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# 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

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**Discretionary Interlocutory Appeals**

***Groves v. United States***

941 F.3d 315, 2019 U.S. App. LEXIS 31974 (7th Cir. Oct. 25, 2019)

The Seventh Circuit, overruling circuit precedent, holds that a district court that has certified an interlocutory order for appeal lacks the power to extend or restart the 10-day time to petition the court of appeals for permission to appeal.

### PRETRIAL SCHEDULING ORDERS

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**Modification**

***Petrone v. Werner Enters., Inc.***

940 F.3d 425, 2019 U.S. App. LEXIS 30344 (8th Cir. Oct. 10, 2019)

The Eighth Circuit ruled that the district court abused its discretion by granting plaintiffs' request to extend the Rule 16(b) disclosure deadline despite finding that good cause for the extension had not been shown.

### PROCEEDING IN FORMA PAUPERIS

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**Prisoner Litigation**

***Brown v. Sage***

941 F.3d 655, 2019 U.S. App. LEXIS 32604 (3d Cir. Oct. 30, 2019) (en banc)

The Third Circuit, overruling circuit precedent, holds that in deciding whether to dismiss a suit by a prisoner who seeks to proceed in forma pauperis, a court has discretion to consider the merits or to evaluate the prisoner's application to proceed in forma pauperis, in any order or even simultaneously.



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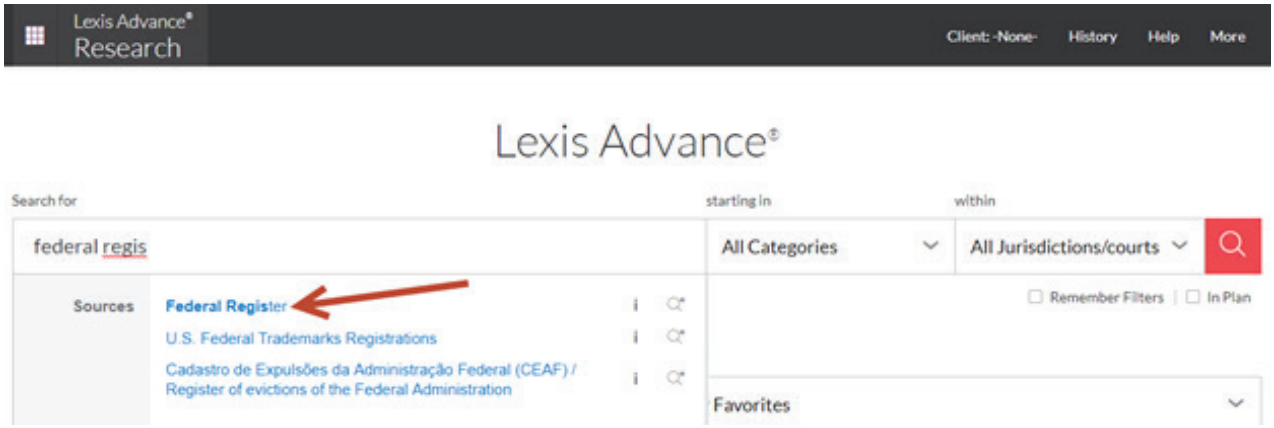


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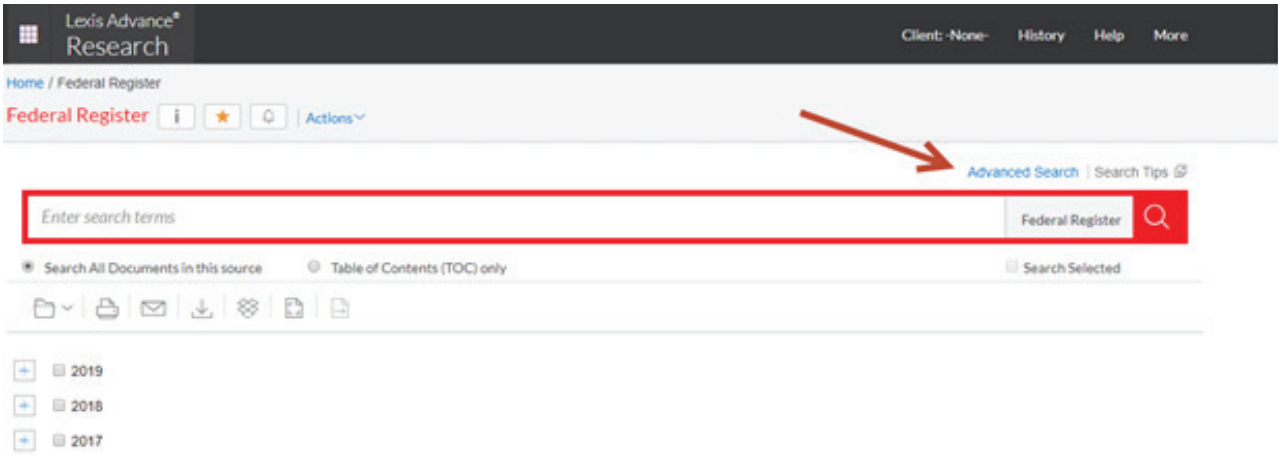


