-signing parties.[15]

Other Formerly Boilerplate Provisions

Finally and happily, there is at least one boilerplate term that plainly remains so in this modern age. A provision allowing counterpart signatures, while fairly common, typically is meaningless as signing a contract in this format (i.e., signing different copies of the identical contract) is superfluous since court holdings in most jurisdictions (and laws authorizing electronic/digital signatures) allow enforcement of agreements in this format even if there is not a counterparts clause.[16] So, some boilerplate remains so.

However, the main thing to remember about the effect of various boilerplate provisions is that the law is ever changing. You can stay abreast of such changes by reading our many discussions in The Wagstaffe Group Practice Guide: Fed. Civil Proc. Before Trial as well as going online and using our Current Awareness component of TWG that provides weekly updates on the hottest new cases in litigation practice. And remember the words of General Eric Shinseki: "If you don't like change, you're going to like irrelevance even less."

Authority you can trust, James M. Wagstaffe

Renowned author James M. Wagstaffe is a preeminent litigator, law professor and expert on pretrial federal civil procedure. He has authored and co-authored a number of publications, including The Wagstaffe Group Practice Guide: Federal Civil Procedure Before Trial, which includes embedded videos directly within the content on Lexis Advance. As one of the nation's top authorities on federal civil procedure, Jim has been responsible for the development and delivery of federal law, and regularly educates federal judges and their respective clerk staffs. Jim also currently serves as the Chair of the Federal Judicial Center Foundation Board—a position appointed by the Chief Justice of the United States Supreme Court.

---

[1] *Atlantic Marine Constr. Co. v. U.S. Dist. Ct.*, 571 U.S. 568 (2013).

[2] The impact of the decision cannot be overestimated as in that case forcing the Texas party and their local attorneys to litigate their $150,000 construction dispute in a geographically inconvenient (and expensive) forum no doubt could in future cases lead to unfavorable settlements or even abandonment of claims in their entirety. *See also Sun v. Advanced China Healthcare, Inc.*, 901 F.3d 1081 (9th Cir. 2018) (forum selection clause results in dismissal of Washington State securities suit for re-filing in Silicon Valley).

[3] See *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 589 (1991) (forum selection clause in cruise ticket).

[4] *Decker v. Circus Circus Hotel*, 49 F.Supp.2d 743, 748 (D. N.J. 1999) (venue transferred on basis of online forum selection clause); *Rudgayzer v. Google, Inc.*, 986 F.Supp.2d 151, 155 (E.D. N.Y. 2013) (click-wrap agreement reasonably communicated to email account holders).

[5] *Kukje Jwajae Ins. Co. v. M/V Huyundai Liberty*, 408 F.3d 1250, 1254-1255 (9th Cir. 2005) (bill of lading forum selection clause enforceable).

[6] *Taxes of Puerto Rico, Inc. v. Taxworks, Inc.*, 5 F.Supp.2d 185, 189 (D. P.R. 2014) (venue selection clause in end user provision in software package).

[7] *City of Albany v. CH2M Hill, Inc.*, 924 F.3d 1306 (9th Cir. 2019); *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); *Grand View v. Helix Electric*, 847 F.3d 255 (5th Cir. 2017); TWG §8-VII[A][2].

[8] *Autoridad de Energia Electrica v. Vitol S.A*, 859 F.3d 140 (1st Cir. 2017).

[9] *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *Granite Rock Co. v. Int'l Broth. of Teamsters*, 561 U.S. 287, 298 (2010); TWG at § 13-VII[H].

[10] *Lamp Plus, Inc. v. Varela, 139 S.Ct.* 1407, 1419 (2019); *see also Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612, 1621 (2018) (court confirms enforceability of class action waivers in arbitration agreements); *AT&T Mobility LLC v. Cponcepcion*, 563 U.S. 33 (2011) (same).

[11] *See Baravai v. Josephtal, Lyon & Ross, Inc.*, 28 F.3d 704,709 (7th Cir. 1994) (parties free to specify idiosyncratic terms of arbitration).

[12] *Monster Energy Co. v. Schechter*, 7 Cal 5th 781 (2019).

[13] *See Martinez v. Bloomberg L.P.*, 740 F.3d 211, 219 (2d Cir. 2014) (forum selection clauses); *Al Copeland Invs., LLC v. First Specialty Ins. Corp.*, 884 F.3d 540 (5th Cir. 2018) (strong presumption to enforce forum selection clause unless obtained through fraud, selects a gravely inconvenient forum, is fundamentally unfair or violates a strong public policy of the forum); *Starke v. SquareTrade, Inc.*, 913 F.3d 279 (2d Cir. 2019) (arbitration clause in "terms and conditions" section on product seller's website was not clear and conspicuous as to require arbitration); cf. *Dicent v. Kaplan University*, 2019 U.S. App. LEXIS 872 (3d Cir. 2019) (court compelled arbitration based on clause in an agreement electronically signed by a student taking online courses).

