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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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For legislative history and intent, the source **Congressional Hearings (1824-current)** is of particular interest. This source contains the official text of each hearing, available within 48 hours of the relevant committee's release. (Committees may take several weeks to release this official version, however.) The archive is incredibly deep, reaching back to 1824, and the coverage is broad, covering almost 150,000 hearings altogether, and 13,000+ over the last 10 years. The documents are presented as PDFs with a text title page that includes the name of the committee, hearing subject, date and witnesses. They also include any pre- or post-hearing submissions. The full text of the document is searchable, as with any other LexisNexis source. If you perform a full Lexis search, they will be found under the Statues and Legislation content category, under the Legislative History filter.

Best Practice: Witnesses can be listed with or without middle names or initials, or with last name first, according to committee preference, so a proximity (within) connector is very useful. Example: ***Anthony w/3 Fauci*** *to find Anthony Fauci, Anthony S. Fauci or Fauci, Anthony.*

For researchers interested in what's happening in Committee right now, LexisNexis provides **CQ Transcriptions**, which provides voice-recognition transcripts of Congressional committee hearings within a few days of completion. In contrast with the previously mentioned source, these are unofficial transcripts, but available much sooner, providing greater current awareness. These are editorially selected transcripts – not every hearing will be covered – and also include political speeches, press conferences and interviews. LexisNexis also provides access to Political Transcript Wire and Federal News Service, which previously provided similar coverage of hearings. Their publisher no longer includes such hearings, but they are useful as archival material.

Best Practice: These transcripts are from a news source with the committee name in the headline, so a headline segment search will find hearings from a specific committee, e.g., Headline(House and Armed Services).

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ERIE DOCTRINE

State Anti-SLAPP Statutes Inapplicable in Federal Court

La Liberte v. Reid

966 F.3d 79, 2020 U.S. App. LEXIS 21936 (2d Cir. July 15, 2020)

The Second Circuit joins the developing consensus among the circuits and holds that state anti SLAPP statutes do not apply to the resolution of state claims in federal court because they conflict with federal pleading and summary-judgment standards.

Parties and Factual Background. The plaintiff Roslyn La Liberte was a private citizen from California who spoke at a city council meeting to oppose that state's sanctuary state law. A photo of her interaction with a minority teenager after the meeting went viral on social media, with a caption asserting that she had yelled specific racist remarks. The defendant Joy Reid, a New York based cable television host on MSNBC, initially retweeted that post on Twitter with no additional material. Later, however, Reid reposted the photograph on Instagram and specifically attributed the previously described racist remarks to La Liberte. In a later post, Reid juxtaposed the photograph with a stock image of a white woman in Little Rock in 1957 screaming at a black child trying to go to school during that city's contentious desegregation efforts. The teenager from the photo later publicly explained that La Liberte did not scream at him, and that they were simply having a civil discussion without any racist overtones. Reid then removed the posts and apologized to both La Liberte and the teenager.

Procedural History. Despite the apology, La Liberte sued Reid for defamation in the U.S. District Court for the Eastern District of New York, alleging diversity as the basis for federal jurisdiction. The parties agreed that California state law applied to the claims despite the New York forum. Reid therefore moved for dismissal under both Fed. R. Civ. P. 12(b)(6) and the California anti SLAPP statute. Relying on both sources of law, the district court dismissed and ordered that Reid was entitled to attorney's fees under California state law. La Liberte appealed to the Second Circuit.

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

Authorizing a special motion to strike or dismiss [Cal. Civ. Proc. Code § 425.16(b)(1)] one or more state-law claims.

Requiring the defendant to bring the motion within a specified time after service [Cal. Civ. Proc. Code § 425.16(f) (60 days)].

Staying discovery after the motion is filed [Cal. Civ. Proc. Code § 425.16(g)].

Adopting standards for the court's decision of the motion [Cal. Civ. Proc. Code § 425.16(b)].

Requiring a decision under those standards within a specified time after the motion is filed [Cal. Civ. Proc. Code § 425.16(f) (30 days)].

Authorizing or requiring an award of attorney's fees, sanctions, or both incident to a dismissal of one or more claims under the statute [Cal. Civ. Proc. Code § 425.16(c)].

Authorizing an interlocutory appeal of any decision on the motion [Cal. Civ. Proc. Code § 425.16(i)].