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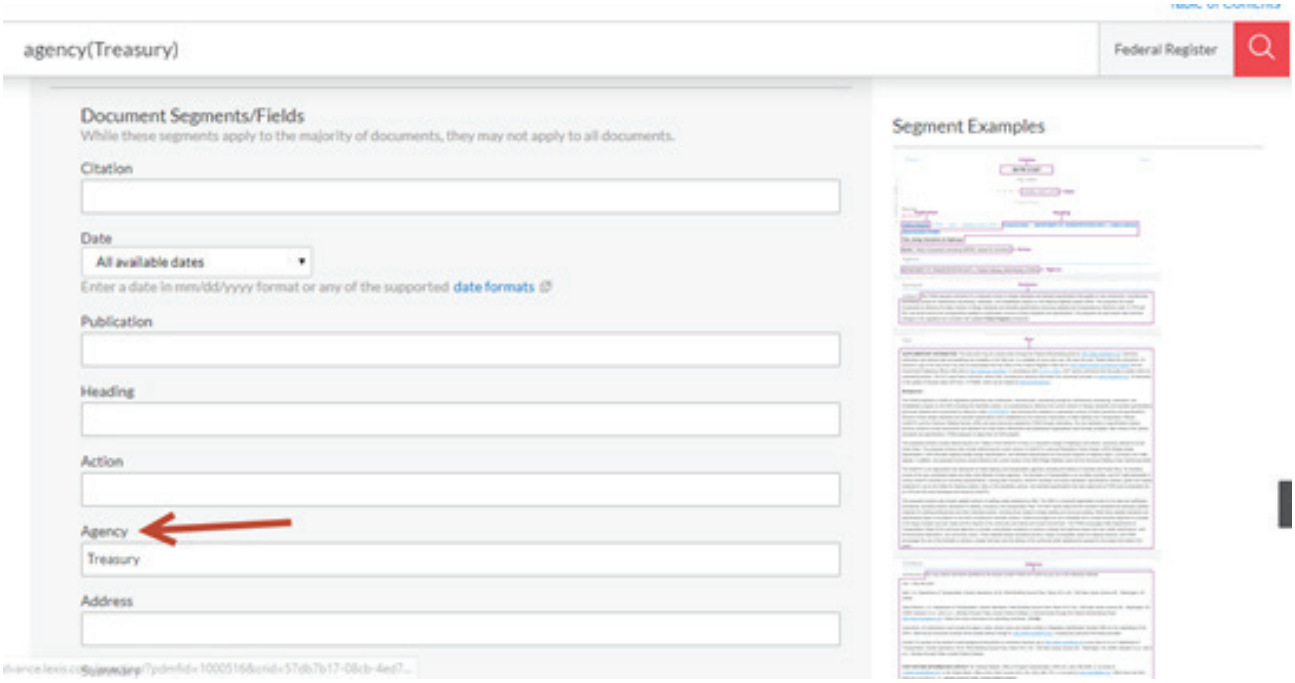
3. Scroll down to the available segments. Often, a sample document is available on the righthand margin that shows where the segments are located in the document.

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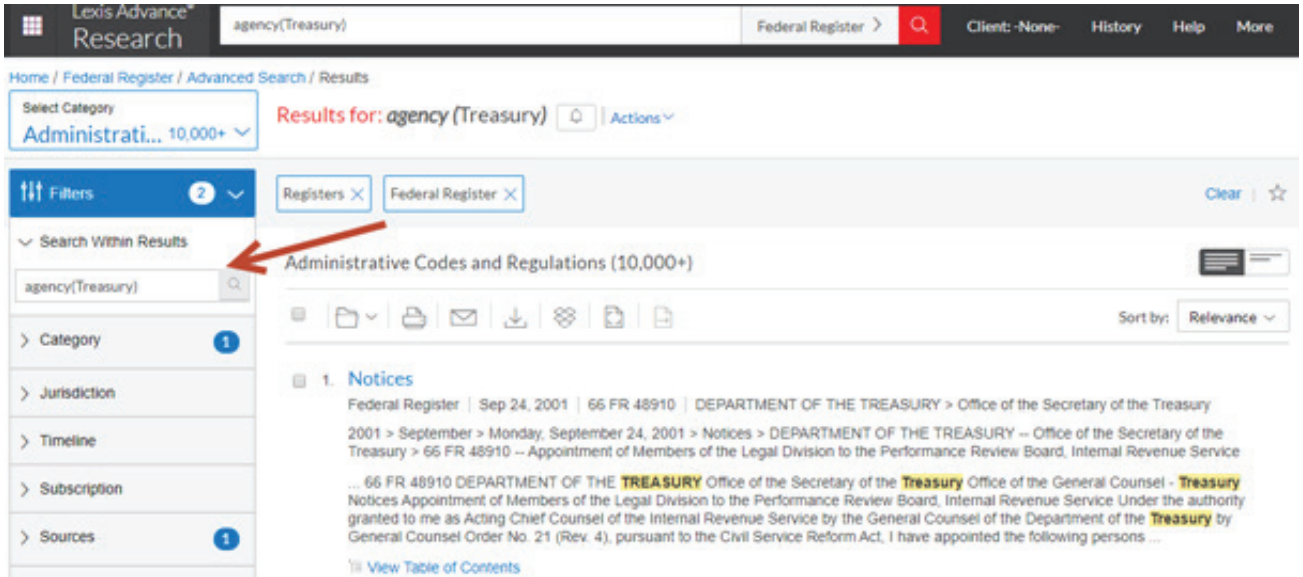


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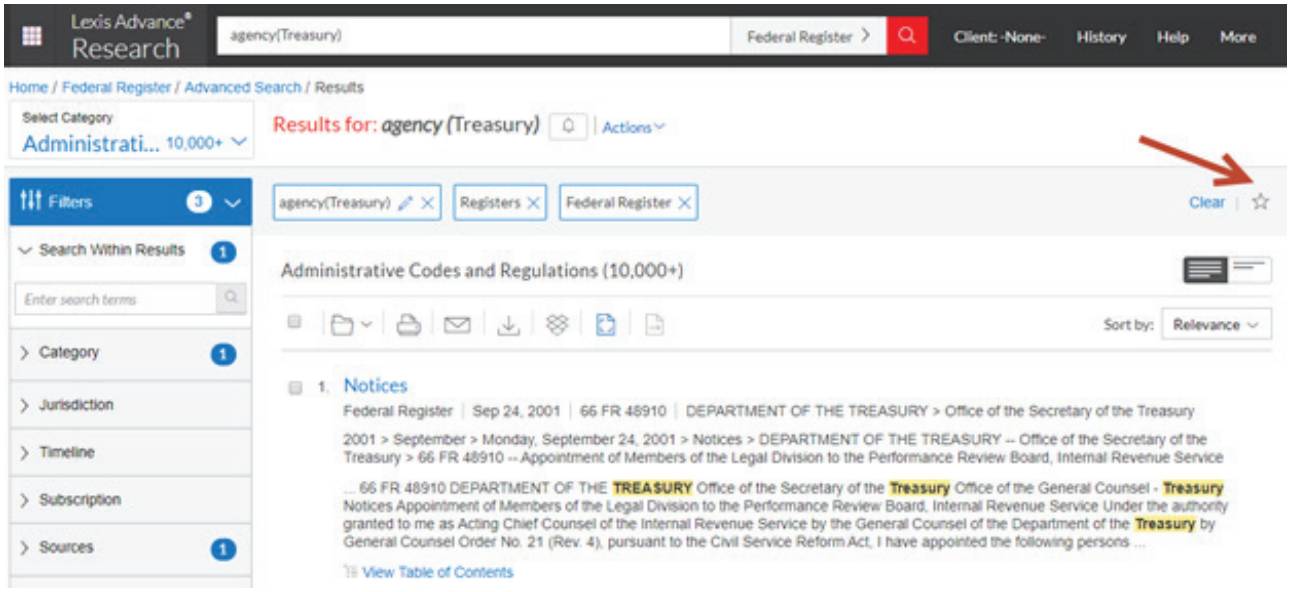


