APRIL 2020

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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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Voluntary Dismissal

Wellfount, Corp. v. Hennis Care Ctr. of Bolivar, Inc.

2020 U.S. App. LEXIS 6670 (6th Cir. Mar. 3, 2020)

In a case of first impression in the circuit, the Sixth Circuit held that a plaintiff may move for a Rule 41(a)(2) court-ordered dismissal when it is still eligible to file a self-effectuating notice of dismissal under Rule 41(a)(1), even if the plaintiff has previously voluntarily dismissed an action including the same claims.

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Voting Rights Act

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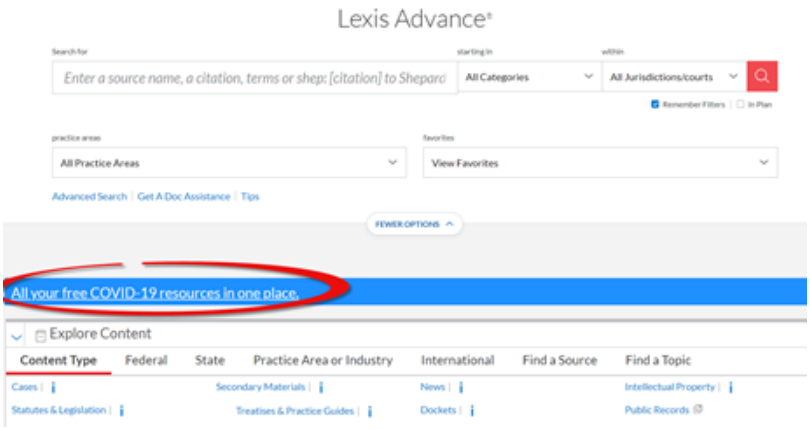

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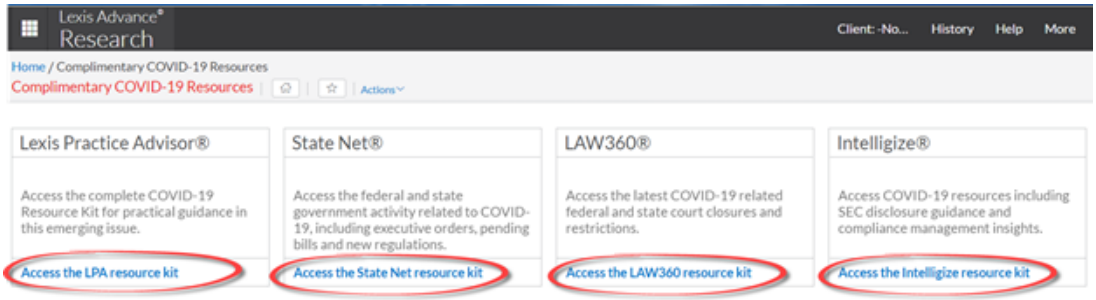

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DISMISSAL

Voluntary Dismissal

Wellfount, Corp. v. Hennis Care Ctr. of Bolivar, Inc.

2020 U.S. App. LEXIS 6670 (6th Cir. Mar. 3, 2020)

In a case of first impression in the circuit, the Sixth Circuit held that a plaintiff may move for a Rule 41(a)(2) court-ordered dismissal when it is still eligible to file a self-effectuating notice of dismissal under Rule 41(a)(1), even if the plaintiff has previously voluntarily dismissed an action including the same claims.

Background. Plaintiff was an institutional pharmacy with its principal place of business in Indiana. Plaintiff contracted to provide pharmaceutical services to nursing homes operated by Defendants in Ohio. When the relationship soured, Plaintiff filed suit against Defendants in Indiana state court, asserting claims for breach of contract, account stated, and unjust enrichment. Before Defendants could file a responsive pleading, Plaintiff voluntarily dismissed its suit, without prejudice, when Defendants questioned whether Indiana was a proper venue.

Plaintiff refiled its complaint in the U.S. District Court for the Northern District of Ohio. Again, Defendants' counsel asserted that, based on a forum-selection clause in the parties' contract, Plaintiff had filed suit in an improper venue. In response, and before Defendants filed an answer or motion for summary judgment, Plaintiff filed a motion for voluntary dismissal without prejudice under Federal Rule of Civil Procedure 41(a)(2). Plaintiff informed Defendants that it planned to refile in the Tuscarawas County Court of Common Pleas.

