FEBRUARY 2020

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LITIGATION INSIGHTS

WAGSTAFFE'S CIVIL PROCEDURE BEFORE TRIAL

MATTHEW BENDER

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.

CLASS ACTIONS

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Notice to Class

Faber v. Ciox Health, LLC

944 F.3d 593, 2019 U.S. App. LEXIS 36083 (6th Cir. Dec. 5, 2019)

The Sixth Circuit holds that when a court renders summary judgment after certifying a class action without sending notice to the absentee class members, the decision binds only the named plaintiffs.

JUDICIAL ESTOPPEL

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The Seventh Circuit holds that a creditor's assertion of a claim in the debtor's bankruptcy proceeding does not judicially estop the creditor from proceeding separately against another person who may be liable on the underlying debt.

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Fair Labor Standards Act

Mei Xing Yu v. Hasaki Rest., Inc.

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The Second Circuit holds that when acceptance of a Rule 68 offer of judgment settles a claim under the Fair Labor Standards Act, judicial approval is not required, and the clerk must enter judgment in accordance with the accepted offer.

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Legislative History Research on Lexis Advance

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1. **Congressional Record:** Lexis Advance Research maintains one of the largest digital archives of the Congressional Record with Congressional Records from 1789 – Present. The Congressional Record is published daily when either chamber of Congress is in session and contains the full text of House/Senate bills, information about the activities of Congress, full versions of speeches given during hearings, and the full text of the Daily Digest (a summarized version of the Congressional Record that is attached at the end of each daily publication). Lexis Advance Research updates the internal repository of Congressional Records on the evening of every business day.

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i. Congressional Records from 1789-1824: Look for the source, "Annals of Congress."
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iii. Congressional Records from 1837-1873: Look for the source, "Congressional Globe."
iv. Congressional Records from 1873-1997: Look for the source, "Congressional Record Retro."
v. Congressional Records for all other periods: Look for the source, "Congressional Record."

2. **Committee Prints:** When either chamber of Congress proposes a measure that goes to committee, documents produced during the initial committee review are called "Committee Prints." Until 2004, these documents were difficult to gather and had no comprehensive numbering system. In 2004, the Government Printing Office took over the compilation of Committee Prints, named them "House and Senate Documents," and gave them a consecutive numbering system.

a. For Committee Prints from 1994-2003: Look up the source, "Committee Prints."
b. For Committee Prints from 2004-Present: Look up the source, "House and Senate Docs."

3. **Committee Reports:** Both House and Senate Committee Reports are found under the source, "Committee Reports." Reports are available from 1989 to Present. The "Committee Reports" source also includes Joint Conference on Committee Reports (reports from the committee made up of both chambers of Congress to resolve differences on an act before submitting said act to the President). These Joint Conference on Committee Reports are included in the same consecutive numbering system as individual chamber committee reports. To parse them out, search within the source by the phrase, "conference on committee."

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4. **Federal Legislative Bill History:** This source provides a compilation and commentary for every bill, measure, resolution, or executive order. Contains hearing summaries, bill text, committee reports, and even the presidential signing message. Coverage is from 2006-present.

5. **Daily Compilation of Presidential Documents:** This source is a compilation of all materials (press releases, photographs, bill signing statements, executive orders and presidential speeches) relevant to the activity of the President of the United States. Updated 1-4 times per week. Coverage from 2000 – Present. Note: Due to documents often requiring partial redaction (as requested by the White House), the updating of this source may experience a time delay of up to one month for certain documents requiring heavy redaction.

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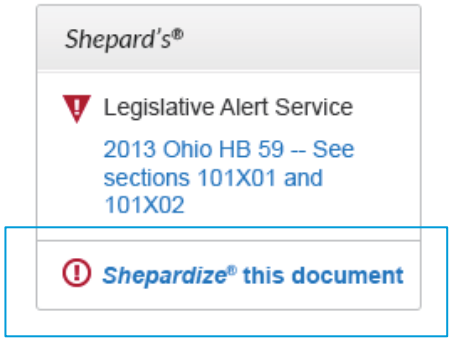