[14] *See, e.g.*, California Labor Code sec. 1241—employers cannot condition employment on employee's agreement to forum selection or choice of law clauses as to states other than where employment takes place; Conn. Gen. Stat. sec. 42-133ff(F)—state public policy limiting suits outside state against local franchisees; *see also Gemini Tech. v. Smith & Wesson*, 931 F.3d 911 (9th Cir. 2019) (forum selection clause not enforceable since it violates clear state public policy invalidating clauses requiring litigation out-of-state) .

[15] *See In re: McGraw-Hill Global Education Holdings LLC*, 909 F.3d 48 (3d Cir. 2018)—non-signatory not bound if not "closely related"; *In re Howmedica Osteonics Corp.*, 867 F.3d 390, 407 (3d Cir. 2017); *see also GE Energy Power Conversion France SAS v. Outokumpu Stinless USA LLC , cert. granted*, No. 18-1048 (2019) (certiorari to decide if a non-signatory can compel arbitration in an international setting).

[16] *See, e.g. Espejo v. Southern California Permanente Medical Group*, 246 Cal. App. 4th 1047, 1060-1061 (2016) (authenticated electronic signature per Cal. Civil Code sec. 1663.1 et seq. on arbitration agreement valid and enforceable).

Continue on next page

APPEAL

Time for Appeal

United States v. Segal

938 F.3d 898, 2019 U.S. App. LEXIS 27779 (7th Cir. Sept. 16, 2019)

The Seventh Circuit holds that a court-approved settlement of a criminal-forfeiture case is essentially a contract, so that subsequent litigation seeking to modify the settlement is treated as a civil matter for purposes of calculating the time to file a notice of appeal.

Background. After the defendant in this case was convicted of several federal crimes, he was ordered to forfeit to the government $15 million and his entire interest in his company (which had also been convicted of several crimes). After years of dispute over the defendant's personal forfeiture obligation, he and the government agreed on a court-approved settlement. In the present case, the defendant sought to rescind or modify the agreement. The district court denied the attempt, and the defendant appealed.

As a threshold matter, the Seventh Circuit had to decide whether the defendant's appeal was timely. This determination turned on whether the litigation over the defendant's request to modify the settlement was a criminal case or a civil case.

Time to Appeal. In a criminal case, a notice of appeal must be filed within 14 days after entry of the order appealed from [Fed. R. App. P. 4(b)(1)(A)]. By contrast, the deadline for filing a notice of appeal in a civil case in which the United States is a party is 60 days after entry of the order appealed from [28 U.S.C. § 2107(b); Fed. R. App. P. 4(a)(1)(A)]. In the present case, the defendant's notice of appeal was filed after expiration of the 14-day period, but within the 60-day period. The proper characterization of the case as criminal or civil was therefore critical.

The Seventh Circuit noted that because it is not mandated by statute, the appeal deadline for criminal cases technically is not a jurisdictional requirement and thus could be waived or forfeited if not asserted by an appellee. In the present case, however, the government had properly raised the issue, and so it was necessary for the court to decide whether this case was criminal or civil.

Contractual Dispute Embedded Within Criminal Case. The Seventh Circuit found that this case was properly viewed as a civil matter. The defendant had titled his motion in the district court as one to modify the underlying forfeiture order. Ordinarily, an appeal from a decision on such a motion is treated as a criminal matter, since criminal forfeitures are considered punishment and therefore part of the criminal sentence. In this case, however, the court of appeals found that the real substance of the relief sought was rescission or modification of the court-approved settlement agreement. The order appealed from thus resolved what was essentially a civil contractual dispute embedded within the criminal case.

Applying a pragmatic approach, the Seventh Circuit looked to the substance and context of the proceedings below. The court found it significant that the defendant and the government had agreed that the settlement would satisfy the defendant's forfeiture obligations, and there had been no forfeiture order in effect since that settlement. The court of appeals concluded that the settlement was properly viewed as a contract and the dispute over it was a civil matter. Accordingly, this appeal was subject to the 60-day filing period for civil cases, and the defendant's appeal was timely.

Turning to the merits of the appeal, the Seventh Circuit affirmed the district court's order denying the defendant's motion to modify the settlement.