Defendants moved the district court to convert Plaintiff's motion into a self-effectuating notice of dismissal under Rule 41(a)(1). Defendants argued that no court order was necessary for Plaintiff to dismiss its case because Defendants had yet to serve an answer or motion for summary judgment. Plaintiff opposed Defendants' motion, emphasizing that it had deliberately chosen to seek a court-ordered dismissal under Rule 41(a)(2) so as to avoid the claim-preclusive effect of Rule 41(a)(1)(B). No binding authority, Plaintiff argued, precluded it from moving pursuant to Rule 41(a)(2).

The district court granted Plaintiff's motion and denied Defendants' motion, dismissing the case without prejudice. The court explained that neither the text of Rule 41(a) nor the purpose of the two-dismissal clause in Rule 41(a)(1)(B) supported the Defendants' view that a plaintiff is barred from seeking a court-ordered Rule 41(a)(2) dismissal if it is eligible to file a notice of dismissal under Rule 41(a)(1). Defendants appealed, arguing that because Plaintiff was eligible to file a self-effectuating notice of dismissal under Rule 41(a)(1) and had previously withdrawn an action based on the same claims, the court was without discretion to dismiss Plaintiff's action under Rule 41(a)(2).

Plaintiff Was Not Required to File Voluntary Notice of Dismissal. On appeal, Defendants argued that the district court was, as a matter of law, required to construe Plaintiff's proffered Rule 41(a)(2) motion for voluntary dismissal as a notice of dismissal under Rule 41(a)(1). Rule 41 provides two main mechanisms by which a plaintiff may voluntarily dismiss its case. First, if an opposing party has yet to serve either an answer or a motion for summary judgment, a plaintiff may dismiss an action without a court order by filing a notice of dismissal [see Fed. R. Civ. P. 41(a)(1)(A)]. Second, if an opposing party has served an answer or a motion for summary judgment, then an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper [Fed. R. Civ. P. 41(a)(2)]. Although a notice of dismissal under Rule 41(a)(1) is self-effectuating and never subject to review, it "operates as an adjudication on the merits" if the plaintiff previously dismissed any action based on or including the same claim [Fed. R. Civ. P. 41(a)(1)(B)]. A court-ordered dismissal pursuant to Rule 41(a)(2), by contrast, is without prejudice unless the order states otherwise.

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Thus, the nature of the voluntary dismissal dictates whether Plaintiff may bring a future action involving the same claims. If the voluntary dismissal was properly entered by court order, then it is "without prejudice," and Plaintiff may refile its claims [see Fed. R. Civ. P. 41(a)(2)]. But if the district court was required to construe Plaintiff's motion as a notice of dismissal under Rule 41(a)(1), then the dismissal "operates as an adjudication on the merits," and Plaintiff is barred from refiling [see Fed. R. Civ. P. 41(a)(1)(B)]. Defendants argued that, no matter the label, a district court must construe any request for voluntary dismissal as a notice of dismissal if the defendant has yet to serve an answer or motion for summary judgment. To hold otherwise, Defendants asserted, would nullify the two-dismissal rule because no plaintiff would file a notice of dismissal under Rule 41(a)(1) if it had previously withdrawn the same claims.

The Sixth Circuit acknowledged that it had never before decided whether a plaintiff may move for a Rule 41(a)(2) dismissal when it both (1) is eligible to file a self-effectuating notice of dismissal under Rule 41(a)(1) and (2) has previously withdrawn an action including the same claims. Only the Eleventh Circuit has directly addressed the issue, finding that a plaintiff always retains the option of seeking a court-ordered dismissal under Rule 41(a)(2) [see Cunningham v. Whitener, 182 Fed. Appx. 966, 969–971 (11th Cir. 2006) (unpublished) (per curiam)]. The Sixth Circuit agreed that a plaintiff may seek a court-ordered dismissal at any point after filing its complaint. Both the text and purpose of Rule 41(a) support this view. With respect to the text of Rule 41, no provision mandates that a plaintiff forgo the use of Rule 41(a)(2) if still eligible to file a notice of dismissal under Rule 41(a)(1). To the contrary, Rule 41(a)(1) states that, if otherwise eligible, a plaintiff "may dismiss an action without a court order" [Fed. R. Civ. P. 41(a)(1)(A) (emphasis added)]. It does not require as much. Similarly, although Rule 41(a)(2) details when a plaintiff must seek a court order to dismiss its action, it imposes no limitation on when a plaintiff may choose to request a voluntary dismissal.

