MARCH 2020

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LITIGATION INSIGHTS

MOORE'S FEDERAL PRACTICE—TOP THREE HIGHLIGHTS

The following three summaries are this month's Editor's Top Picks from the dozens of decisions added to Moore's Federal Practice and Procedure.

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"Look-Through" Approach to Determining Jurisdiction

Quezada v. Bechtel OG & C Constr. Servs.

946 F.3d 837, 2020 U.S. App. LEXIS 1192 (5th Cir. Jan. 14, 2020)

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Freedom of Information Act

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The D.C. Circuit found no clear error in the district court's finding that a FOIA plaintiff was ineligible for attorney's fees because it did not show that its lawsuit caused a change in the government's position.

CLASS ACTIONS

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Use of Discovery

In re Williams-Sonoma, Inc.

947 F.3d 535, 2020 U.S. App. LEXIS 1046 (9th Cir. Jan. 13, 2020)

The Ninth Circuit has granted mandamus to vacate a discovery order directing the defendant to produce a list of customers, which counsel had sought in order to find an appropriate lead plaintiff to pursue a class action.

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Context

Samantha Chassin, Esq.

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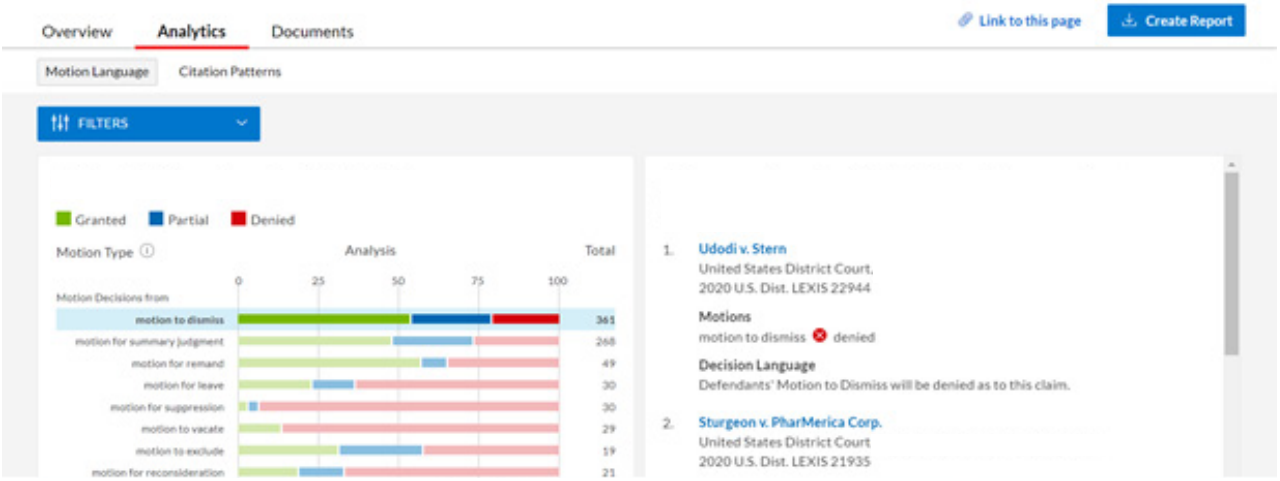

