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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.

CLASS ACTION

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Typicality

Boley v. Universal Health Servs., Inc.

36 F.4th 124, 2022 U.S. App. LEXIS 15001 (3d Cir. June 1, 2022)

The Second Circuit holds that a motion commencing court proceedings to vacate an arbitration award under the Federal Arbitration Act cannot be served on counsel for the arbitration winner by e-mail unless the attorney has previously consented in writing to that form of service within the litigation itself, despite consent in the underlying arbitration.

DISCOVERY

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Sanctions Against Law Firm

NPF Franchising, LLC v. SY Dawgs, LLC

37 F.4th 369, 2022 U.S. App. LEXIS 16511 (6th Cir. June 15, 2022)

The Eleventh Circuit has ruled that the fact that a Rule 30(b)(6) witness designated by a corporation could not answer every question on a certain topic did not necessarily mean that the corporation failed to comply with its obligation to prepare its designee to testify as to matters known to the corporation.

DISMISSAL

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Recovery of Costs of Previously Dismissed Action

Moskowitz v. Am. Sav. Bank, F.S.B.

37 F.4th 538, 2022 U.S. App. LEXIS 16016 (9th Cir. June 10, 2022)

On remand from the Supreme Court, the First Circuit has held that there was no federal question jurisdiction over Rhode Island's climate-change suit against energy companies.

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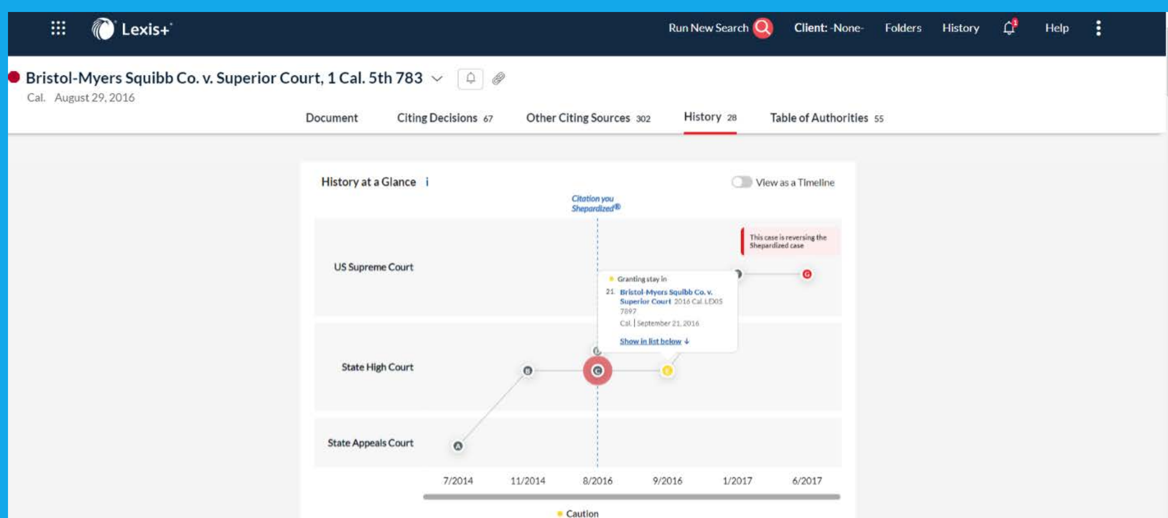

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CLASS ACTION

Typicality

Boley v. Universal Health Servs., Inc.

36 F.4th 124, 2022 U.S. App. LEXIS 15001 (3d Cir. June 1, 2022)

The Third Circuit has held that the typicality requirement was met in an ERISA case, even though the class representatives did not invest in all of the relevant defined contribution retirement plan's available investment options, because the class representatives alleged actions or a course of conduct by ERISA fiduciaries that affected multiple funds in the same way.

Background. The defendant sponsored a defined contribution retirement plan in which qualified employees could participate and invest a portion of each paycheck in selected investment options. The plan's investment options consisted of 37 funds, including mutual funds and a collective investment trust. These funds charged annual management fees, and the plan also charged participants an annual recordkeeping and administrative fee. The class representatives were three current and former participants in the plan. Between them, the named plaintiffs invested in seven of the plan's 37 investment options. They were also charged the plan's annual fee for recordkeeping and administrative services.

The named plaintiffs, on behalf of themselves and all other plan participants, sued the defendant under 29 U.S.C. § 1132(a)(2) and 29 U.S.C. § 1109. They alleged that the defendant had breached its fiduciary duty by including the Fidelity Freedom Fund suite in the plan, charging excessive recordkeeping and administrative fees, and employing a flawed process for selecting and monitoring the plan's investment options, resulting in the selection of expensive investment options instead of readily available lower-cost alternatives.