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

Initial Decisions Applied State Law. When these issues were first presented to federal courts, they typically applied state anti-SLAPP statutes as a matter of course to avoid inconsistent outcomes and discourage forum-shopping. In particular, both the Ninth Circuit [e.g., United States ex rel. Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 973 (9th Cir. 1999)] and the Second Circuit [e.g., Adelson v. Harris, 774 F.3d 803, 809 (2d Cir. 2014)] took that approach.

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

The analysis of Judge Kavanaugh in the Abbas case has proven most influential, as several circuits have adopted it either in full, or with some minor clarifications, including the Fifth Circuit [Klocke v. Watson, 936 F.3d 240, 247–248 (5th Cir. 2019)], the Tenth Circuit [Los Lobos Renewable Power, LLC v. AmeriCulture, Inc., 885 F.3d 659, 673 (10th Cir. 2018)], and the Eleventh Circuit [Carbone v. CNN, Inc., 910 F.3d 1345, 1350 (11th Cir. 2018)]. The Ninth Circuit has also adjusted its analysis after the decision in Abbas, holding that the only attributes of the California anti SLAPP statute that apply in federal court are the initial authorization for the motion and a resulting fee award, and that all other features of the statute as to the resolution of the merits of the motion are displaced by federal pleading and summary-judgment standards [Planned Parenthood Fed'n of Am. v. Ctr. for Med. Progress, 890 F.3d 828, 833–835 (9th Cir. 2018)].

Second Circuit Adopts Abbas Approach. Returning to the instant action, the Second Circuit rejected Reid's argument that it should apply the Ninth Circuit approach just described, noting that doing so elided the more fundamental question of whether the California anti SLAPP statute applied at all; instead, it governed only how the statute should be applied. On that fundamental question, the court of appeals agreed with the Abbas analysis that the anti SLAPP statute does not apply at all in federal court because it provides a different answer to the same question addressed by federal rules, specifically, when can Reid avoid trial by securing a dismissal under Rule 12 or summary judgment under Rule 56? The California anti SLAPP statute requires a demonstration of probable success to avoid dismissal, while the federal rules require only possible success. Therefore, as the Second Circuit succinctly put it, "California's special motion requires the plaintiff to make a showing that the Federal Rules do not require."

Rules Regulate Procedure. Once a conflict has been found, the federal rule displaces the state rule under Hanna if it is a valid exercise of congressional rulemaking authority under the Rules Enabling Act. The Second Circuit concluded that it had "little difficulty" in holding that Rules 12 and 56 affect only the process of enforcing the litigants' rights and not the rights themselves, and thus really regulate procedure and are valid under the Rules Enabling Act.

Award of Attorney's Fees. Finally, Reid argued that the district court's award of attorney's fees could be affirmed for securing the Rule 12(b)(6) dismissal, even if the California anti SLAPP statute did not apply. The Second Circuit rejected that argument on the basis of the statutory language itself, which conditions an award on a successful motion to strike, not on any other disposition.

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Earlier Case Applying Nevada Statute Distinguished. The Second Circuit distinguished an earlier case in which it had applied the Nevada anti SLAPP statute, noting that the statute involved in that case did not alter the procedure for resolving state-law claims; instead, it created a substantive defense to liability on the claim.

Merits Issues. After disposing of the procedural question of the anti SLAPP statute, the Second Circuit turned to the merits issues and concluded that Reid was a publisher of the posts to which she had added content, so she could not claim immunity under Section 230 of the Communications Decency Act. The court also concluded that La Liberte was not a limited purpose public figure, so an allegation of malice was not required to avoid dismissal under Rule 12(b)(6). Finally, the accusation of racism was not merely an opinion; instead, it was an assertion of fact that could be proved either true or false.

Disposition. The Second Circuit vacated the district court's dismissal under Rule 12(b)(6) and the California anti SLAPP statute, as well as the resulting award of attorney's fees, and remanded for further proceedings.

PRETRIAL CONFERENCES

Settlement Conference

In re GM, LLC

2020 U.S. App. LEXIS 21009 (6th Cir. July 6, 2020)

The Sixth Circuit ruled that a district judge abused his discretion when he dictated who specifically had to attend a settlement conference on behalf of the parties and required that they meet face-to-face.