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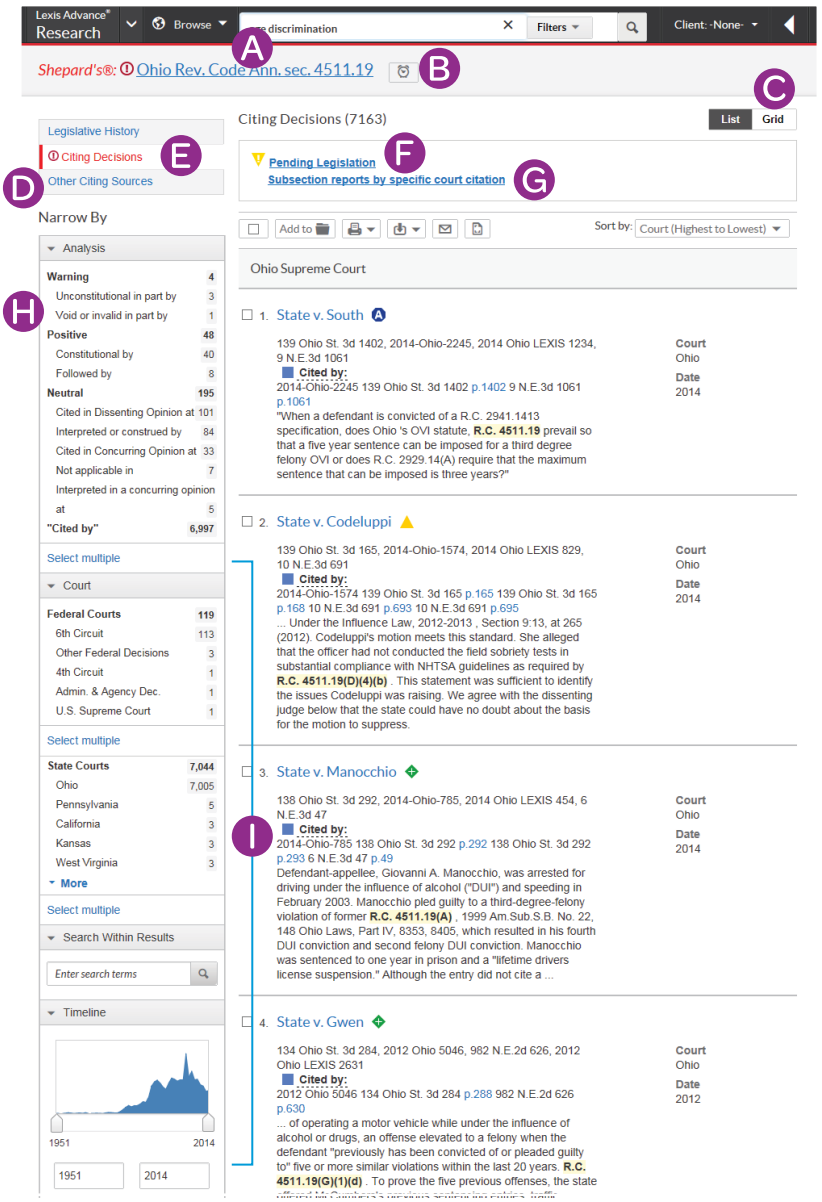

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CLASS ACTIONS

Notice to Class

Faber v. Ciox Health, LLC

944 F.3d 593, 2019 U.S. App. LEXIS 36083 (6th Cir. Dec. 5, 2019)

The Sixth Circuit holds that when a court renders summary judgment after certifying a class action without sending notice to the absentee class members, the decision binds only the named plaintiffs.

Background. The defendant was a large medical records provider. As such, it was subject to regulations that prohibited it from charging patients more than reasonable, cost-based fees for their records [45 C.F.R. § 164.524(c)(4)]. The named plaintiffs were two individuals who requested their medical records from Tennessee hospitals. These hospitals contracted with the defendant, who serviced the plaintiffs' requests and charged them for their records.

The named plaintiffs eventually filed the present action asserting they were charged more than allowed. Because the federal statutes and regulations did not authorize a private cause of action, they styled their claims as common-law claims for negligence, negligence per se, unjust enrichment, and breach of implied-in-law contract. They also sought certification of a class of persons who requested medical records and were over-charged. The district court granted the motion for certification and, just two weeks later, granted the defendant's motion for summary judgment.

Lack of Notice. The Sixth Circuit affirmed the district court's summary judgment. All the plaintiffs' common-law claims suffered from the same defect: common law did not provide a substitute for the private right of action Congress has refused to create. Nor did state statutes create a private right of action that would apply to medical records providers.