The defendant moved for partial dismissal of the claims, contending the named plaintiffs lacked constitutional standing to pursue claims relating to funds in which they did not personally invest. The district court denied this motion. The named plaintiffs then moved to certify a class under Rule 23(b)(1), comprising all current and former plan participants. In opposition, the defendant argued that because the named plaintiffs did not invest in 30 of the plan's funds, they lacked standing to bring claims relating to these funds, making these claims atypical to those of the class. The district court rejected this argument and certified a class composed of all participants in the plan.

Standing. To establish standing, a plaintiff must show (1) an injury in fact that is concrete, particularized, and actual or imminent; (2) that the injury was likely caused by the defendant; and (3) that the injury would likely be redressed by judicial relief. The plaintiffs here claimed a breach of fiduciary duty and a failure to monitor fiduciaries. They alleged three specific breaches of fiduciary duty: first, the defendant's imprudence in offering the excessively expensive Fidelity Freedom Fund suite to plan participants; second, the failure to monitor and reduce the excessively high recordkeeping and administrative fees for the plan; and third, the defendant's lack of a prudent investment evaluation process, which resulted in the plan offering a menu of excessively expensive investments. The defendant conceded that the plaintiffs had standing to challenge the recordkeeping and administrative costs, since this conduct affected every plan participant the same way. For the alleged imprudent selection of the Fidelity Freedom Fund suite, the named plaintiffs similarly had a concrete injury flowing from the challenged conduct. The named plaintiffs each invested in at least one of the Fidelity Freedom Funds. For the lack-of-prudent-investment-evaluation claim, because each class representative invested in at least one fund with allegedly excessive fees, the named plaintiffs adequately alleged they suffered injury from the imprudent investment evaluation process, and therefore had standing to bring the claim. Finally, the failure-to-monitor claim alleged conduct regarding the plan as a whole, not individual funds, and therefore alleged conduct that led to concrete injuries to all of the named plaintiffs. Accordingly, the named plaintiffs had standing to bring all these claims.

The defendant asked the court to reach the opposite conclusion, contending essentially that the named plaintiffs' allegations were really 37 separate claims challenging 37 separate investment options included in the plan. The named plaintiffs, the court of appeals said, actually alleged several broader failures by the defendant affecting

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multiple funds in the same way. To establish standing, class representatives needed only show a constitutionally adequate injury flowing from those decisions or failures. Since the named plaintiffs each had a concrete and personalized stake in each claim alleged in the complaint, they were entitled to proceed under Article III.

Typicality. TThe defendant argued that class certification was improper because the class failed to satisfy the Rule 23(a)(3) requirement that the class representative's claims be typical of the claims of the class. The requirement of typicality is imposed to prevent certification when the legal theories of the named plaintiffs potentially conflict with those of the absent class members. Typicality seeks to ensure the interests of the class and the class representatives are aligned so that the representatives would work to benefit the entire class through the pursuit of their own goals.

Here, the named plaintiffs alleged that the defendant breached its fiduciary duty under ERISA by failing to properly manage these investment options. The defendant claimed that because the named plaintiffs did not invest in all 37 of the challenged funds, their claims were not typical of the class. That is, it argued that in the context of a defined contribution plan under ERISA, named class representatives' claims are not typical of the class unless the named representatives invested in each of the challenged funds, because otherwise the representatives would lack an incentive to litigate on behalf of the class.

This argument was not persuasive. The named plaintiffs had alleged that the defendant employed a flawed fund selection process resulting in a menu of excessively expensive funds, and that the defendant failed to monitor expense ratios and consider possible ways to lessen fees charged to participants. These claims were the same for participants across all the plan's 37 funds. Each participant's potential recovery, regardless of the fund in which he or she invested, was under the same legal theory, the defendant's breach of its fiduciary duty under ERISA in managing the plan's investment options. Likewise, each participant who was charged excessive fees when investing in any of the plan's funds could trace his or her injury to the same practice—the defendant's alleged failure to properly consider expense ratios when selecting and updating the plan's investment options. And the same was true for the named plaintiffs' allegations that the defendant imprudently offered a suite of Fidelity Freedom target date funds with high expense ratios and aggressive equity allocation as the plan's default investment option. Although the named plaintiffs had invested in only three of the suite's 13 target date funds, the defendant's decision to add and retain the Fidelity Freedom suite was the cause of injury for each participant across all 13 funds. Accordingly, the named plaintiffs' claims relating to the funds in which they invested were typical of the claims relating to the funds in which they did not.