Background. Plaintiffs, General Motors, LLC and General Motors Company, sued defendants for conspiring to violate the RICO Act and various state laws. The district judge entered an order requiring the parties' CEOs to meet in person, without their legal counsel, "to reach a sensible resolution of this huge legal distraction," and to personally report back to the district judge via a public Zoom webinar on their progress in settling the case. Plaintiff sought a writ of mandamus that the district judge abused his discretion in setting the terms of the settlement conference.

District Judge Generally May Not Dictate Specifically Who Attends Settlement Conferences. The district court subsequently modified its order to provide that counsel could be present during the CEOs' face-to-face meeting and at the pretrial conference, which would be closed to the public. The Sixth Circuit acknowledged that mandamus relief is inappropriate if the district court corrects its own errors. However, one issue remained in this case: Did the district judge abuse his discretion when he dictated who specifically had to attend on behalf of the parties and required that they meet face-to-face?

The Federal Rules of Civil Procedure provide district judges with tools to manage their busy dockets. Relevant to this case, at any pretrial conference, the district judge may consider and take appropriate action on settling the case [see Fed. R. Civ. P. 16(c)(2)(I)]. The Sixth Circuit noted that, to facilitate open communication, settlement conferences should be private, and not open to the media and the public. "If appropriate, the court may require that a party or its representative be present or reasonably available by other means to consider possible settlement" [Fed. R. Civ. P. 16(c)(1)]. "Whether this would be the individual party, an officer of a corporate party, a representative from an insurance carrier, or someone else would depend on the circumstances" [Fed. R. Civ. P. 16 Advisory Committee Notes (1993 Amendments)]. However, the selection of the appropriate representative should ordinarily be left to the party and its counsel. In this case, the district judge did not consider or try the lesser alternative of permitting the parties and their counsel to select their own corporate representatives and allowing them to confer with one another by any reasonable means, including by telephone or video conference. Furthermore, the reasons offered by the district judge for issuing the order—for example, the COVID-19 pandemic and the tragic killing of George Floyd—were not related to settling the issues specific to this case. The district judge accordingly failed to provide legally adequate reasons to establish that it was appropriate to order the CEOs personally to meet face-to-face to consider a possible settlement. The Sixth Circuit concluded that, despite its subsequent modification, the order was not in harmony with the provisions of Rule 16.

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Authority to Issue Writ of Mandamus. The Sixth Circuit also found that it had authority to issue a writ of mandamus. The court acknowledged that a writ of mandamus is an extraordinary remedy, which should issue only in exceptional circumstances amounting to a judicial usurpation of power, or a clear abuse of discretion. Three conditions must be satisfied. First, a party must have no other adequate means to attain the relief it desires. Second, it must show that its right to the issuance of the writ is clear and indisputable. Third, the court must find that the writ is appropriate under the circumstances. The Sixth Circuit found that these conditions were satisfied.

First, the relief sought could not be obtained by other adequate means such as direct appeal because, once the in-person meeting occurred, the issue would be moot. Second, the need for mandamus relief was clear because the district judge abused his discretion. An abuse of discretion occurs when the district court's decision is clearly unreasonable, arbitrary or fanciful. Without any prior input from the parties or their counsel, the district judge (1) singled out the parties' highest ranking officers, (2) required that they meet face-to-face, (3) did not account for the risks involved in traveling during the COVID-19 crisis, (4) ordered them to report back to the court in only eight days, and (5) took these measures for reasons unrelated to the case.

Conclusion. Therefore, the Sixth Circuit granted the petition for writ of mandamus to the extent the district judge ordered a settlement conference to be held face-to-face and dictated specifically who was required to attend on behalf of the parties. However, the court rejected plaintiffs' request for reassignment of the case to a different judge.

REVIEWABILITY OF ISSUES

Forfeiture of Appellate Review

Acadian Diagnostic Labs., L.L.C. v. Quality Toxicology, L.L.C.

965 F.3d 404, 2020 U.S. App. LEXIS 21846 (5th Cir. July 13, 2020)

The Fifth Circuit has held that a litigant asking the appellate court to amend a final judgment to award greater damages forfeited that issue by not pursuing any of several mechanisms for relief that had been available in the district court.

Background. After a jury award for the plaintiff in this breach-of-contract action, the defendant appealed, and the plaintiff cross-appealed. The plaintiff argued that the damages award was too low and "not supported under any view of the evidence at trial." The plaintiff therefore asked the Fifth Circuit for an amendment of the final judgment to reflect a higher award of damages, based either on the evidence at trial or the district judge's apparent finding made in connection with a grant of partial summary judgment.