The court noted that the two-dismissal rule is an exception to the general principle that a voluntary dismissal does not bar a new suit based on the same claim. However, Rule 41(a)(1)(B) prevents abusive tactics by a plaintiff who unilaterally and repeatedly dismisses a case without prejudice. The court explained that those concerns are not implicated by a voluntary dismissal pursuant to Rule 41(a)(2) because a plaintiff's ability to harass can be cut off completely by serving an answer. Furthermore, unlike a dismissal as of right under Rule 41(a)(1), a dismissal under Rule 41(a)(2) is subject to review by the district court and may be conditioned on whatever terms the district court deems necessary to offset the prejudice the defendant may suffer from a dismissal without prejudice.

The court disagreed with Defendants' contention that allowing court-ordered dismissals at the earliest stages of a lawsuit will nullify the two-dismissal rule. A plaintiff who moves pursuant to Rule 41(a)(2) is treated differently than one who files a Rule 41(a)(1) notice of dismissal. Under Rule 41(a)(1), a qualifying plaintiff has an absolute right to withdraw its action and, once a notice of dismissal is filed, a district court has no discretion to deny such a dismissal. By contrast, a plaintiff who moves to dismiss its action by court order is subject to the discretion of the district court. The district court may deny the motion, require that a dismissal be with prejudice, or impose any other conditions that it deems necessary. Thus, the two-dismissal rule continues to serve an important function by informing a plaintiff's choice and insulating defendants from repeated unilateral dismissals.

Conclusion. For these reasons, the Sixth Circuit affirmed the ruling of the district court allowing plaintiff to proceed under Rule 41(a)(2) and entering a dismissal without prejudice.

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ELEVENTH AMENDMENT

Voting Rights Act

Ala. State Conf. of the NAACP v. Alabama

949 F.3d 647, 2020 U.S. App. LEXIS 3220 (11th Cir. Feb. 3, 2020)

The Eleventh Circuit holds that the Voting Rights Act abrogates states' immunity from suit in federal court.

Facts and Procedural Background. Alabama selects appellate judges in at-large elections. Although African-American voters make up about 26% of the population in Alabama, only two have ever been elected to the appellate court in at-large elections, and both had first been appointed by the governor. This prompted the Alabama State Conference of the NAACP (NAACP) and four black Alabama voters to sue the State of Alabama under the Voting Rights Act (VRA). They sought declaratory and injunctive relief striking down the state's at-large election system for appellate judges and ordering the state to implement a new election method consisting of single-member districts. The district court held, among other things, that the suit was not barred by the Eleventh Amendment. The Eleventh Circuit affirmed.

Voting Rights Act. Private parties have been suing states and localities under the VRA for 50 years. Section 2 of the Act prohibits "any State or political subdivision" from imposing any "voting qualification or prerequisite to voting or standard, practice, or procedure" that "results in a denial or abridgment of the right of any citizen of the United States to vote on account of race" [52 U.S.C. § 10301(a)]. Section 3 gives private parties a right to sue, setting forth the appropriate judicial procedures for whenever "the Attorney General or an aggrieved person" institutes a proceeding "to enforce the voting guarantees of the fourteenth and fifteenth amendment in any State or political subdivision" [52 U.S.C. § 10302(a), (b)].

Eleventh Amendment Immunity. The Eleventh Amendment generally prohibits suits against states in federal court. However, this prohibition is subject to abrogation by federal statute. To determine whether Congress abrogated state sovereign immunity, the court asks whether Congress (1) expressed its unequivocal intent to do so, and (2) acted pursuant to a valid grant of constitutional authority.

Clear Congressional Intent to Abrogate State Sovereign Immunity. To abrogate sovereign immunity by statute, Congress must make its intention to do so "unmistakably clear" in the statutory text. However, an express abrogation clause is not required. The court looks at the entire statute, including amendments, to determine whether Congress clearly abrogated sovereign immunity.

The text of the VRA makes clear that Congress intended to subject states to suits by private parties, according to the Eleventh Circuit. The court reasoned that the language of Sections 2 and 3, read together, imposes direct liability on states for discrimination in voting and explicitly provides remedies to private parties to address violations under the statute. Section 2 specifically forbids "any State" from imposing a practice that would deny any citizen the right to vote on account of race [52 U.S.C. § 10301], and Section 3 repeatedly refers to proceedings initiated by "the Attorney General or an aggrieved person" to enforce the VRA [52 U.S.C. § 10302(a), (b), (c)]. The court found it "implausible that Congress designed a statute that primarily prohibits certain state conduct, made that statute enforceable by private parties, but did not intend for private parties to be able to sue States."