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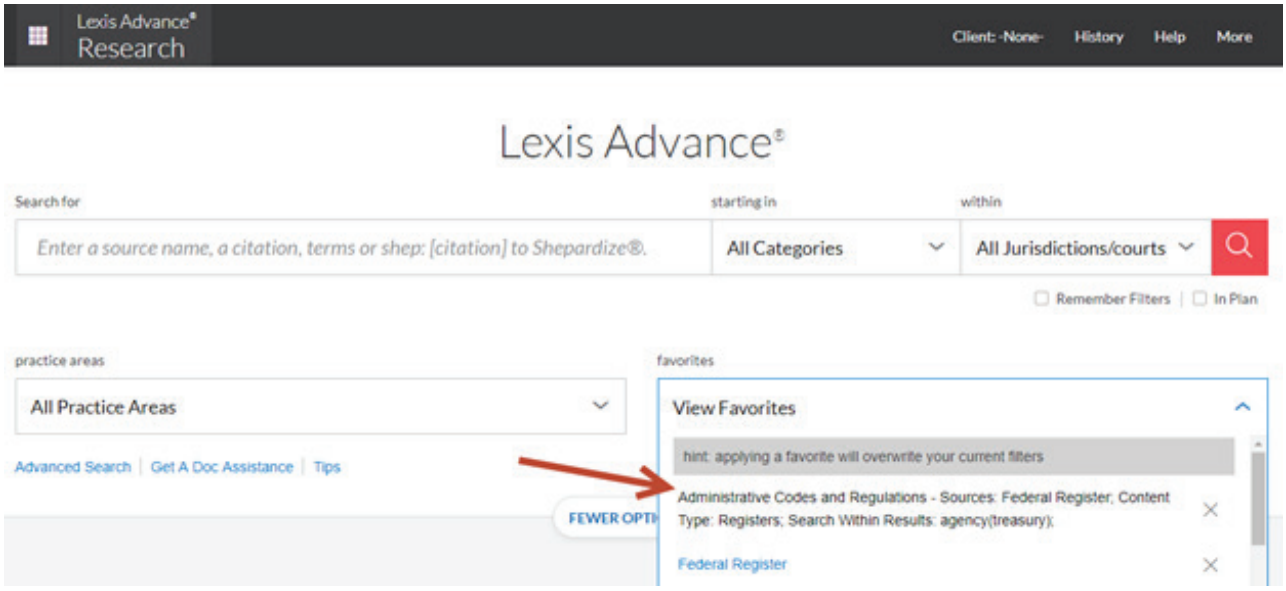


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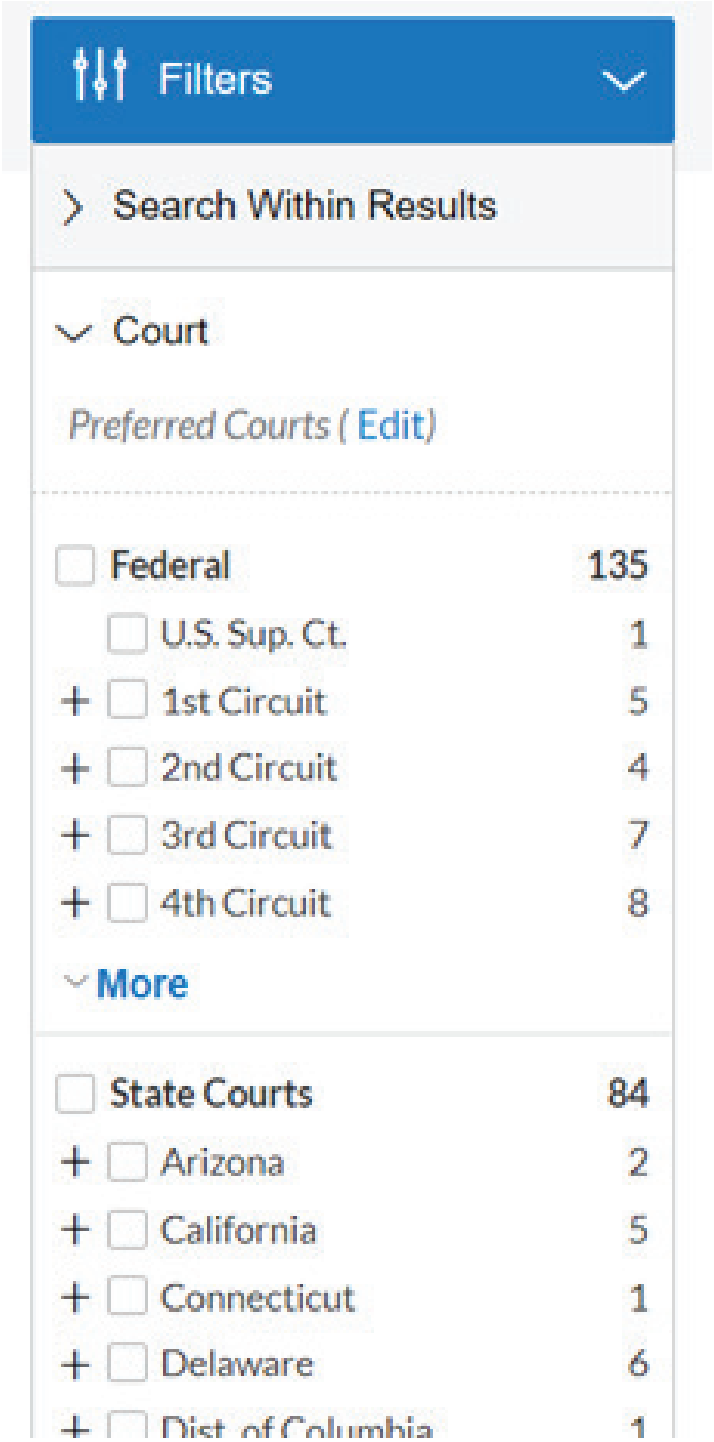