Appellate Court Could Not Simply Enter Judgment for Higher Damages. The Fifth Circuit panel began by observing that it could not simply amend the jury's damages award and increase the damages the defendant must pay. That would have been true even if the appellate court thought the evidence could support a higher award. The court explained that it has long been established that the Seventh Amendment's Re-Examination Clause—that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law"—generally prevents increasing jury awards after a verdict [see Dimick v. Schiedt, 293 U.S. 474, 486, 55 S. Ct. 296, 79 L. Ed. 603 (1935); Taylor v. Green, 868 F.2d 162, 164 (5th Cir. 1989)]. The court thus easily concluded that the plaintiff's request for the entry of judgment reflecting a higher damages award was meritless.

The court remarked that its conclusion was reinforced by the fact that the Federal Rules of Civil Procedure provide several ways for a federal litigant to seek a different damages figure than what the jury has awarded. Yet the plaintiff had not chosen to pursue any of those avenues for relief. The court reviewed these options in order.

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Plaintiff Could Have Sought Judgment as Matter of Law. A litigant's first option—available before the jury decides anything—is to seek judgment as a matter of law under Rule 50(a) if there is no valid dispute as to the amount of damages [see Fed. R. Civ. P. 50(a); Moreau v. Oppenheim, 663 F.2d 1300, 1311 (5th Cir. 1981); see also Hyundai Motor Fin. Co. v. McKay Motors I, LLC, 574 F.3d 637, 642 (8th Cir. 2009)]. The Fifth Circuit observed that such a motion is akin to one for summary judgment, but at a later stage of the proceedings. The plaintiff could have explained why there was no dispute as to the damages, and why no damages figure was possible except for the one the plaintiff sought. But because the plaintiff had not made a Rule 50(a) motion, it had forfeited the right to seek judgment as a matter of law in the court of appeals [see Purcell v. Seguin State Bank & Tr. Co., 999 F.2d 950, 956 (5th Cir. 1993)].

Had the plaintiff filed a Rule 50(a) motion, it could have renewed that motion under Rule 50(b) after the jury rendered its damages verdict [see Fed. R. Civ. P. 50(b)]. In that case, the district court could have (1) allowed the jury's damages figure to stand, (2) ordered a new trial, or (3) directed the entry of judgment as a matter of law [Fed. R. Civ. P. 50(b)]. But the plaintiff did not file a Rule 50(b) motion, and in the absence of such a motion, the court of appeals lacked the power to direct the district court to enter judgment contrary to the one it had permitted to stand [see Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc., 546 U.S. 394, 400–401, 126 S. Ct. 980, 163 L. Ed. 2d 974 (2006)].

Plaintiff Could Have Sought New Trial on Damages. Even without filing any motion under Rule 50, the plaintiff could have filed a Rule 59 motion for a new trial on damages [see Fed. R. Civ. P. 59(a)]. One ground for a new trial is that the jury's damages award is against the weight of the evidence [see Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 433, 116 S. Ct. 2211, 135 L. Ed. 2d 659 (1996)]. On a motion for new trial in the district court, the plaintiff could have argued, as it did on its cross-appeal, that the jury's verdict was not supported by the evidence at all. But the plaintiff failed to file a Rule 59 motion for new trial, and that failure deprived the plaintiff of the right to pursue a new trial on appeal [see Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc., 546 U.S. 394, 404, 126 S. Ct. 980, 163 L. Ed. 2d 974 (2006)].

The Fifth Circuit concluded that the plaintiff's failure to seek relief in the district court under Rule 50 and 59 forfeited its ability to seek appellate review of the jury verdict.

Plaintiff Could Have Requested Entry of Judgment to Resolve Apparent Inconsistency. Although it had forfeited appellate review of the jury's damages determination, the plaintiff nonetheless argued that the Fifth Circuit should correct the apparent inconsistency between the final judgment and the district court's damages finding made in connection with its earlier summary-judgment order. Again the Fifth Circuit panel pointed out that the plaintiff had failed to pursue available options for relief in the district court.