Continue on next page

No Intervention by Defendant's Former Spouse. The Seventh Circuit went on to affirm the district court's order denying intervention by the defendant's ex-wife. She had previously intervened in the original forfeiture proceedings and had her own settlement agreement with the government. Under that agreement, she received some property that had been granted to her in the divorce settlement, which occurred not long after the defendant's conviction. Under her settlement with the government, the ex-wife gave up any claim to the defendant's remaining property that was held by the government, and could reassert a claim only if the government were to disclaim an interest in any of that remaining property. Because that condition had not occurred—and might never occur—the Seventh Circuit concluded that the ex-wife had no current interest to assert in the current proceedings. Therefore, she could not intervene as of right, and the district court did not abuse its discretion by denying permissive intervention [see Fed. R. Civ. P. 24(a)(2), (b)(1)(B)].

ERIE DOCTRINE

State Anti-SLAPP Statutes

Klocke v. Watson

936 F.3d 240, 2019 U.S. App. LEXIS 25343 (5th Cir. Aug. 23, 2019)

The Fifth Circuit holds that the Texas anti-SLAPP statute does not apply to state-law claims in a federal action, because it is in direct conflict with the federal rules governing the adequacy of pleadings, the propriety of dismissal for failure to state a claim, and federal summary-judgment standards.

Facts and Procedural Background. A student at a state university in Texas committed suicide after he was refused permission to graduate. The refusal was a punishment imposed under Title IX for alleged homophobic harassment of another student. As administrator of the estate, the student's father sued both the university for Title IX violations, and the harassment accuser for defamation. The accuser moved to dismiss the latter claims under the Texas anti SLAPP statute, also known as the Texas Citizens Participation Act (TCPA) [see Tex. Civ. Prac. & Rem. Code § 27.001 et seq.].

The plaintiff responded that the TCPA should simply be inapplicable in federal court, but did not address any issues based on the particular requirements of the statute. Alternatively, the plaintiff moved for discovery and further time to respond if the court held that the TCPA applied. The district court overruled the objection to applying the TCPA, and concluded that the failure to raise any "substantive" arguments waived them under local rules. The district court therefore granted the motion to dismiss and awarded attorney's fees, expenses, and sanctions under the TCPA. The district court entered a final judgment as to the dismissal [see Fed. R. Civ. P. 54(b)], and the plaintiff appealed.

Attributes of State Anti-SLAPP Statutes. State anti SLAPP (Strategic Lawsuits Against Public Participation) statutes govern certain expedited dismissals of defamation claims or other state-law claims that arise from or are related to free speech or other constitutional rights. California was the first state to adopt such a statute, and its provisions have become a model for those later enacted by other states, including the Texas statute at issue. Though the precise terms of these statutes vary from state to state, most share the following attributes:

1. Authorization of a special motion to strike or dismiss [see Tex. Civ. Prac. & Rem. Code § 27.003(a)] one or more state-law claims.

2. A requirement that the defendant bring the motion within a specified time after service [see Tex. Civ. Prac. & Rem. Code § 27.003(b) (60 days)].

3. A stay of discovery after the motion is filed [see Tex. Civ. Prac. & Rem. Code § 27.003(c)].

Continue on next page

4. Adoption of standards for the court's decision on the motion [see Tex. Civ. Prac. & Rem. Code § 27.005(b)–(d)].

5. A requirement that a decision under those standards be issued within a specified time after the motion is filed [see Tex. Civ. Prac. & Rem. Code § 27.005(a) (30 days)].

6. A provision authorizing or requiring an award of attorney's fees, sanctions, or both incident to a dismissal of one or more claims under the statute [see Tex. Civ. Prac. & Rem. Code § 27.009].

7. Authorization of an interlocutory appeal of any decision on the motion [see Tex. Civ. Prac. & Rem. Code § 27.008(a); Tex. Civ. Prac. & Rem. Code § 54.014(a)(12)].

When state-law claims are asserted in federal court, federal courts have disagreed over two separate but related issues: (1) whether these state statutes apply at all under the Erie doctrine; and (2) if they do, which of the listed attributes, if any, are displaced by contrary federal procedural rules.

Initial Decisions Applied State Law. When these issues were first presented to federal courts, they typically applied state anti-SLAPP statutes as a matter of course to avoid inconsistent outcomes and discourage forum-shopping [e.g., United States ex rel. Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 973 (9th Cir. 1999)]. The Fifth Circuit followed this approach as well, holding with little analysis that Louisiana's "nominally procedural" anti SLAPP statute applies in federal court [Henry v. Lake Charles American Press, LLC, 566 F.3d 164, 168–169 (5th Cir. 2009)].