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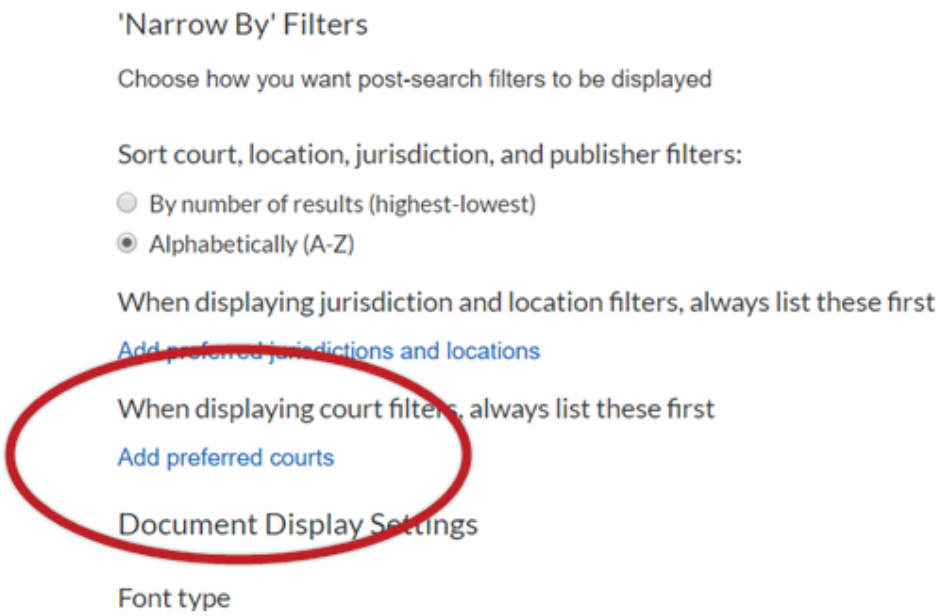
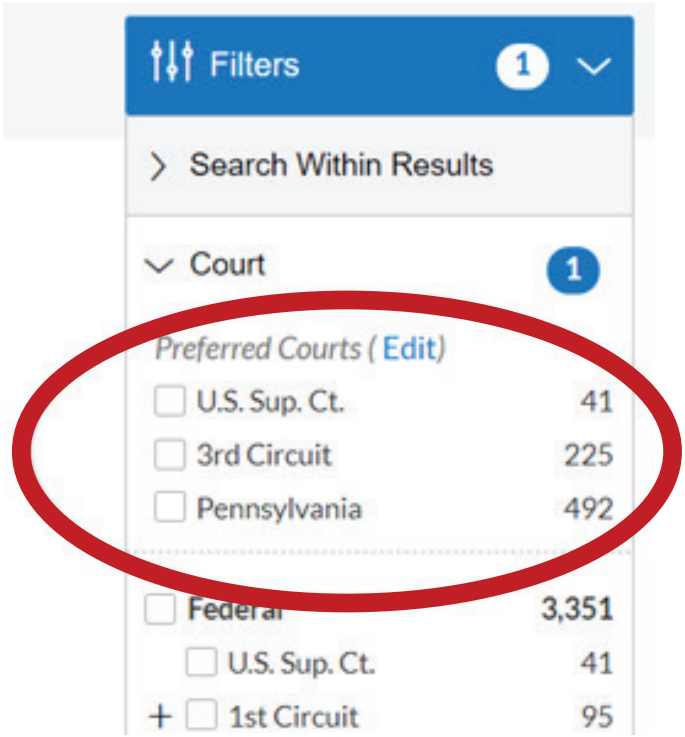
You can customize a preferred courts list by clicking “edit” next to “preferred courts.” The “edit” link brings you to the settings page where you can select the courts you search most often at the top of your list, giving you easier access to your favorite courts.

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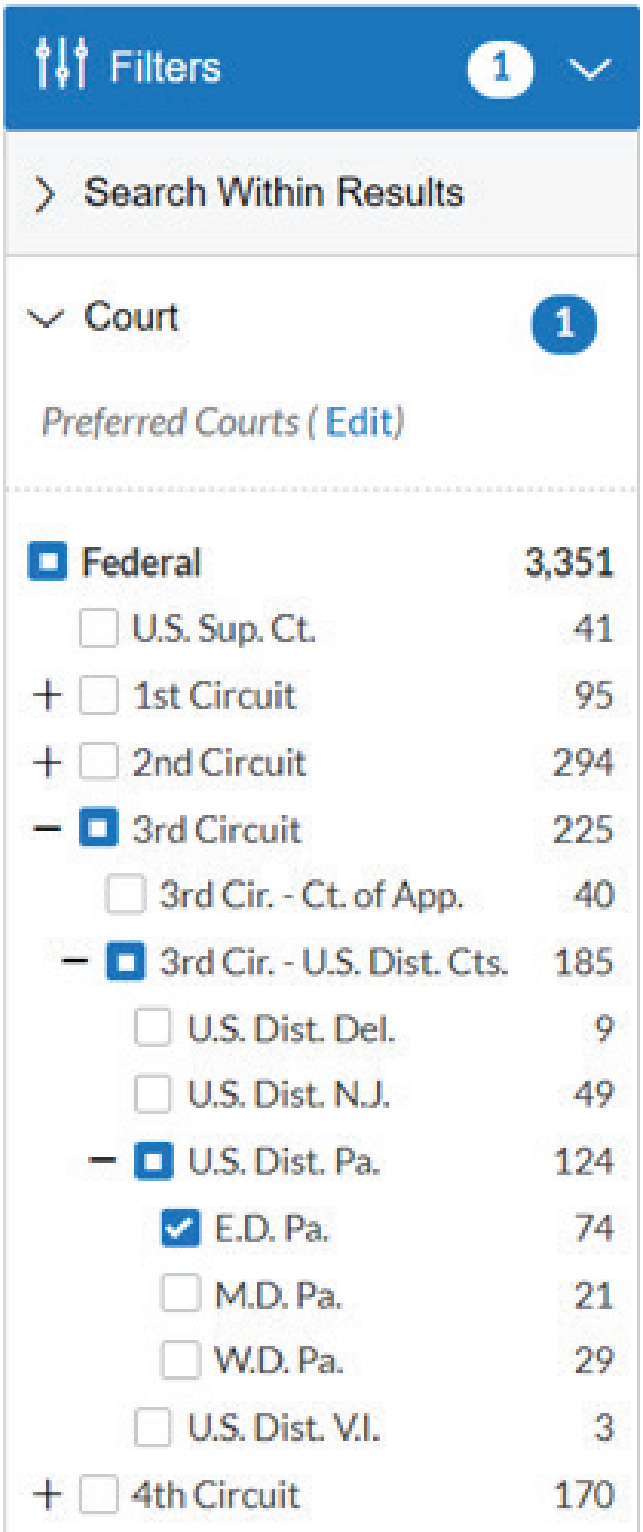
Selecting your favorite court, especially district courts, is even easier with the check boxes. Simply open the drop downs until you get to the court you want! You have the flexibility to un-check and re-check courts as you need to alter your results without starting a new search.