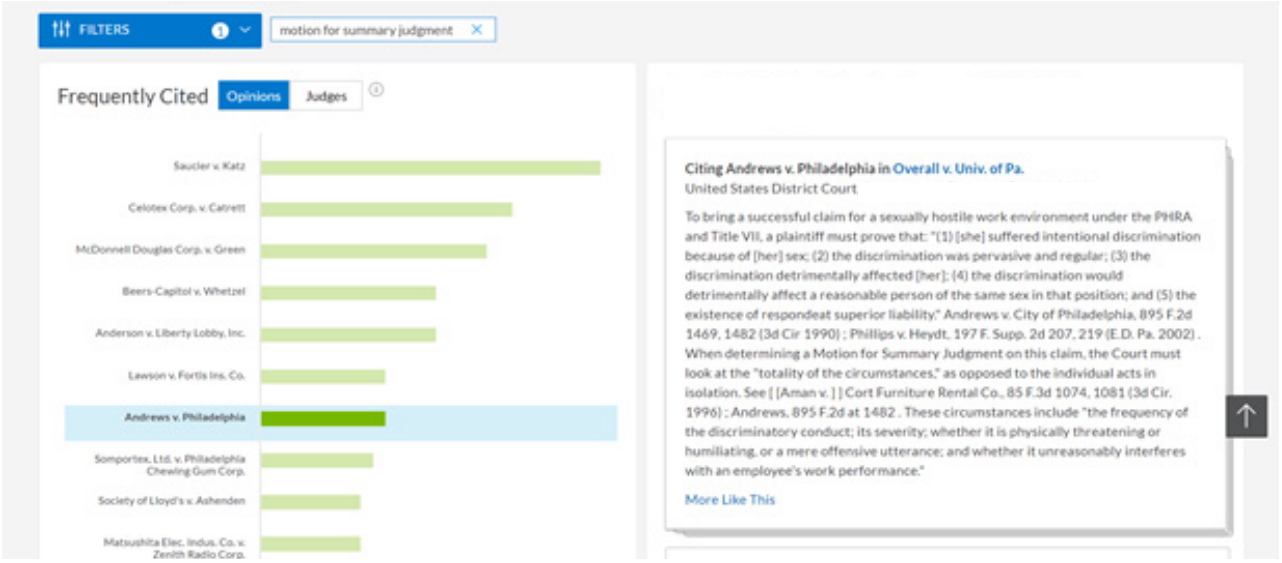

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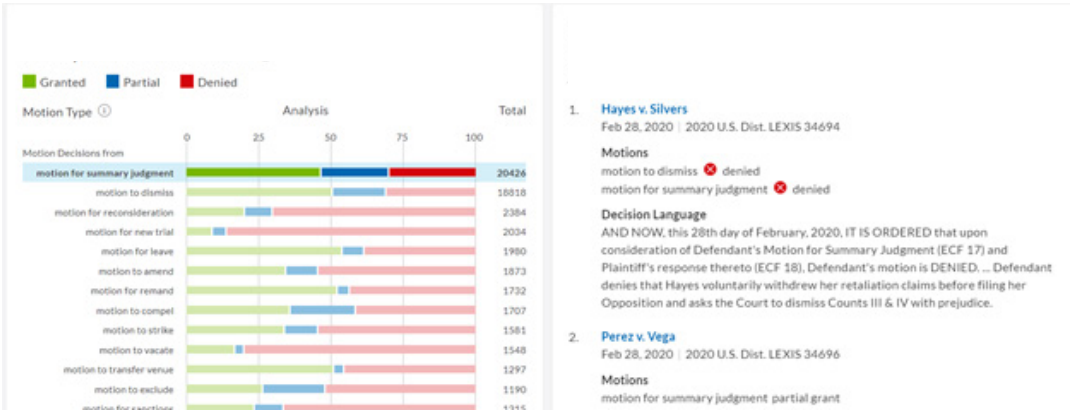

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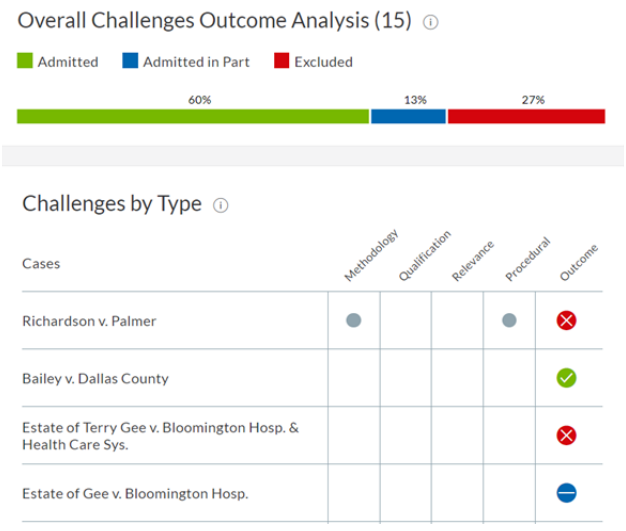

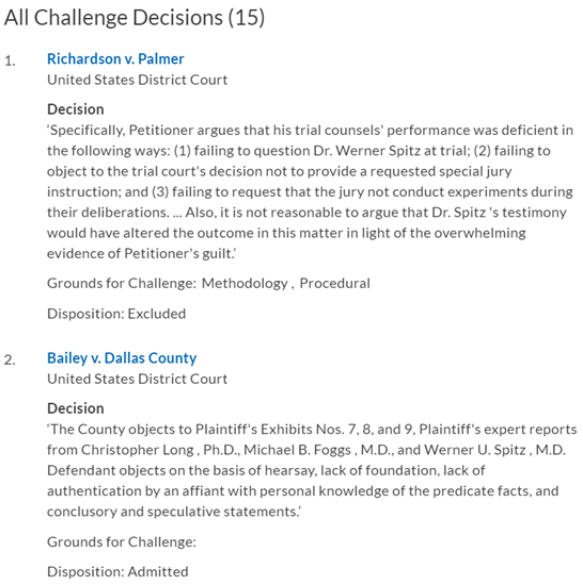

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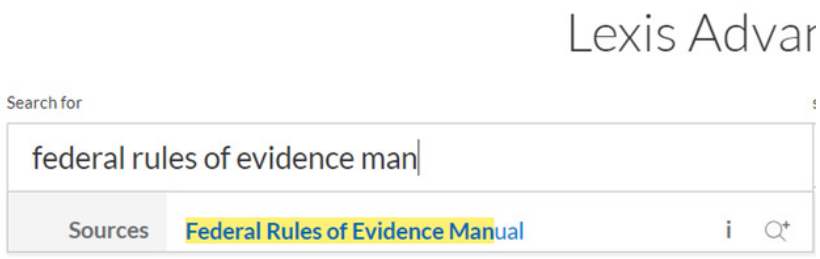
Federal Rules of Evidence Manual

(by Chet Lexvold, March 2020)

Published by Matthew Bender & Company and accessible on Lexis Advance, the Federal Rules of Evidence Manual (FREMAN) is an authoritative reference interpreting the Federal Rules of Evidence. Co-authored by Daniel J. Capra, reporter to the United States Judicial Conference Advisory Committee on evidence rules, FREMAN is cited widely by courts, and is often used as a coursebook for Continuing Legal Education programs. Saving you hours of research, FREMAN provides the following for each Rule: the complete, current text; a current explanation by experts; analysis of salient cases, including Circuit splits; and the relevant legislative history.