***Abbas* Case Marked Shift in Analysis.** In 2015, however, federal courts began to reassess their prior approach. The first court to do so was the D.C. Circuit in Abbas v. Foreign Policy Group, LLC, in an opinion by then-Circuit Judge Kavanaugh, which held that its local anti SLAPP statute requiring a plaintiff to show a likelihood of success does not apply at all in a diversity action because it answers the same question as the federal rules governing dismissal and summary judgment, i.e., when can the defendant avoid going to trial? [Abbas v. Foreign Policy Group, LLC, 783 F.3d 1328, 1333–1337 (D.C. Cir. 2015) (Kavanaugh, C. J.)]. As the Abbas case pointed out, the application of a state anti-SLAPP statute does not present the broader Erie issue of whether state law is substantive or procedural; instead, it presents the more narrowly focused inquiry of whether that law directly conflicts with federal procedural rules and is therefore presumptively inapplicable under Hanna v. Plumer [380 U.S. 460, 85 S. Ct. 1136, 14 L. Ed. 2d 8 (1965)]. A direct conflict is presented when the applicable federal rule and the state law at issue "answer the same question" in different ways [Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 398–399, 130 S. Ct. 1431, 176 L. Ed. 2d 311 (2010)].

The Eleventh Circuit has agreed with the approach of Abbas, holding that a state anti SLAPP statute does not apply at all in a diversity action [Carbone v. CNN, Inc., 910 F.3d 1345, 1350 (11th Cir. 2018)]. In addition, the Tenth Circuit has essentially agreed, holding that a state anti SLAPP statute does not apply, though it confined its analysis to the particular New Mexico statute at issue, and did not adopt a categorical rule applicable to other states in the circuit [Los Lobos Renewable Power, LLC v. AmeriCulture, Inc., 885 F.3d 659, 668–670 (10th Cir. 2018), discussed in May 2018]. Similarly, the Ninth Circuit has adjusted its approach to the application of the California anti SLAPP statute, holding that the only attributes that apply in federal court are the initial authorization for the motion and a resulting fee award, and all other features of the statute as to the resolution of the merits of the motion are displaced by federal pleading and summary-judgment standards [Planned Parenthood Fed'n of Am. v. Ctr. for Med. Progress, 890 F.3d 828, 833–835 (9th Cir. 2018)].

Continue on next page

Fifth Circuit Adopts Abbas Approach. Returning to the instant action, the Fifth Circuit concluded that its analysis was governed by Hanna and whether the Texas anti SLAPP statute presented a direct conflict with the federal rules. The court found the Abbas decision to be "most persuasive" because Rules 12 and 56, governing dismissal and summary-judgment motions, respectively, answer the same question as the Texas anti SLAPP statute, i.e., when can the defendant secure a dismissal or judgment before trial? The court concluded that state law conflicts with a federal procedural rule when it imposes additional procedural requirements beyond those of the federal rules. In short, the rules "answer the same question" when each specifies requirements for a case to proceed at the same stage of litigation. Because the TCPA's burden shifting framework imposes additional requirements beyond those found in the federal rules and answers the same question, the state law does not apply in federal court.

Federal Rules Are Comprehensive Standards. The Fifth Circuit next rejected the argument that the federal rules were mere minimum requirements, and that state law can supplement its provisions with respect to state-law claims in federal court. The court noted that "the Federal Rules impose comprehensive, not minimum, pleading requirements." Citing the Eleventh Circuit's decision in Carbone, the court noted that Rules 8, 12, and 56 are a comprehensive framework governing pretrial dismissal and judgment, so there is no room for any other device for determining whether a valid claim supported by sufficient evidence avoids pretrial dismissal or judgment.

Rules Regulate Procedure. Once a conflict has been found, the federal rule displaces the state rule under Hanna if it is a valid exercise of congressional rulemaking authority under the Rules Enabling Act. The Fifth Circuit concluded that there is "no doubt" that Rules 8, 12, and 56 affect only the process of enforcing the litigants' rights and not the rights themselves, and thus really regulate procedure and are valid under the Rules Enabling Act.

Previous Fifth Circuit Cases Did Not Conclusively Decide Issue. Finally, the Fifth Circuit rejected the argument that its Henry precedent under the Louisiana anti SLAPP statute [Henry v. Lake Charles Am. Press, LLC, 566 F.3d 164 (5th Cir. 2009)] controlled the outcome, noting that the provisions of each state statute are distinct, and that the court had specifically reserved the issue of whether the TCPA applies in federal court on multiple occasions [see Block v. Tanenhaus, 867 F.3d 585, 589 n.2 (5th Cir. 2017) (collecting cases)]. As the court put it, it was not bound by an unargued and undecided issue in another case interpreting another state's dissimilar statute.