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# APPEAL

## Discretionary Interlocutory Appeals

***Groves v. United States***

941 F.3d 315, 2019 U.S. App. LEXIS 31974 (7th Cir. Oct. 25, 2019)

**The Seventh Circuit, overruling circuit precedent, holds that a district court that has certified an interlocutory order for appeal lacks the power to extend or restart the 10-day time to petition the court of appeals for permission to appeal.**

**Discretionary Appeal of Interlocutory Order.** Generally, appellate review is not available until the district court has entered a final judgment [*see* 28 U.S.C. § 1291; Nutraceutical Corp. v. Lambert, 586 U.S. —, 139 S. Ct. 710, 203 L. Ed. 2d 43, 51 (2019)].

But under 28 U.S.C. § 1292(b), if the district court determines that one of its orders "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation," it can say so in the order, enabling the disappointed litigant to ask the court of appeals to review the order immediately [28 U.S.C. § 1292(b)]. This statement is commonly known as a "certification" for appeal. The court of appeals has discretion to permit the appeal "if application is made to it within ten days after the entry of the order" [28 U.S.C. § 1292(b)]. The district court can add its certification in the original order or add it afterward by amendment; in the latter circumstance, the time to petition runs from entry of the amended order [Fed. R. App. P. 5(a)(3)]. Thus, the time to seek permission to appeal does not start until the litigant is actually authorized to file a petition.

**Ten-Day Deadline Is Jurisdictional.** The Seventh Circuit panel in this case pointed out that the 10-day deadline for seeking permission to appeal is a jurisdictional requirement, not a claim-processing rule. The court of appeals explained that the Supreme Court has drawn a bright line. In *Hamer v. Neighborhood Hous. Servs.*, the Court said, "If a time prescription governing the transfer of adjudicatory authority from one Article III court to another appears in a statute, the limitation is jurisdictional; otherwise the time specification fits within the claim-processing category" [Hamer v. Neighborhood Hous. Servs., 583 U.S. —, 138 S. Ct. 13, 199 L. Ed. 2d 249, 257 (2017) (citations omitted)].

The distinction between a jurisdictional requirement and a claim-processing rule is critical. A failure to comply with a jurisdictional time requirement deprives a court of adjudicatory authority over a case, necessitating dismissal, and in such a case the court must notice the jurisdictional defect sua sponte. On the other hand, mandatory claim-processing rules must be enforced if properly invoked, but they may be waived or forfeited [Eberhart v. United States, 546 U.S. 12, 19, 126 S. Ct. 403, 163 L. Ed. 2d 14 (2005) (per curiam)].

In this case, the Seventh Circuit concluded that the 10-day requirement of § 1292(b) is jurisdictional, because it is set by statute, and it governs the transfer of adjudicatory authority from the district court, which issued the order, to the court of appeals, which reviews it. Under a straightforward application of Hamer, therefore, the 10-day time bar is jurisdictional.

**Deadline Is Set by Statute.** The appellate panel rejected an argument that the 10-day deadline is not jurisdictional in nature because § 1292(b) lacks a clear statement that it imposes a jurisdictional requirement. The court of appeals explained that the clear-statement rule applies only when a time limit appears in a statute that does not govern an Article III court's adjudicatory authority [see Hamer v. Neighborhood Hous. Servs., 583 U.S. —, 138 S. Ct. 13, 199 L. Ed. 2d 249, 257 n.9 (2017) ("In cases not involving the timebound transfer of adjudicatory authority from one Article III court to another, we have additionally applied a clear-statement rule . . . .")]. But when a time limit appears in a statute that addresses an Article III court's adjudicatory authority, as § 1292(b) does, the time limit is presumptively jurisdictional.

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## Statute Governs Courts' Adjudicatory Authority.

The court of appeals also rejected an argument that the interlocutory nature of a § 1292(b) appeal means that the provision does not really govern the transfer of adjudicatory authority between courts. This argument was based on the fact that a petition for permissive appeal does not stay the proceedings in the district court, with the district court retaining jurisdiction over the case even if the petition is granted [see 28 U.S.C. § 1292(b)]. Based on the premise that § 1292(b) does not govern a transfer of adjudicatory authority, the argument went, the 10-day time limit could not be presumptively jurisdictional, and therefore the lack of a clear statutory statement making the time limit a jurisdictional requirement should mean that § 1292(b) is only a claim-processing rule.

In rejecting this argument, the Seventh Circuit panel pointed out that § 1292(b) actually does govern the transfer of adjudicatory authority to the courts of appeals; it empowers the court of appeals to review a district-court order, and once that order is on appeal, the district court can no longer modify it. And in any event, Hamer did not suggest that the jurisdictional status of a deadline (or other limitation) turns on the details of a transfer—for example, whether the transferred authority encompasses the whole case or a single order. Instead, Hamer makes clear that the relevant inquiry is whether the time limit appears in a jurisdictional statute—one that addresses the power of a court rather than the rights or obligations of the parties.