Accessing the Federal Rules of Evidence Manual

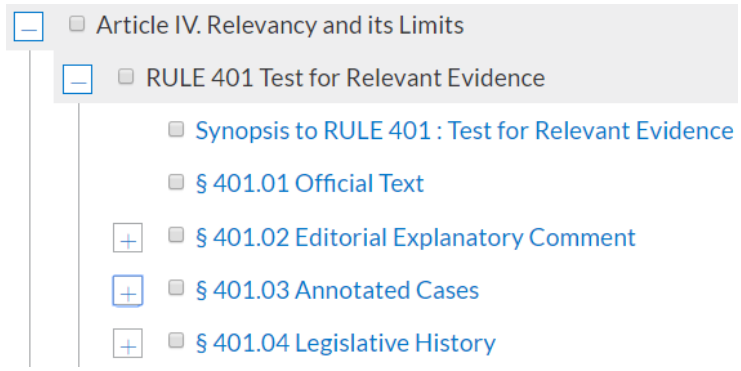
On Lexis Advance (Research), the fastest way to access FREMAN is by typing in some variation of the title in the main search box, causing the word wheel to open:



You can also find FREMAN in the Federal Civil Litigation Practice Center under "Treatises;" on the "All Evidence Treatises, Practice Guides, and Jurisprudence" page; or by searching under "Find a Source" on the home page.

Using the Federal Rules of Evidence Manual

Clicking on the name of the treatise will take you to the Table of Contents for FREMAN. "PART TWO: The Rules Themselves" is where most research will occur. The topics displayed correspond with the natural numerical progression of the Federal Rules of Evidence. For example, one can open "Article IV: Relevancy and its Limits," and view sections for Rules 401-415. Opening a Rule will display links for the Synopsis, Official Text, Editorial Comment, Annotated Cases, and Legislative History for the Rule.



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Clicking on the "Synopsis" link is a good starting point, as it allows you to view the entire outline for Rule 401 on one page, with easy-to-access links to each descriptive subheading. "Annotated Cases" provides an excellent survey of cases across federal circuits, allowing the researcher in the Ninth Circuit, for example, to easily find binding or highly persuasive case law from their jurisdiction.

Finally, because FREMAN has many descriptive subheadings, it allows the researcher to effectively utilize the "Table of Contents (TOC) only" search in the Red Search Box on the Table of Contents page on Lexis Advance. One may wish to research whether a juror's racial bias in deliberations is admissible evidence in light of Pena-Rodriguez v. Colorado, 137 S. Ct. 855 (2017). A "TOC only" search for "racial bias" quickly surfaces the following result, which provides an extensive analysis of the Supreme Court's holding in Pena-Rodriguez regarding the admissibility of such evidence.

As you can see, the Federal Rules of Evidence Manual is an authoritative and comprehensive reference interpreting the Federal Rules of Evidence, and a valuable tool for any legal researcher involved with litigation and evidentiary research.

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To Doe or not to Doe in Federal Court

By Jim Wagstaffe

Young lawyers drafting their first civil complaint will tell you that the supervising partners routinely warn that it's malpractice not to include Doe defendants to protect the statute of limitations as against unknown parties. However, to Doe defendant or not to Doe defendant in federal court: that is the question.

There are certain linguistic truisms emphasized by federal court practitioners when distinguishing state court civil litigation. These include:

• "It's a counterclaim so don't call it a cross-complaint;"

• "Forget notice pleading -- Twombly/Iqbal is how we do it in federal court;"

• "Federal venue rolls by residence in the district, not by where you live in a county"; and finally and emphatically,

• "There are no Does in federal court so don't look ignorant by pleading them."

However, in light of modern case developments, maybe the no-Does truism isn't so true after all. For these days there is much ado about Doe defendants in federal court arising from the conflict between the federal rule which severely limits the untimely joinder of new defendants and the mandated rule that, at least in diversity cases, federal courts must follow substantive state court statutes perhaps including the Doe rules extending state law statutes of limitation.[1]

1. The Doe Defendant Practice in State Courts

Virtually every state in the country allows the pleading of fictitious defendants in a complaint for the purpose of preserving the statute of limitations against unknown parties.[2] The requirements for obtaining the benefit of the Doe practice are that the plaintiff must (i) be ignorant of the fictitious defendants' identities and/or roles in the alleged wrongdoing, and (ii) actually include the boilerplate allegations against the Does and name them in the caption by numbers (e.g. Does I-X).[3]