The summary judgment had been granted after the district court had granted a motion for class certification, but before any notice to the class had been provided. For classes certified under Rule 23(b)(3), both Rule 23(c)(2) and constitutional principles require the district court to give notice of certification to the class. However, the parties disagreed as to the appropriate remedy. The defendant argued that the court of appeals should remand so that the district court could provide notice. The plaintiffs argued that the summary judgment should be limited to the named plaintiffs only. This was an issue of first impression in the Sixth Circuit.

The general rule in other circuits, the Sixth Circuit said, is that when the defendant moves for and obtains summary judgment before the class has been properly notified, the defendant waives the right to have notice sent to the class, and the district court's decision binds only the named plaintiffs. The defendants assume the risk that a judgment in their favor will not protect them from subsequent suits by other potential class members, except for the protection provided by stare decisis.

The circumstances here supported application of the general rule. Rule 23(b)(3) class certification, the Sixth Circuit said, cannot bind a class without providing adequate notice as required by due process. Moreover, notice that is incomplete or erroneous or fails to apprise the absent class members of their rights does not satisfy due process. Before receiving adequate notice, class members merely constitute passive beneficiaries. Class certification remains functionally incomplete until class members receive notice. If class members never get a chance to be heard, then notice does not satisfy due process, and parties are not bound to class action judgments until given a full and fair opportunity to litigate. The court noted that post-judgment notice, as proposed by the defendant, would give no meaningful opportunity for class members to make their case.

Accordingly, the class certification issued by the district court could not bind the absent class members. Post-judgment notice would only invite parties to enter a fight that they had already lost. Courts have the prerogative to remand class action suits for post-judgment notice, the Sixth Circuit said, but this should only be done in appropriate circumstances in which equitable reasons demand binding the class. Typically, courts disfavor "one way street" post-judgment certifications, in which parties may enter a class action suit with full knowledge of the outcome.

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Generally, as in the present case, class members would be prejudiced on receiving notice of certification for a case they had already lost on the merits, so the equities would go against post-judgment notice. This approach follows the general rule of movant beware: a defendant's motion for summary judgment made prior to class certification carries the risk of only binding the named plaintiffs, and not the entire class.

The Sixth Circuit also observed that Rule 23's text and structure support the general rule that only named plaintiffs are bound when the defendant obtains summary judgment. Rule 23(c)(3) requires that "the judgment in a class action must . . . for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members." It would make little sense for absentee class members to not request exclusion if the court gave them notice after granting summary judgment to the defendant. Also, Rule 23(c)(2)(B)(iv) requires that the notice inform class members that they may enter an appearance through an attorney. However, an attorney's appearance would serve little purpose once the court has granted summary judgment. Further, Rule 23(d)(1)(B) provides that a court may inform class members of important steps in the litigation process. This rule is largely pointless if a district court grants summary judgment before notifying the class. Rule 23 thus clearly contemplates that the notice requirement will be met before the parties are aware of the district court's judgment on the merits.

The court therefore adopted the general rule for use in the Sixth Circuit. The district court's summary judgment was affirmed. The district court's certification of the class was a nullity so that the case would not be remanded to issue post-judgment notice.

JUDICIAL ESTOPPEL

Success of Previous Position

CSI Worldwide, LLC v. Trumpp Inc.

944 F.3d 661, 2019 U.S. App. LEXIS 36693 (7th Cir. Dec. 11, 2019)

The Seventh Circuit holds that a creditor's assertion of a claim in the debtor's bankruptcy proceeding does not judicially estop the creditor from proceeding separately against another person who may be liable on the underlying debt.

Background. TRUMPP Inc. was a manufacturer of specialty tools, and its selling venues included trade shows. TRUMPP hired Lynch Exhibits to handle its appearance at the 2017 PABTECH show in Chicago. Lynch in turn subcontracted with CSI Worldwide to provide some of the necessary services.

CSI contended that it told TRUMPP it was unsure of Lynch's reliability and would do the work only if TRUMPP paid it directly or guaranteed Lynch's payment. CSI further contended that TRUMPP agreed to do so, although it did not sign any undertaking to that effect. CSI did the work and billed Lynch, which did not pay. CSI then filed an involuntary bankruptcy petition against Lynch, which soon filed a voluntary bankruptcy petition. CSI filed a claim as a creditor in the bankruptcy case for approximately $530,000.