Valid Grant of Constitutional Authority. Abrogation of state sovereign immunity by statute also requires a valid grant of congressional power. The Supreme Court has held that Congress may not abrogate state immunity pursuant to its Article I powers, but it may do so under its enforcement powers pursuant to Section 5 of the Fourteenth Amendment [see Bd. of Trs. v. Garrett, 531 U.S. 356, 364, 121 S. Ct. 955, 148 L. Ed. 2d 866 (2001)]. The Supreme Court has never considered whether Congress may also abrogate state sovereign immunity using its Fifteenth Amendment enforcement powers.

The Eleventh Circuit held that Congress may abrogate state sovereign immunity using its Fifteenth Amendment enforcement powers. The court reasoned that the language in Section 2 of the Fifteenth Amendment authorizing Congress to enforce its provisions by appropriate legislation is identical to the language in Section 5 of the Fourteenth Amendment. Given this identical language and the nature of the Civil War Amendments (Amendments 13, 14, and 15) as an intentional intrusion on state sovereignty, the Eleventh Circuit held that Section 2 of the Fifteenth Amendment must also give Congress power to abrogate state sovereign immunity.

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Conclusion. The VRA was designed to intrude on state sovereignty to eradicate state-sponsored racial discrimination in voting. Because the Fifteenth Amendment permits this intrusion, Alabama is not immune from suit under Section 2 of the VRA. In so holding, the Eleventh Circuit joined several other courts [see OCA-Greater Houston v. Texas, 867 F.3d 604, 614 (5th Cir. 2017); Mixon v. Ohio, 193 F.3d 389, 398–399 (6th Cir. 1999); Ga. State Conf. of the NAACP v. Georgia, 269 F. Supp. 3d 1266, 1274–1275 (N.D. Ga. 2017); Reaves v. United States DOJ, 355 F. Supp. 2d 510, 515–516 (D.D.C. 2005)].

Dissent. Judge Branch dissented, arguing that Congress did not unequivocally abrogate state sovereign immunity under Sections 2 and 3 of the VRA. She accused the majority of replacing the express abrogation test with "something novel and without foreseeable limitations: Congress prohibits state conduct, ergo abrogation." She would have reversed the district court's order and remanded with instructions to dismiss the State of Alabama from the suit.

VENUE

Patent Cases

In re Google LLC

949 F.3d 1338, 2020 U.S. App. LEXIS 4588 (Fed. Cir. Feb. 13, 2020)

The Federal Circuit holds that, for purposes of the patent venue statute, a "regular and established place of business" requires the regular, physical presence of an employee or other agent of the defendant conducting the defendant's business at the alleged place of business.

Background. The defendant, Google LLC, sought a writ of mandamus ordering the district court to dismiss this patent infringement case, filed in the Eastern District of Texas, for lack of venue. The plaintiff argued that under the patent venue statute, 28 U.S.C. § 1400(b), venue was proper because Google had committed acts of infringement in the Eastern District and had a regular and established place of business there.

Google's business includes providing video and advertising services to residents of the Eastern District of Texas through the internet. Several Google Global Cache servers, which function as local caches for Google's data, were located in the Eastern District. These servers were not hosted within datacenters owned by Google; instead, Google contracted with internet service providers within the district to host Google's servers. No Google employee performed installation of, performed maintenance on, or physically accessed any of the servers hosted by internet service providers in the Eastern District.

Google moved to dismiss the complaint for improper venue, and the district court denied the motion, finding that the Google Global Cache servers qualified as Google's "regular and established place of business." Google then petitioned for mandamus to direct the district court to dismiss for lack of venue.

Propriety of Mandamus Relief. A court of appeals may issue a writ of mandamus if (1) the petitioner has no other adequate means to attain relief, (2) the petitioner shows that the right to mandamus is clear and indisputable, and (3) the court is satisfied that the writ is appropriate under the circumstances. These requirements may be met when the district court's decision involves basic and undecided legal questions. The court of appeals noted that, in an earlier case, the same district court had found that venue was proper under identical facts. Google had also petitioned for mandamus in that case, and the court of appeals had denied the petition on the ground that Google had failed to show that the district court's ruling implicated the special circumstances justifying mandamus review of basic, unsettled, recurring legal issues.