The purpose of Doe defendants is salutatory in the sense that if the statute of limitation otherwise would have expired between the filing of the complaint and the identification of the hitherto unknown Doe defendant, the statute will be preserved. Specifically, this statute saving occurs by "relating back" the amendment to the time when the original complaint was filed. Indeed, as long as the complaint contains the magic Doe defendant incantation, malpractice can be avoided in those albeit unusual cases when an unknown defendant's identity emerges for the first time in discovery.[4]

2. The Problem of Doe Defendants in Federal Civil Actions

Historically, there are two reasons why federal courts have treated the pleading of Doe defendants with disdain and outright rejection. First there is no rule in federal practice expressly authorizing the use of the Doe defendant procedure.[5] To the contrary, the federal rules of civil procedure expressly require that each defendant be named and identified by their capacity to be sued.[6]

Second, if the basis for federal jurisdiction is complete diversity of citizenship under 28 U.S.C. § 1332, the presence of a fictitious defendant in the caption would seem to preclude properly pleading such jurisdiction. Simply put, since the fictitious defendants' identities (and therefore citizenship) are not known, their presence would seem to be wholly at odds with alleging the required complete diversity of citizenship. Thus the Doe practice has been rejected by numerous federal courts.[7]

In the removal context, of course, years ago Congress addressed and solved this problem by passing a statute stating that for purposes of removal the citizenship of Doe defendants is to be disregarded.[8] Recognizing that virtually every complaint in state court includes boilerplate Doe allegations that would, in essence, always bar diversity removal, Congress opted for addressing evolving jurisdictional developments at the time, if ever, of the concededly rare later amendment to add a non-diverse Doe. If a non-diverse Doe were to be added then and only then would remand be ordered.[9]

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Perhaps importantly, there is no comparable federal statute addressing the jurisdictional impact, if any, of the presence of Doe defendants in complaints filed originally in federal court. However, the presence of a potentially non-diverse Doe defendant would seem to destroy complete diversity and in federal question cases might be viewed as an unauthorized mechanism for obtaining relation back of amendments in conflict with Rule 15(c).[10] So, how to address the conundrum?

3. The Doe Defendant/Statute of Limitations Conundrum in Federal Court

While it is understandable that federal courts resist the pleading of Doe defendants in diversity cases because the fictitious party might destroy complete diversity, the conundrum can be stated easily: If you must plead Does in order to obtain the benefit of relation back of the statute of limitations under state law, then to preclude such a procedural device could be seen as depriving plaintiffs of a substantive right.

In *Lindley v. General Electric Co.*,[11] the Ninth Circuit expressly held that California's Doe statute extending the statute of limitations must be applied in a diversity action because under the Erie rule it is a matter of substantive law. And to underscore the point, Rule 15(c) was amended some years back to state that an amendment will relate back when "the law that provides the applicable statute of limitations allows relation back." Therefore, in an action involving state law claims, federal courts will expressly incorporate state relation back provisions, including Doe defen-dant statutes.[12]

In federal question cases, by contrast, there is no problem of destroyed diversity, and relation back is governed expressly by the remaining provisions of the federal rule. When state law does not provide the relation back principle (i.e., most federal question cases), Rule 15(c) allows relation back only if:

- (i) the claim arose out of conduct set out in the original pleading,
- (ii) the party to be brought received such notice that it will not be prejudiced in maintaining a defense,
- (iii) that party knew or should have known that, but for a mistake of identity, the original action would have been brought against it, and
- (iv) the second and third criteria are fulfilled within the 90-day window by which the complaint must be served under the federal rules (Rule 4(m)).[13]

Therefore, in federal question cases, there is no real need for fictitious defendants as they presumably can be added if the strict requirements of the rule are satisfied.[14]

And courts have uniformly held that even if a Doe defendant is named in the caption, there will be no relation back because Rule 15(c) is meant to correct a mistake concerning the identity of the party and not to allow an amendment because of a lack of knowledge of the party to be added.[15]

While all this addresses the relation back principle in federal question and diversity cases, it does not solve the possible impact of the Doe defendant on the existence of complete diversity. Since there must be complete diversity, and since the fictitious defendants might be non-diverse, then what does one do with the continuing presence of the Does before (or if) there is a request to amend the complaint?

4. Answering the Doe Defendant Question as a Practical Matter

Although (unlike in removed actions) there is no statute for cases filed originally in federal court saying that the Doe defendants can be disregarded in diversity actions, there is simply no good reason why they cannot be named and their citizenship considered later at the time of any amendment. And federal judges will simply have to hold their noses when plaintiffs include such fictitious defendants in their federal diversity complaints.

The solution, it seems to me, is to get over our fear of Doe defendants in federal court and acknowledge that there is really no jurisdictional danger at all. If, as rarely is the case, the Doe defendant's existence and/or role are later identified in discovery, and if that party does indeed destroy complete diversity, the federal court can simply take a new snapshot of complete diversity, allow the joinder and dismiss the case.[16]

On the other hand and consistent with Rule 19 (neces-sary party analysis), if the proposed new defendant is sham, nominal or being added simply to avoid federal jurisdiction late in the case, the federal court can decline to allow the amendment, strike the Does and go forward with the case.[17] This can occur trusting that a state court in any follow-up action against the former Doe might simply toll the statute for a reasonable failure to discov-er the defendant's identity. My bet that when the suggested Doe defendant is truly nominal, the plaintiff won't separately pursue the party at all.