No Waiver Under Local Rule. Because the plaintiff objected to the application of the TCPA at all and the Fifth Circuit agreed, that was sufficient under the district court's local rules, and the failure to oppose the discrete issue of how the statute should be applied was not a waiver.

Disposition. The Fifth Circuit reversed the district court's grant of the defendant's motion to dismiss under the Texas anti SLAPP statute, as well as the resulting award of attorney's fees and sanctions, and remanded for further proceedings.

Continue on next page

INTERSYSTEM PRECLUSION

Rooker-Feldman Doctrine

Malhan v. Sec'y U.S. Dep't of State

938 F.3d 453, 2019 U.S. App. LEXIS 28047 (3d Cir. Sept. 18, 2019)

The Third Circuit holds that the *Rooker-Feldman* doctrine does not apply when state-court proceedings have neither ended nor led to an order that is reviewable by the U.S. Supreme Court.

***Rooker-Feldman* Doctrine.** The *Rooker-Feldman* doctrine embodies the principle that lower federal courts lack jurisdiction over claims seeking review of state-court judgments [*see* District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413, 44 S. Ct. 149, 68 L. Ed. 362 (1923)]. In *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, the Supreme Court described the doctrine as a narrow doctrine, confined to "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments" [Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 284, 125 S. Ct. 1517, 161 L. Ed. 2d 454 (2005)].

In this case, the Third Circuit considered, as a matter of first impression within the circuit, whether the *Rooker-Feldman* doctrine applies to a state court's interlocutory orders.

The Third Circuit began by noting that *Exxon Mobil* itself offers conflicting guidance. In the passage quoted above, the *Exxon Mobil* Court's reference to "state-court judgments" could be read to include nonfinal orders [see Fed. R. Civ. P. 54(a) ("'Judgment' as used in these rules includes a decree and any order from which an appeal lies.")]. On the other hand, *Exxon Mobil* described *Rooker and Feldman* as cases in which "the losing party in state court filed suit in federal court *after the state proceedings ended*" [see Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 291, 125 S. Ct. 1517, 161 L. Ed. 2d 454 (2005) (emphasis added)]. That language suggests that the Rooker-Feldman doctrine applies only to final state-court judgments. And the Third Circuit further noted that the *Exxon Mobil* Court's holding that *Rooker-Feldman* "is confined to cases of the kind from which the doctrine acquired its name" [*see* Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 284, 125 S. Ct. 1517, 161 L. Ed. 2d 454 (2005)] invites disagreement about the scope of *Rooker* and *Feldman*.

The Third Circuit did find guidance in the "practical finality" approach adopted by the First Circuit in *Federacion de Maestros de Puerto Rico v. Junta de Relaciones del Trabajo de Puerto Rico*. Under that approach, there is a state-court "judgment" for purposes of the Rooker-Feldman doctrine if (1) the highest state court in which review is available has affirmed the judgment and nothing is left to be resolved, (2) the state action has reached the point where neither party seeks further action, or (3) the state proceeding has finally resolved all federal questions in the litigation [Federacion de Maestros de P.R. v. Junta de Relaciones del Trabajo de P.R., 410 F.3d 17, 24–25 (1st Cir. 2005)].

Following the First Circuit's *Federacion* approach, the Third Circuit held in this case that the *Rooker-Feldman* doctrine does not apply when state proceedings have neither ended nor led to orders that are reviewable by the U.S. Supreme Court [*see* Federacion de Maestros de P.R. v. Junta de Relaciones del Trabajo de P.R., 410 F.3d 17, 26–27 (1st Cir. 2005)].

The Third Circuit thus joins the Second, Eighth, Ninth, Tenth, and Eleventh Circuits, all of which have cited *Federacion* with approval [*see* Robins v. Ritchie, 631 F.3d 919, 927 (8th Cir. 2011); Nicholson v. Shafe, 558 F.3d 1266, 1274–1276, 1279 (11th Cir. 2009); Guttman v. G.T.S. Khalsa, 446 F.3d 1027, 1032 & n.2 (10th Cir. 2006); Hoblock v. Albany County Bd. of Elections, 422 F.3d 77, 89 (2d Cir. 2005); Mothershed v. Justices of Supreme Court, 410 F.3d 602, 604 n.1 (9th Cir. 2005), *as amended on denial of reh'g*, 2005 U.S. App. LEXIS 14804 (9th Cir. July 21, 2005)].