One option was Rule 58(d), which allows a party to request that judgment be set out in a separate document [Fed. R. Civ. P. 58(d)]. The court of appeals explained that when a judgment may be more complicated than a general jury verdict, Rule 58 contemplates that the district court will pay careful attention to the preparation of this document [see Fed. R. Civ. P. 58(b)(2)]. So the plaintiff could have used Rule 58 to request the entry of a final judgment that reflected both the jury verdict and the summary judgment opinion. But the plaintiff failed to make a Rule 58(d) motion.

Plaintiff Could Have Moved to Alter or Amend Judgment. Once the allegedly incorrect final judgment was entered, the plaintiff had yet another option for relief in the district court. Within 28 days after entry of the judgment, the plaintiff could have moved to alter or amend the judgment under Rule 59(e) [Fed. R. Civ. P. 59(e)]. That rule gives a district court the chance to rectify its own mistakes in the period immediately following its decision [see Banister v. Davis, 590 U.S. —, 140 S. Ct. 1698, 207 L. Ed. 2d 58, 65 (2020)]. And a motion under Rule 59(e) suspends the ordinary time to file a notice of appeal, enabling the district court to perfect its judgment before appeal (and possibly to make an appeal unnecessary) [see Fed. R. App. P. 4(a)(4)(A)(iv); Banister v. Davis, 590 U.S. —, 140 S. Ct. 1698, 207 L. Ed. 2d 58, 71 (2020); United States v. Ibarra, 502 U.S. 1, 5, 112 S. Ct. 4, 116 L. Ed. 2d 1 (1991) (per curiam)]. But the plaintiff in this case did not file a Rule 59(e) motion.

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Plaintiff Could Have Moved for Relief From Judgment. Even after the window closed for a Rule 59(e) motion, the plaintiff could have filed a Rule 60(b) motion for relief from the allegedly erroneous judgment [see Fed. R. Civ. P. 60(b)]. Among the grounds for relief under Rule 60(b) are "mistake, inadvertence, surprise, or excusable neglect." In this context, "mistake" includes a judicial error that is a fundamental misconception of the law, and not merely an erroneous ruling [see Webb v. Davis, 940 F.3d 892, 899 (5th Cir. 2019)]. A denial of a Rule 60(b) motion is itself an appealable order [see Browder v. Dep't of Corr., 434 U.S. 257, 263 n.7, 98 S. Ct. 556, 54 L. Ed. 2d 521 (1978)]. Thus, a Rule 60(b) motion not only allows the district court to fix its own errors, but it also creates a right to appellate review of unfixed errors [see Taylor v. Johnson, 257 F.3d 470, 474 (5th Cir. 2001)].

The appellate panel in this case pointed out that the Fifth Circuit has a long-established procedure to allow parties to file Rule 60(b) motions during the pendency of appeals. Although a perfected appeal ordinarily deprives the district court of jurisdiction, it does not prevent the district court from considering and denying a Rule 60(b) motion. Moreover, if the district court indicates that it would grant the motion, the movant can then ask the court of appeals for a remand of the case in order that the district court may grant the motion [see Winchester v. U.S. Attorney for S. Dist. of Tex., 68 F.3d 947, 949 (5th Cir. 1995)]. (That procedure has in essence been adopted for all circuits [see Fed. R. Civ. P. 62.1; Fed. R. App. P. 312.1].) The appellate panel in this case expressed no view on whether a Rule 60(b) motion would have been successful; the court only noted that the plaintiff had failed to pursue that option.

Conclusion and Disposition. The Fifth Circuit panel closed by emphasizing that the possible motions described above provide ample mechanisms for litigants to ensure that a district court gets its post-jury-trial judgment right. These motions reflect the institutional advantages of trial courts and the unchallenged superiority of the district court's factfinding ability [see Salve Regina Coll. v. Russell, 499 U.S. 225, 233, 111 S. Ct. 1217, 113 L. Ed. 2d 190 (1991)]. And they provide the district court a last chance to correct its own errors without delay, expense, or other hardships of an appeal [see Cone v. W. Va. Pulp & Paper Co., 330 U.S. 212, 217, 67 S. Ct. 752, 91 L. Ed. 849 (1947)].

By not pursuing any of its available options in the district court to correct the damages award, the plaintiff deprived the court of appeals of the benefit of the district court's ruling on the alleged inconsistency between the jury verdict, the final judgment, and the summary-judgment decision. The appellate panel concluded, therefore, that the plaintiff had forfeited its right to raise the issue on appeal. Accordingly, the court of appeals affirmed the judgment of the district court.