Accordingly, if a time limit appears in a statute that speaks to the power of the court, it is a limitation on the power of the court. If it appears in a statute that speaks to the rights or obligations of parties, it is a claim-processing rule unless Congress says otherwise [see United States v. Kwai Fun Wong, 575 U.S. —, 135 S. Ct. 1625, 191 L. Ed. 2d 533, 543 (2015) ("This Court has often explained that Congress's separation of a filing deadline from a jurisdictional grant indicates that the time bar is not jurisdictional.")].

Applying these principles to § 1292(b), the Seventh Circuit panel easily concluded that the statute speaks to the power of the court rather than to the rights or obligations of the parties. That means that the 10-day deadline is jurisdictional. The court noted that no other circuit has questioned the jurisdictional status of the 10-day limit [see, e.g., In re City of Memphis, 293 F.3d 345, 348 (6th Cir. 2002) ("Failure to file an appeal within the 10-day period is a jurisdictional defect that deprives this court of the power to entertain an appeal."); Safety-Kleen, Inc. v. Wyche, 274 F.3d 846, 866 (4th Cir. 2001) ("The ten-day filing requirement is jurisdictional and therefore may not be waived.")].

## District Court Lacks Power to Extend Deadline.

The Seventh Circuit panel then turned to the question whether the district court could extend the jurisdictional 10-day deadline imposed by § 1292(b).

The statute does not authorize either district courts or the courts of appeals to extend the 10-day deadline for any reason. But in Nuclear Eng'g Co. v. Scott, the Seventh Circuit held that if there are equitable reasons to permit an appeal even after the statutory deadline has passed, a district court could restart the 10-day clock by either vacating and reentering or simply by recertifying its order [Nuclear Eng'g Co. v. Scott, 660 F.2d 241, 246–247 (7th Cir. 1981)]. The court of appeals in this case noted that other circuits have approved this sort of indirect extension as well, although there is disagreement about the factors that a district court should apply in deciding whether to grant it [see In re City of Memphis, 293 F.3d 345, 350 (6th Cir. 2002); Safety-Kleen, Inc. v. Wyche, 274 F.3d 846, 866–867 (4th Cir. 2001); Triggs v. John Crump Toyota, 154 F.3d 1284, 1291 n.9 (11th Cir. 1998); English v. Cody, 146 F.3d 1257, 1259 n.1 (10th Cir. 1998); Marisol A. ex rel. Forbes v. Giuliani, 104 F.3d 524, 528–529 (2d Cir. 1996); In re Benny, 812 F.2d 1133, 1137 (9th Cir. 1987); Aparicio v. Swan Lake, 643 F.2d 1109, 1112 (5th Cir. 1981); Braden v. Univ. of Pittsburgh, 552 F.2d 948, 954–955 (3d Cir. 1977) (en banc); In re La Providencia Dev. Corp., 515 F.2d 94, 95 n.1 (1st Cir. 1975)].

However, Nuclear Eng'g Co. and all of the other cases allowing district courts to restart the 10-day period were decided before Bowles v. Russell, in which the Supreme Court introduced a renewed emphasis on the federal courts' lack of authority to read equitable exceptions into fixed statutory deadlines [Bowles v. Russell, 551 U.S. 205, 214, 127 S. Ct. 2360, 168 L. Ed. 2d 96 (2007)].

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The Seventh Circuit panel in the present case overruled Nuclear Eng'g Co. because it is inconsistent with the Supreme Court's approach to fixed filing deadlines. The court of appeals began with the basic principle that when a jurisdictional statute sets a firm deadline, courts have no authority to extend it [see Bowles v. Russell, 551 U.S. 205, 209, 127 S. Ct. 2360, 168 L. Ed. 2d 96 (2007)]. Section 1292(b) indisputably bars the courts of appeals from granting litigants more time; the statute authorizes a court of appeals to grant a petition to appeal only "if application is made to it within ten days after entry of the order" [see also Fed. R. App. P. 5(a)(2), 26(b)(1)]. Similarly, it is indisputable that § 1292(b) prohibits district courts from granting litigants extensions outright. And although a district court can extend the time for filing a notice of appeal on grounds of excusable neglect [see 28 U.S.C. § 2107(c)], no statute confers authority to extend the time for filing a petition for permission to appeal [cf. Fed. R. App. P. 26(b)(1) (treating notices of appeal and petitions for permission to appeal differently)]. The Seventh Circuit panel opined that this distinction makes sense: a litigant who loses the opportunity to appeal a final judgment forever loses the ability to appeal, but a litigant who loses the opportunity to file an interlocutory appeal will have another chance later.

The Seventh Circuit rejected the fiction underlying Nuclear Eng'g Co.—that recertifying an order is not the same thing as granting more time. The court recognized that treating reentry of an order or judgment as a mechanism for restarting the clock renders the deadline subject to tolling, even when tolling is otherwise prohibited. The court found it significant that § 1292(b) uses singular terminology to refer to an order that the district court can certify for appeal. Once an order is certified, it becomes "the order" from which the clock runs, and accordingly "the order" from which a court of appeals may permit an appeal "from such order, if application is made to it within ten days after entry of the order" [28 U.S.C. § 1292(b) (emphasis added)]. If the application is not made within 10 days, the order is no longer appealable, and the statute does not contemplate that the order's appealability can be revived by a new certification.

**Conclusion.** When a deadline for appeal is fixed, it cannot be enlarged just because a court in its discretion thinks it should be enlarged [see FTC v. Minneapolis-Honeywell Regulator Co., 344 U.S. 206, 211, 73 S. Ct. 245, 97 L. Ed. 245 (1952)]. Accordingly, the Seventh Circuit overruled the portion of Nuclear Eng'g Co. holding that mere recertification (or vacatur and reentry) of an order for interlocutory appeal may extend the jurisdictional 10-day deadline to request permission to appeal.