Let there be no question about it: federal judges have a longstanding discomfort with the Doe defendant practice reasoning that it is uniquely state in nature and conflicts with simple federal pleading rules. However, since the right to name Does does appear to be substan-tive under Erie, federal courts should and must borrow this state practice.

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So our survival tips are as follows:

• Don't plead Does in federal question cases as they are unnecessary

• Do plead Does in diversity cases to preserve the relation back protection

• Since the federal court may dismiss such defendants for failure to serve within 90 days under Rule 4(m), conduct prompt discovery to identify any possible Doe

• Resist a Judge's request that you stipulate to striking the Does in the interim as you just might need them.

That's the answer.

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.

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[1] Compare Fed. R.Civ. P. 15(c) (severely limiting relation back when adding new defendants) and Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) (for state law claims in federal court apply state substantive law); and see The Wagstaffe Group Practice Guide: Fed. Civ. Proc. Before Trial at § 7-IV[D][2], 7.290 (LexisNexis 2020).

[2] See, e.g., Ala. R. Civ. P. 9(h); Ariz. Rule 10(f); Cal. Code Civ. Proc. § 474; N.J. Rule 4:26-4; Ohio Civ. R. 15(d).

[3] See, e.g., Barnes v. Wilson, 40 Cal. App. 3d 199, 203 (1974); Harrison v. Trump Plaza Hotel & Casino, 2015 U.S. Dist. LEXIS 1919 (D. N.J. Jan. 8, 2015).

[4] For an excellent discussion of the Doe defendant practice in federal court pleadings, see Gardiner Family, LLC v. Crimson Resource Mgmt. Corp., 147 F. Supp. 3d 1029 (E.D. Cal. 2015) (O'Neill, J.).

[5] See, e.g. Graziose v. Am. Home Prod. Corp., 202 F.R.D. 638, 643 (D. Nev. 2001); Richardson v. Johnson, 598 F.3d 734, 738 (11th Cir. 2010); Gillespie v. Civiletti, 629 F.2d 637, 642-643 (9th Cir. 1980).

[6] See Fed. R. Civ. P. 10(a); Fifty Associates v. Prudential Insurance Co. of America, 446 F.2d 1187, 1191 (9th Cir. 1970); Taylor v. Federal Home Loan Bank Bd., 661 F. Supp. 1341, 1350 (N.D. Tex. 1986). The Wagstaffe Practice Guide: Fed. Civ. Proc. Before Trial § 17.269.

[7] Garter-Bare Co. v. Munsingwear, Inc., 650 F.2d 975, 981 (9th Cir. 1980); Vogel v. Go Daddy Group, Inc., 266 F. Supp. 3d 234, 239-240 (D. D.C. 2017); see also The Wagstaffe Group Practice Guide: Fed. Civ. Proc. Before Trial § 17.269.

[8] 28 U.S.C. § 1441(a); see also The Wagstaffe Group Practice Guide: Fed. Civ. Proc. Before Trial § 7-IV[D][2][b][i].

[9] However, make no mistake about it--if the court does, in its discretion, allow the amendment and adds a non-diverse defendant after removal, the action must then be remanded to state court for lack of continuing jurisdiction. See 28 U.S.C. § 1447(e).

[10] See Winzer v. Kaufman County, 916 F.3d 464, 471 (5th Cir. 2019) (in federal civil rights action, Rule 15(c)—not the state Doe practice—governs relation back of amendments adding new parties); Heglund v. Atkin Cty., 871 F.3d 572, 579 (8th Cir. 2017) (same).

[11] 780 F.2d 797, 800 (9th Cir. 1986).

[12] See Gardiner Family, LLC v. Crimson Resource Mgt. Corp., supra; Doe v. Ciolli, 611 F. Supp. 2d 216, 220 (D. Conn. 2009); Fat T, Inc. v. Aloha Tower Assoc. Piers 7, 8 & 9, 172 F.R.D. 411, 414 (D. Haw. 1996).

[13] Importantly, Rule 15(c) does not allow a new party to be added beyond the statute of limitations unless the party knew it should have been named in the case at the time the action was filed or within the ninety day penumbral period thereafter. This means, therefore, that very few fictitious defendants allowed to be sued in state court can be added in a federal question case since rarely will they actually have known they should have been named at any time, much less within the ninety day period after commencement. But see Ceara v. Deacon, 916 F.3d 208, 211 (2d Cir. 2019) (if party was simply misnamed—"Deagan" should have been "Deacon" courts will allow the pleading to be corrected).