CSI also filed the present lawsuit in federal district court against TRUMPP, asserting diversity jurisdiction, seeking $530,000, based on unjust enrichment, promissory estoppel, and other theories. The district court invoked the doctrine of judicial estoppel and dismissed the suit on the pleadings. Specifically, the court ruled that by making a claim in Lynch's bankruptcy case, CSI necessarily represented that Lynch was the sole debtor.

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No Judicial Estoppel in This Case. The Seventh Circuit reversed, holding that this was not an appropriate case for the application of judicial estoppel. The court of appeals began with the Supreme Court's description of judicial estoppel [see New Hampshire v. Maine, 532 U.S. 742, 749, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001)]:

> Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.

The Supreme Court explained that judicial estoppel generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase [see New Hampshire v. Maine, 532 U.S. 742, 749, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001) (citing Moore's)].

No Previous Success That Would Trigger Judicial Estoppel. The Seventh Circuit in this case reasoned that the Supreme Court's description showed judicial estoppel was not an obstacle to CSI's suit, because CSI had not prevailed by collecting the debt from Lynch's estate in bankruptcy. Thus, the district court had erred in assuming that success in the earlier suit does not matter in determining whether to apply the doctrine of judicial estoppel.

No Contradictory Positions That Would Trigger Judicial Estoppel. The Seventh Circuit also concluded that CSI's claim against TRUMPP was not "contrary" to its claim against Lynch. CSI had not asserted in the involuntary or voluntary bankruptcy case that Lynch was solely responsible for payment, and CSI had not tried to recover twice on one debt. There was no basis for the district court's conclusion that making a claim in bankruptcy necessarily abandons all claims against other persons who are potentially responsible for the debt.

The court of appeals observed that seeking to recover one debt from multiple persons is common and proper. It is settled law that filing a claim in bankruptcy does not foreclose claims against non-bankrupt obligors such as guarantors or jointly obligated persons [see, e.g., In re Shondel, 950 F.2d 1301, 1306 (7th Cir. 1991)]. And the Bankruptcy Code specifically provides that even a bankruptcy discharge of a debt of the debtor does not affect the liability of any other entity on that debt [11 U.S.C. § 524(e)].

OFFER OF JUDGMENT

Fair Labor Standards Act

Mei Xing Yu v. Hasaki Rest., Inc.

944 F.3d 395, 2019 U.S. App. LEXIS 36222 (2d Cir. Dec. 6, 2019)

The Second Circuit holds that when acceptance of a Rule 68 offer of judgment settles a claim under the Fair Labor Standards Act, judicial approval is not required, and the clerk must enter judgment in accordance with the accepted offer.

Background. The plaintiff in this case sued her employer, alleging violations of the overtime provisions of the Fair Labor Standards Act (FLSA) [see 29 U.S.C. § 207]. Soon after the action was filed, the defendant sent the plaintiff an offer of judgment under Federal Rule of Civil Procedure 68. The plaintiff accepted the offer, and the parties filed the offer and notice of acceptance with the district court. Before the clerk of the court could enter judgment [see Fed. R. Civ. P. 68(a)], the district court sua sponte ordered the parties to submit the settlement to the court for a fairness review and judicial approval.

Both parties disputed the need for judicial review or approval, and on interlocutory appeal, the Second Circuit agreed. The court of appeals accordingly vacated the district court's order and remanded with instructions to direct the clerk of the district court to enter judgment as stipulated in the accepted Rule 68 offer.

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Rule 68 Offers. The Second Circuit began its analysis with Rule 68. Subdivision (a) of the rule provides as follows:

> At least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.

Rule 68 goes on to provide, among other things, that if the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made [Fed. R. Civ. P. 68(b)]. The purpose of Rule 68 is to encourage settlement and avoid litigation.

The Second Circuit in this case observed that on its face, Rule 68(a)'s command that the clerk "must" enter judgment is mandatory and absolute. The court of appeals thus endorsed the view that a district court's role in entering a Rule 68(a) judgment is ministerial rather than discretionary, because the plain language of the rule leaves no discretion in the district court to do anything but enter judgment once an offer has been accepted.

Despite the mandatory language of Rule 68(a), the district court in this case had concluded that judicial review for fairness was required by the FLSA before judgment could be entered on the accepted Rule 68 offer. The court of appeals therefore examined the FLSA to ascertain whether it contains a clear expression of congressional intent to exempt FLSA cases from the operation of Rule 68.