## PRETRIAL SCHEDULING ORDERS

### Modification

***Petrone v. Werner Enters., Inc.***

940 F.3d 425, 2019 U.S. App. LEXIS 30344 (8th Cir. Oct. 10, 2019)

**The Eighth Circuit ruled that the district court abused its discretion by granting plaintiffs' request to extend the Rule 16(b) disclosure deadline despite finding that good cause for the extension had not been shown.**

**Background.** Philip Petrone and others filed a class action against Werner Enterprises, Inc., and Drivers Management, LLC, arising out of an eight-week student-driver training program operated by defendants and intended for new truck drivers. Plaintiffs alleged violations of the Fair Labor Standards Act (FLSA) and Nebraska law, and sought compensation for unpaid wages allegedly earned during off-duty time spent on short rest breaks and while resting in their trucks' sleeper berths.

In the pretrial scheduling order, the district court set January 15, 2014, as the deadline for the parties to disclose expert witness reports. Plaintiffs timely disclosed their expert reports. However, defendants' deposition of plaintiffs' expert revealed considerable flaws in the methodology for computing the allegedly uncompensated break and sleeper-berth time. In fact, plaintiffs' expert admitted at deposition that some times were double counted and some periods were artificially split into two separate breaks when they spanned 12:00 a.m., which resulted in inconsistent and inflated estimates of the disputed time.

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Well after the court-imposed deadline for the filing of expert reports had passed, plaintiffs, pursuant to Rule 16(b), moved to modify the scheduling order to permit them to file a supplemental expert report correcting the flaws that the expert's deposition had revealed. The district court declined to characterize the belated expert report as a "supplement," because a supplement means correcting inaccuracies or adding information that was not available at the time of the initial disclosure. The court in fact determined that nothing precluded plaintiffs' expert from recognizing the flaws in his original report; he simply failed to do so. The district court stated that, although Rule 26(e) imposes a duty to supplement incorrect or incomplete information, it does not permit litigants to produce information in a belated fashion.

Although the district court found no good cause to extend the disclosure deadline, it determined that, while the delay was neither "substantially justified" nor "harmless" under Rule 37(c), Rule 1 "counsels against complete exclusion of the new information" because it provides "that the rules should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding" and indicates a preference for determination of cases on the merits. Because the corrected information was useful and necessary to the disposition of the case on the merits, the court was "inclined to invoke the discretion granted by Rule 37(c) to fashion a lesser sanction than exclusion." Accordingly, the district court extended the disclosure deadline and scheduled a planning conference to establish new deadlines and a new trial date. In addition, the court provided defendants with an opportunity, at plaintiffs' expense, to depose plaintiffs' expert about the purported supplemental report, and awarded defendants costs incurred by the late submission of the report.

Following a three-day trial, the jury awarded plaintiffs $779,127.00 in damages for their short-rest-break claims and found defendants not liable on plaintiffs' sleeper-berth claims. On appeal, defendants argued that the district court abused its discretion by granting plaintiffs' request to extend the Rule 16(b) disclosure deadline, despite finding that good cause for the extension had not been shown.

## Modification of Scheduling Order Requires Finding of Good Cause.

Rule 26(a)(2) provides that a party must disclose the identity of any expert witness along with a written report from that expert. Rule 26(e) imposes an obligation on the parties to supplement incorrect or incomplete information. Under Rule 16, a court must issue a scheduling order, which, among other things, limits the time to complete discovery and file motions [see Fed. R. Civ. P. 16(b)(1), (3)(A)]. The scheduling order may modify the timing of expert witness disclosures under Rule 26(a), and set dates for pretrial conferences and for trial [see Fed. R. Civ. P. 16(b)(3)(B)(i), (vi)].

The Eighth Circuit noted that a district court has broad discretion in establishing and enforcing the scheduling order deadlines. However, a schedule may be modified only for good cause and with the judge's consent [Fed. R. Civ. P. 16(b)(4)]. In other words, the good-cause standard is not optional. To establish good cause, a party must show its diligence in attempting to meet the scheduling order. Both the district court and the Eighth Circuit found that plaintiffs did not show good cause to modify and extend the Rule 16(b) deadline.

Furthermore, the expert's substantial revisions to his original report came only after defendants revealed significant flaws in the original report. Although plaintiffs' motion framed the revised expert report as a mere supplement under Rule 26(e), plaintiffs' expert was materially altering, not merely clarifying, his original report, and there was no evidence that plaintiffs subsequently learned of information that was previously unknown or unavailable to them. The Eighth Circuit again agreed that the district court correctly determined the revised report was not a Rule 26(e) supplement, but a new, distinct report subject to the Rule 16(b) deadline for expert disclosures. As the district court noted, nothing "precluded plaintiffs' expert from recognizing the flaws in his original report." Plaintiffs thus failed to show the requisite good cause to extend the expert disclosure deadline.

Nevertheless, relying on Rules 1 and 37(c)(1), the district court modified the schedule, and extended the deadline to disclose expert reports. The Eighth Circuit concluded that this was error. Nothing in the text of either rule allowed the district court to bypass the mandatory good-cause standard under Rule 16(b)(4). The district court's reliance on Rule 1 to support its ruling was contrary to the general rule that adherence to scheduling order deadlines is critical to achieving the primary goal of the judiciary: to serve the just, speedy, and inexpensive determination of every action.

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Additionally, Rule 37(c)(1) does not support the district court's actions. By its terms, Rule 37(c)(1) applies only when a party fails to comply with Rule 26(a) and then seeks to use the information "on a motion, at a hearing, or at a trial" [see Fed. R. Civ. P. 37(c)(1)]. Rule 37(c)(1) says nothing about its applicability when a court considers a motion, pursuant to Rule 16(b), to amend a scheduling order and extend the deadline for Rule 26 disclosures. The order appealed from in this case, which extended the Rule 16(b) disclosure deadline and permitted plaintiffs to disclose the new report within the new disclosure deadline, clearly did not involve an attempt by plaintiffs to "use that information or witness to supply evidence on a motion, at a hearing, or at a trial" [Fed. R. Civ. P. 37(c)(1)]. To the contrary, by their motion for extension of the disclosure deadline, plaintiffs sought to bring their disclosure of the new report into compliance with Rule 26(a) so that the disclosed information would not be excluded under the terms of Rule 37(c)(1) at a later hearing or trial, nor would plaintiffs be subject to other sanctions when use of the information was attempted.