[14] Of course, it is not unusual to see the pleading of fictitious parties in federal question cases. Famously, for example, there is Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971); see also Gillespie v. Civiletti, supra, 629 F.2d at 639 (Doe pleading allowed where plaintiff is given opportunity through discovery to identify the unknown defendants). Moreover, when there is an overriding privacy concern, courts even allow plaintiffs to plead anonymously. Doe v. Vill. of Deerfield, 819 F.3d 372, 377 (7th Cir. 2016); The Wagstaffe Group Practice Guide: Fed. Civ. Proc. Before Trial § 17.250. However, none of these cases address the complete diversity conundrum.

[15] Ceara v. Deacon, supra; Heglund v. Atkin Cty., supra; Barrow v. Wethersfield Police Dept., 66 F.3d 466, 470 (2d Cir. 1995).

[16] Gardiner Family, LLC v. Crimson Resource Mgmt. Corp., supra; see also Brown v. Owens-Corning Inv. Review Comm., 622 F.3d 564, 572 (6th Cir. 2010) (plaintiffs permitted to sue Doe defendants until discovery reveals their identity); Martinez-Rivera v. Sanchez Ramos, 498 F.3d 3, 8 (1st Cir. 2009) (same).

[17] Lee v. Airgas-Mid South, Inc., 793 F.3d 894, 899 (8th Cir. 2015).

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ARBITRATION

"Look-Through" Approach to Determining Jurisdiction

Quezada v. Bechtel OG & C Constr. Servs.

946 F.3d 837, 2020 U.S. App. LEXIS 1192 (5th Cir. Jan. 14, 2020)

The Fifth Circuit holds that federal question jurisdiction over a motion to confirm, modify, or vacate an arbitration award is determined by the nature of the underlying claim.

Facts and Procedural Background. A former employee claimed that her employer engaged in discrimination, failure to accommodate, and retaliation in violation of the Americans with Disabilities Act (ADA). The arbitrator awarded the employee nearly $400,000. The employer sought vacatur or modification of the award in district court, and the employee moved to confirm the award. The district court concluded that it had federal question jurisdiction because the underlying action arose under federal law, denied the motion to vacate, and granted the motion to confirm. The Fifth Circuit affirmed.

FAA Does Not Confer Jurisdiction. Under the Federal Arbitration Act (FAA), a party to an arbitration agreement can seek a district court order compelling arbitration [9 U.S.C. § 4] or confirming, modifying, or vacating an arbitration award [9 U.S.C. §§ 9, 10, 11]. However, the FAA does not confer federal jurisdiction. Thus, a party seeking to compel arbitration or to confirm, modify, or vacate an arbitration award must establish an independent basis for subject-matter jurisdiction, such as diversity or federal question jurisdiction.

Vaden v. Discover Bank. In Vaden v. Discover Bank, the Supreme Court held that federal question jurisdiction over a petition to compel arbitration is determined by "looking through" the petition to the underlying dispute and determining whether that dispute arises under federal law. Such petitions are filed under 9 U.S.C. § 4, which authorizes petitions to compel arbitration in "any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties" [9 U.S.C. § 4 (emphasis added)]. The Court construed the "save for such agreement" language as indicating the district court should assume the absence of the arbitration agreement and determine whether it would have jurisdiction under Title 28 without it. The Court also reasoned that the look-through approach is consistent with basic jurisdictional tenets and practical considerations, because failure to look through to the arbitration proceeding's subject matter would allow a federal court to entertain a § 4 petition only when a federal-question suit was already before the court, the parties satisfied requirements for diversity jurisdiction, or the dispute involved a maritime contract [Vaden v. Discover Bank, 556 U.S. 49, 62–65, 129 S. Ct. 1262, 173 L. Ed. 2d 206 (2009)].

Circuit Split Concerning Motions to Confirm, Modify, or Vacate Arbitration Awards. The Third and Seventh Circuits hold that because Vaden relied on the "save for such agreement" language in § 4, which does not appear in §§ 9, 10, and 11, the look-through approach does not apply to motions to confirm, modify, or vacate arbitration awards [see 9 U.S.C. §§ 9–11; Goldman v. Citigroup Global Mkts., Inc., 834 F.3d 242, 252–255 (3d Cir. 2016); Magruder v. Fid. Brokerage Servs. LLC, 818 F.3d 285, 287–289 (7th Cir. 2016)]. By contrast, reasoning that the difference in language is not dispositive, the First, Second, and Fourth Circuits hold that the background principles animating the Court's analysis in Vaden require application of the same look-through approach for post-award motions as for motions to compel arbitration [see Ortiz-Espinosa v. BBVA Sec. of P.R., Inc., 852 F.3d 36, 45–47 (1st Cir. 2017); Doscher v. Sea Port Grp. Sec., LLC, 832 F.3d 372, 381–386 (2d Cir. 2016); McCormick v. Am. Online, Inc., 909 F.3d 677, 679–684 (4th Cir. 2018)].

Fifth Circuit Applies Look-Through Approach. The Fifth Circuit joined the majority of circuits, holding that the look-through approach applies to motions to confirm, modify, or vacate arbitration awards. The Fifth Circuit agreed with those courts that the principle of uniformity dictates using the same approach for determining jurisdiction under each section of the FAA. In addition, the Fifth Circuit noted that the practical reasons for the Court's use of the look-through approach with respect to motions to compel apply with equal force to the other motions authorized under the FAA.