Fair Labor Standards Act. The FLSA contains two primary worker protections: (1) it guarantees covered employees a federal minimum wage, and (2) it provides covered employees the right to overtime pay at a rate of one-and-a-half times their regular rate for hours worked above forty hours a week [29 U.S.C. §§ 206, 207]. The FLSA allows for a private right of action by a covered employee against any employer who violates the minimum-wage and overtime-pay provisions to recover unpaid wages, together with an additional equal amount as liquidated damages [see 29 U.S.C. § 216(b)]. The FLSA also authorizes the Secretary of Labor to bring an action on behalf of a covered employee to recover unpaid minimum wages or overtime compensation [see 29 U.S.C. § 216(c)].

The Second Circuit found it significant that nowhere in the FLSA's provisions authorizing actions to recover unpaid minimum wages or overtime compensation is there a command that such actions cannot be settled or otherwise dismissed without approval from a court. The lack of any explicit requirement for judicial approval before a settlement or dismissal thus distinguishes the FLSA from the statutory examples the district court had cited as evidence of exceptions to Rule 68(a)'s mandatory character [see, e.g., Fed. R. Civ. P. 23(e) (claims of certified class, or of class proposed to be certified for purposes of settlement, may be settled only with court's approval)].

Judicial Approval Not Required for Rule 68 Settlement of FLSA Case. Based on the unambiguous language of Rule 68(a) and the FLSA, the Second Circuit concluded that there is no requirement of judicial approval for a Rule 68 settlement in an FLSA case.

The court of appeals rejected arguments that a judicial-review requirement should be read into the FLSA. The court distinguished two early Supreme Court decisions holding that contracts for waiver of liquidated damages under the FLSA are void as contrary to public policy [Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 710, 65 S. Ct. 895, 89 L. Ed. 1296 (1945)] and that an employee's remedy of liquidated damages cannot be bargained away as part of a settlement of a dispute over coverage of the FLSA [D.A. Schulte, Inc. v. Gangi, 328 U.S. 108, 114–115, 66 S. Ct. 925, 90 L. Ed. 1114 (1946)]. The court of appeals read those decisions as applying to "private, back-room compromises that could easily result in exploitation of the worker and the release of his or her rights" before litigation is even commenced. Such cases are distinguishable from a case in which suit has been filed, airing the dispute in public and before a judge, with the parties then coming to an agreement—which is what happens when a Rule 68(a) settlement is made.

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The Second Circuit also rejected an argument that its own precedent required judicial approval of the Rule 68(a) settlement in this case. In Cheeks v. Freeport Pancake House, Inc., the court of appeals held that parties could not enter a stipulated dismissal of FLSA claims with prejudice, without the approval of the district court or the Department of Labor pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii) [Cheeks v. Freeport Pancake House Inc., 796 F.3d 199, 206 (2d Cir. 2015)]. That rule provides that "[s]ubject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing . . . a stipulation of dismissal signed by all parties who have appeared." Cheeks turned on whether the FLSA was an "applicable federal statute such that court approval was necessary before FLSA claims could be dismissed with prejudice by stipulation of the parties.

The court of appeals in this case explained that the holding in Cheeks was limited to Rule 41(a)(1)(A)(ii) dismissals with prejudice, and the court in Cheeks did not consider whether parties may settle such cases without court approval or Department of Labor supervision by entering into a Rule 41(a)(1)(A) stipulation without prejudice. Nor did it address other avenues for dismissal or settlement of claims, including Rule 68(a) offers of judgment.

The court of appeals in this case declined to extend Cheeks to the Rule 68 context. The court pointed out that Rule 41(a)(1)(A) contains an explicit command that judicial approval of a stipulated dismissal is necessary if a federal statute so requires, but Rule 68(a) does not contain a similar, explicit provision. Also, the Cheeks opinion expressed concern that Rule 41(a)(1)(A)(ii) stipulated dismissals are not filed publicly on the docket and therefore are akin to the private, secret settlements and waivers of an employee's FLSA rights that the Supreme Court refused to enforce as discussed above. Rule 68 avoids any secret-settlement problem because an offer of judgment is filed on the court's publicly available docket [see Fed. R. Civ. P. 68(a)].

Dissent. Circuit Judge Calabresi dissented, opining that the panel majority had misread the FLSA as a whole, and that the FLSA "is paradigmatically a statute that prohibits unsupervised private settlement agreements, including those made under Rule 68(a)."