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This previous denial of mandamus, the court of appeals said, was based on (1) its observation that it was not known if the district court's ruling involved the kind of broad and fundamental legal questions relevant to § 1400(b) that would be appropriate for mandamus, and (2) the lack of disagreement among a large number of district courts on these questions. Under these circumstances, it was appropriate to allow the issue to "percolate in the district courts" so as to more clearly define the importance, scope, and nature of the issue for review. Since then, a significant number of district court decisions had adopted conflicting views on the basic legal issues presented. Experience had also shown that it was unlikely that these issues would be preserved and presented through the regular appellate process. The substantial expense to the parties that would result from an erroneous district-court decision confirmed the inadequacy of appeal. Finally, the additional district-court decisions had crystallized and brought clarity to the issues. The court of appeals concluded that mandamus was now an available remedy.

Interpretation of Patent Venue Statute. Under the patent venue statute, 28 U.S.C. § 1400(b), a civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a "regular and established place of business." A "regular and established place of business" must be (1) a physical place in the district (2) that is a regular and established place of business, and (3) is a place of the defendant [In re Cray, Inc., 871 F.3d 1355, 1360 (Fed. Cir. 2017)]. Google argued that a "place" must have the characteristics of a real property or leasehold interest, and that a "place of business" requires a place where an employee or agent of the defendant is conducting the defendant's business.

The court of appeals first determined that a "place" need not be a real property or leasehold interest. A "place" merely needs to be a physical, geographical location in the district from which the business of the defendant is carried out. A "virtual space" or "electronic communications from one person to another" cannot constitute a regular and established place of business [In re Cray, Inc., 871 F.3d 1355, 1362 (Fed. Cir. 2017)], but here the Google servers were physically located in the district in a fixed, geographic location. This was a "place" for purposes of the statute. In the same way, a defendant who operated a table at a flea market might have an established place of business, because the table serves as a physical, geographical location from which the business of the defendant is carried out.

However, the court of appeals agreed with Google's argument that a "place of business" requires an employee or agent of the defendant to be conducting business at that place. This conclusion is supported by the service statute for patent cases [28 U.S.C. § 1694], which was originally enacted together with what is now the patent venue statute. The service statute allows service where the defendant "shall have committed acts of infringement and have a regular and established place of business. If such suit is brought in a district of which the defendant is not an inhabitant, but in which such defendant has a regular and established place of business, service of process, summons, or subpoena upon the defendant may be made by service upon the agent or agents engaged in conducting such business in the district in which the suit is brought." This language plainly assumes that the defendant will have a "regular and established place of business" within the meaning of the venue statute only if the defendant also has an "agent . . . engaged in conducting such business." Also, the provision that "service . . . may be made by service upon the agent" and the "regular and established" character of the business assumes the regular, physical presence of an agent at the place of business.

Eastern District of Texas Was Not a Proper Venue. The court of appeals concluded that the Eastern District of Texas was not a proper venue because Google lacked a "regular and established place of business" within the district, since it had no employee or agent regularly conducting its business at its alleged "place of business" within the district. The record clearly showed that Google had no employees in the Eastern District, and the court of appeals concluded that the internet service providers that hosted the Google servers were not acting as Google's agents.

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An agency relationship is a fiduciary relationship through which an agent acts on behalf of a principal. The essential elements of agency are (1) the principal's right to direct or control the agent's actions, (2) the manifestation of consent by the principal to the agent that the agent will act on the principal's behalf, and (3) the consent by the agent to act. The contracts here stated that Google would provide the two internet service providers with server equipment, which the providers would install and host in their datacenters. Google had no right of control over the providers in carrying out these functions. The performance of installation and maintenance functions did not amount to conducting Google's business as an agent. These activities were meaningfully different from the actual producing, storing, and furnishing to customers of Google's electronic services. In reaching this conclusion, the court of appeals noted that the Supreme Court has cautioned against a broad reading of the venue statute, and also noted the importance of relatively clear rules as to venue issues, as well as the clear intent of Congress in enacting the statute to restrict venue to where the defendant resides or is conducting business at a regular and established place of business, with agents there regularly conducting that business.

Accordingly, the Eastern District of Texas was not a proper venue, because Google lacked a "regular and established place of business" within the district, since it had no employee or agent regularly conducting its business at its alleged "place of business" within the district. The court of appeals granted the petition for mandamus and directed the district court to dismiss or transfer the case as appropriate.