District Court Had Jurisdiction. The underlying dispute in this case arose out of the ADA, a federal statute. Thus, the employee's claims would have been subject to federal-question jurisdiction absent the arbitration agreement. Therefore, applying the look-through approach, the Fifth Circuit held that the district court had jurisdiction to resolve the parties' motions to vacate, modify, or confirm the arbitration award.

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ATTORNEY'S FEES

Freedom of Information Act

Grand Canyon Trust v. Bernhardt

947 F.3d 94, 2020 U.S. App. LEXIS 1556 (D.C. Cir. Jan. 17, 2020) (per curiam)

The D.C. Circuit found no clear error in the district court's finding that a FOIA plaintiff was ineligible for attorney's fees because it did not show that its lawsuit caused a change in the government's position.

Background. Under the Freedom of Information Act (FOIA), a court may award attorney's fees to a requester in any case in which the complaint has "substantially prevailed" [5 U.S.C. § 552(a)(4)(E)(i)]. The OPEN Government Act of 2007 amended FOIA to clarify what "substantially prevailed" means, including "a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial [5 U.S.C. § 552(a)(4)(E)(ii)].

In this case, the plaintiff requested records from the Bureau of Land Management (BLM) and the Office of the Secretary of the Interior. The plaintiff received most of the requested records only after it filed suit.

The plaintiff sought attorney's fees, maintaining that the suit brought about a change in the agencies' positions because it caused a "sudden acceleration" in the processing of its requests. The district court denied attorney's fees, finding that the agencies produced all the requested documents on approximately the schedule they had predicted before the suit was filed.

Restoration of Catalyst Theory. Prior to 2001, the D.C. Circuit applied the "catalyst theory" to FOIA fee awards, which allowed for attorney's fees when the requestor's suit substantially caused the government to release the requested documents before final judgment. But in Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., the Supreme Court rejected the catalyst theory in the context of the Americans with Disabilities Act and the Fair Housing Amendments Act, holding that fees could be obtained by litigants under these Acts only if they were awarded some relief by a court [Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 610, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)].

Following Buckhannon, the D.C. Circuit shelved the catalyst theory for FOIA actions. Citing four other D.C. Circuit opinions, the court found that the passage of the OPEN Government Act of 2007 had the purpose of reinstating the catalyst theory for FOIA actions.

Standard of Review. The court rejected the plaintiff's assertion that the district court's finding should be reviewed de novo. The cases that the plaintiff cited in favor of de novo review used that standard because they rested on an interpretation of the statutory terms that define attorney's fees eligibility, or a dispute about the applicability of judicial precedent.

Noting that it has not revisited the standard of review since Buckhannon, the court applied pre-Buckhannon decisions holding that the clearly-erroneous standard should be applied because the issue of whether a plaintiff's suit caused the production of documents is a question of fact.

No Clear Error in District Court's Finding. The parties agreed that the plaintiff has the burden of showing that it was more probable than not that the government would not have produced the documents absent the lawsuit. Here, the court held that the district court properly found that the plaintiff failed to show that the suit caused the agencies to release the documents. Both agencies began processing the plaintiff's request well before the lawsuit was initiated, and both agencies made partial releases before the lawsuit was filed.

Moreover, the agencies gave predictions as to when the production would be completed, and they produced all of the requested documents roughly within the schedules that they had estimated before the litigation began.

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The plaintiff claimed on appeal that its lawsuit caused the government to accelerate its production of documents. The court indicated that it did not need to decide whether an acceleration constitutes a change in position within the meaning of the statute, given the relation of the pre-litigation schedules and the timing of the production.

Concurrence: 2007 FOIA Amendment Did Not Reinstate Catalyst Theory. Judge Randolph concurred in the judgment. Although he agreed with the finding that the plaintiff was ineligible for attorney's fees because it did not show that the government changed its position after the lawsuit was filed, he disagreed with the conclusion that the catalyst theory was reinstated by the 2007 FOIA amendment.

Judge Randolph opined that the discussion of the catalyst theory was dictum in this case as well as the four decisions relied on by the court in this case. Moreover, the statements about the theory "appear to be casual, offhand. No analysis, rigorous or otherwise, backs them up."

Countering "dicta with my own dictum," Judge Randolph concluded that the 2007 amendment does not embody the catalyst theory.

He stated that the catalyst theory embodies the notion that, even if the FOIA plaintiff obtained relief without a favorable judgment, the plaintiff could still recover attorney's fees by proving that its lawsuit caused the government to change its position by disclosing previously withheld documents.

He asserted that subsection II in the 2007 amendment, however, does not require a plaintiff to show a causal connection between its lawsuit and the government's capitulation. It contains three conditions "and only three conditions": (1) the plaintiff has obtained relief through the government's change in position, (2) the government's change in position was "voluntary or unilateral," and (3) the plaintiff's lawsuit must not have been "insubstantial." Therefore, "the provision requires only correlation not causation."