The Eighth Circuit concluded that the district court, having found no good cause for extension of the Rule 16(b) disclosure deadline to permit the late disclosure of plaintiffs' new expert report, abused its discretion in granting plaintiffs' motion to modify the scheduling order and to allow disclosure of the new expert report after the court-imposed deadline.

**District Court's Error Was Not Harmless.** The Eighth Circuit explained that, despite error, a district court's ruling can be upheld if it was harmless. Defendants had moved to exclude all of plaintiffs' expert's damages calculations and testimony, which the district court denied, without prejudice, when it modified the scheduling order and allowed plaintiffs to file the late report. The court found that the information in the report was "useful and necessary to the disposition of the case on the merits." The jury awarded $779,127.00 in damages on plaintiffs' short-rest-break claims, an amount identical to plaintiffs' expert's testimony at trial. Thus, the jury clearly relied on plaintiffs' expert's opinion in reaching its $779,127.00 damages award. The Eighth Circuit observed that it could not determine whether the jury's award would have been the same without the new information. Therefore, the district court's error was not harmless.

**Conclusion.** For these reasons, the Eighth Circuit vacated the judgment and remanded the case to the district court for further proceedings.

## PROCEEDING IN FORMA PAUPERIS

### Prisoner Litigation

***Brown v. Sage***

941 F.3d 655, 2019 U.S. App. LEXIS 32604 (3d Cir. Oct. 30, 2019) (en banc)

**The Third Circuit, overruling circuit precedent, holds that in deciding whether to dismiss a suit by a prisoner who seeks to proceed in forma pauperis, a court has discretion to consider the merits or to evaluate the prisoner's application to proceed in forma pauperis, in any order or even simultaneously.**

**Background.** A plaintiff filing a lawsuit or a litigant pursuing an appeal in federal court generally must pay a filing fee. But an indigent plaintiff can avoid the filing fee if he or she files a successful application for leave to proceed in forma pauperis (IFP).

Special rules govern IFP status for plaintiffs who are prisoners. Under the Prison Litigation Reform Act (PLRA), a federal prisoner may proceed IFP and file a case or proceed on appeal without prepaying the requisite fees if the prisoner meets certain requirements, including filing an affidavit that demonstrates he or she cannot afford the fees [28 U.S.C. § 1915]. However, under 28 U.S.C. § 1915(g), the PLRA's so-called "three-strikes rule," a prisoner cannot proceed IFP if he or she has "on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action . . . that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury."

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In the present case, the Third Circuit vacated a panel decision granting the prisoner leave to proceed IFP on appeal [see Brown v. Sage, 903 F.3d 300, 2018 U.S. App. LEXIS 25419 (3d Cir. Sept. 7, 2018)]. The en banc court then denied the prisoner leave to proceed IFP and issued an opinion clarifying the framework that courts may use in assessing IFP applications under the PLRA. Before enactment of the PLRA, the court had suggested that courts must use a two-step analysis, first assessing the plaintiff's economic status, and then considering the merits of the complaint. But in this case the en banc court held that the PLRA does not require such a rigid, stepwise process; rather, courts are free to assess the merits of the lawsuit at any time [see 28 U.S.C. § 1915(e)(2)].

**PLRA Authorizes Flexible Approach for IPF Determinations.** The court of appeals explained that the PLRA amended the IFP statute in several important respects. Whereas the prior version had provided that a court "may" dismiss "frivolous or malicious" actions, the statute now provides that "a court shall dismiss the case at any time if . . . the action or appeal (i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief" [28 U.S.C. § 1915(e)(2)]. The PLRA also added 28 U.S.C. § 1915A, which requires courts to screen prisoner complaints for possible dismissal "before docketing, if feasible or, in any event, as soon as practicable after docketing" [28 U.S.C. § 1915A(a)]. And as noted above, the PLRA added the three-strikes rule to provide an incentive not to file frivolous lawsuits or appeals.

The Third Circuit concluded that the PLRA supersedes the court's former rigid, stepwise procedure and prescribes a flexible approach. Accordingly, the court held that a court has the authority to dismiss a case "at any time" [28 U.S.C. § 1915(e)(2)], regardless of the status of a filing fee; that is, a court has the discretion to consider the merits of a case and evaluate an IFP application in either order or even simultaneously.

The Third Circuit noted that in adopting a flexible approach, it joins several other circuits [see, e.g., Buchheit v. Green, 705 F.3d 1157, 1160–1161 (10th Cir. 2012); Ford v. Johnson, 362 F.3d 395, 399–400 (7th Cir. 2004); Leonard v. Lacy, 88 F.3d 181, 185 (2d Cir. 1996)].

**When Action Is "Brought" for Purposes of Three-Strikes Rule.** The en banc court went on to hold that a dismissal of a previous action can count as a strike under the PLRA's three-strikes rule even if the dismissal occurred on the merits before any IFP application was considered (and thus before the complaint was formally filed).

Under the PLRA, a prisoner generally incurs a strike if he or she has "brought an action" that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted [28 U.S.C. § 1915(g)]. The court of appeals in this case held that, in light of the PLRA's purpose of limiting the filing of frivolous and vexatious prisoner lawsuits and the fact that Congress used the word "brought" rather than "commenced" or "filed," the most reasonable interpretation of "brought an action" is that the expression refers to the tendering or submission of a complaint to a federal court. In the IFP context, therefore, a prisoner has "brought an action" when he or she tenders or submits a complaint to the court along with an IFP application, even though the complaint will not be formally filed unless the IFP application is approved [see Oatess v. Sobolevitch, 914 F.2d 428, 429 n.1 (3d Cir. 1990)].

The Third Circuit concluded that the fact that a previous dismissal on the merits was entered before any action on the accompanying IFP application (and thus before the complaint could be formally filed) does not prevent that dismissal from qualifying as a strike (assuming the dismissal otherwise meets the requirements for a strike). In so holding, the Third Circuit joined the Ninth Circuit [see O'Neal v. Price, 531 F.3d 1146, 1152 (9th Cir. 2008)].