In support of his concurrence, Judge Randolph cited Judge Berzon's concurrence in First Amendment Coalition v. United States DOJ [878 F.3d 1119 (9th Cir. 2017)].

CLASS ACTIONS

Use of Discovery

In re Williams-Sonoma, Inc.

947 F.3d 535, 2020 U.S. App. LEXIS 1046 (9th Cir. Jan. 13, 2020)

The Ninth Circuit has granted mandamus to vacate a discovery order directing the defendant to produce a list of customers, which counsel had sought in order to find an appropriate lead plaintiff to pursue a class action.

Background. This action was brought in district court in California by a resident and citizen of Kentucky, against a California retailer. He alleged claims of fraud under California law based on misrepresentations as to the quality of bedding he had purchased. He also sought certification of a class of consumers who were similarly situated.

Before considering class certification issues, the district court determined that Kentucky law governed the plaintiff's claims, and that Kentucky consumer law prohibited class actions. The plaintiff gave notice to the court that he would pursue his personal claims under Kentucky law, but also sought to obtain discovery from the defendant for the sole purpose of aiding his counsel's attempt to find a California purchaser who might be willing to sue. The district court agreed to the discovery and ordered the defendant to produce a list of California customers who had purchased the relevant products. The defendant then filed this petition for mandamus relief.

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Mandamus Relief Was Appropriate to Vacate Discovery Order. In deciding whether to issue a writ of mandamus, the Ninth Circuit considers whether (1) the party seeking the writ has no other adequate means, such as a direct appeal, to attain the desired relief; (2) the petitioner will be damaged or prejudiced in a way not correctable on appeal; (3) the district court's order is clearly erroneous as a matter of law; (4) the district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules; and (5) the district court's order raises new and important problems, or issues of law of first impression [Bauman v. U.S. Dist. Court, 557 F.2d 650, 656–661 (9th Cir. 1977)]. Not all of these factors need to be satisfied; they must be weighed together on a case-by-case basis. The party seeking mandamus has the weighty burden of convincing the court to grant it.

Addressing the third factor first, the court of appeals determined that clear error was demonstrated by Supreme Court authority. Civil Rule 26(b)(1) limits the scope of discovery to "nonprivileged matter that is relevant to any party's claim or defense," and the Supreme Court in Oppenheimer Fund, Inc. v. Sanders determined that seeking discovery of the name of a class member is not relevant within the meaning of that rule [see Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 350-353, 98 S. Ct. 2380, 2389-2390, 57 L. Ed. 2d 253 (1978)]. The Supreme Court construed relevance under Rule 26(b)(1) to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case. A request for a customer list for the purpose of sending class notice did not fall within this definition since it was not calculated to lead to the discovery of admissible evidence. The class list had no bearing on the issues in the case.

The court of appeals noted that Rule 26(b)(1) was amended after Oppenheimer. The earlier version indicated that discovery must be "relevant to the subject matter involved in the pending action" while the current rule requires that discovery must be "relevant to any party's claim or defense." This change, however, was intended to restrict, not broaden, the scope of discovery and did not affect the rule in Oppenheimer. The court also noted that Oppenheimer dealt with a case in which class certification had already been granted, and the moving party sought to obtain a list of members of that class. In the present case, no class had been certified and counsel was without a plaintiff to pursue the class issues. Accordingly, the request here was less relevant than the request in Oppenheimer. The district court had clearly erred as a matter of law when it ordered the discovery in question.

As to the other Bauman factors, the court of appeals noted that the defendant had no other adequate means for relief available. Before a direct appeal could be taken and heard, the disclosure and damage to its interests would be complete. Thus, the first and second factors weighed in favor of granting mandamus. There was no showing that the district court's error was one that is often repeated, or that this was a novel issue. Thus, the fourth and fifth factors did not weigh in favor of granting mandamus. Overall, the balance of factors weighed in favor of mandamus, and accordingly the court of appeals granted mandamus and vacated the district court's discovery order.

Dissent. A dissenting judge took the view that the district court had not erred, let alone committed clear and indisputable error as required for mandamus. The dissent read Oppenheimer as holding only that, once a district court certifies a class action, class counsel must rely on the class action procedures outlined in Federal Rule of Civil Procedure 23 (not the discovery rules) to notify absent class members of certification. Oppenheimer did not hold that plaintiffs cannot seek the identities and contact information of absent class members for a different purpose before the class is certified.

Further, even if the federal discovery rules do not authorize the district court's order, Rule 23 broadly empowers the district court to take measures necessary to maintain a class action, protect the interests of putative class members, and provide notice to absent class members when necessary to protect their interests. Oppenheimer, the dissent said, did not narrow the scope of Rule 23. Rule 23(d) provides district courts with substantial residual powers to regulate communications with absent class members outside of formal notice requirements. Rule 23(d)(1)(B)(i) authorizes district courts to order that class members be notified of any step in the action to protect class members. The district court, the dissent concluded, acted well within its authority by facilitating class counsel's attempts to communicate with absent class members and to notify them of important developments in the lawsuit.