This did not mean there were no factual differences between any of the individual 37 funds. These differences related to degree of injury and level of recovery. So long as the alleged cause of the injury remained the same across all funds, even relatively pronounced factual differences generally would not preclude a finding of typicality. Typicality does not require the class representatives' claims be coterminous with those of the class. Here, the named plaintiffs' interests were sufficiently aligned with those of the class because the common allegation for each class member—the defendant's alleged imprudence in managing the plan's funds—was comparably central to the claims of the named plaintiffs as to the claims of the absentees. For these reasons, typicality was satisfied even though additional fund-specific proof of objective imprudence might be required to support the claims of some class members.

The court of appeals noted that there might be some situations in which typicality for an ERISA class would not be satisfied unless the class representative invested in each of the challenged funds, and that the typicality inquiry is best done on a case-by-case basis. Accordingly, the court declined to adopt a per se rule as to whether a class representative must have invested in each of the challenged funds.

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DISCOVERY

Sanctions Against Law Firm

NPF Franchising, LLC v. SY Dawgs, LLC

37 F.4th 369, 2022 U.S. App. LEXIS 16511 (6th Cir. June 15, 2022)

The Sixth Circuit holds that Federal Rule of Civil Procedure 37 does not allow for discovery sanctions against a law firm unless the firm is a party to the action.

Background. NPF Franchising, LLC (NPF) brought a lawsuit against a franchisee, SY Dawgs, LLC, which operated Scrap Yard Dawgs—one of the fast-pitch softball teams in the National Pro Fastpitch League. The case concerned a franchise awarded in October 2015 by NPF to SY Dawgs. NPF terminated the franchise in January 2018. It then sought injunctive relief against SY Dawgs, alleging that the franchisee had solicited NPF's suppliers, sponsors, and media partners and had formed a new league to directly compete with NPF, all in violation of a noncompetition agreement. The district court denied NPF's motion for a preliminary injunction, and NPF amended the complaint. SY Dawgs moved for attorney's fees, costs, and expenses, pursuant to a contractual fee-shifting provision, arguing that it was entitled to monetary compensation because NPF was the "unsuccessful party" on its claim for injunctive relief. The district court denied the motion without prejudice as premature.

Over the next two years, NPF failed to comply with several discovery obligations. In August 2018, NPF failed to appear at a status conference. At that conference, the district court noted that despite SY Dawgs having issued multiple subpoenas and responded to NPF's discovery requests, NPF had to that point refused to respond to SY Dawgs's discovery requests, with the discovery deadline two months away. SY Dawgs again moved for costs and fees, this time over NPF's nonattendance at the status conference. At the next status conference, on September 4, 2018, new counsel, the Buchalter Law Firm, appeared for NPF and vowed to produce all outstanding discovery. The district court granted motions to appear pro hac vice on behalf of NPF filed by Buchalter Law Firm attorneys Tracy Warren and Kathryn Fox.

Later in September, SY Dawgs again moved to compel discovery and for sanctions. It stated that NPF had provided no interrogatory answers or documents in response to the requests that it served on June 20, 2018. SY Dawgs also noted that NPF refused to designate a representative for corporate representative depositions. The parties then had a status conference in early October, at which NPF represented to the district court that it had turned over all the requested discovery. Relying on this representation, the district court denied SY Dawgs's motion for costs and fees but also expressed willingness to revisit the issue later.

SY Dawgs moved for discovery sanctions yet again on October 25, 2018. It stated that NPF had failed to appear for a properly noticed deposition or produce any documents related to a subpoena. SY Dawgs also accused NPF of misrepresenting to the district court that it had produced all documents, given that it had later produced several hundred more documents. The district court then granted a motion by NPF to extend discovery, held another status conference at which it noted that SY Dawgs's motion for sanctions was fully briefed, and asked the parties to confer and prepare a list of documents still needed. Soon after, it extended discovery again, this time until March 1, 2019.

In December, SY Dawgs filed another motion to compel discovery. In addition to alleging that NPF had provided insufficient or incomplete responses to several of SY Dawgs's requests, SY Dawgs argued that NPF had provided no documents responsive to the 45 other requests. That same day, Buchalter Law Firm attorneys Rick Waltman and J. Patrick Allen were admitted pro hac vice to represent NPF. NPF made its own motion to compel discovery and sanction SY Dawgs, alleging that SY Dawgs had failed to supplement its prior discovery responses. The district court denied both parties' motions for discovery sanctions, but it left the sanctions issue open for revisitation after litigation concluded. The court did, however, again grant SY Dawgs's motion to compel discovery. It also instructed NPF to respond to the discovery requests within 14 days or, in the alternative, certify to the district court that there was nothing responsive left to produce.

The 14-day deadline passed with no such certification from NPF. In February 2019, SY Dawgs renewed its motion for sanctions. It stated that "NPF and its pro hac vice-admitted counsel" had a "pattern of ignoring discovery obligations" and "flagrantly" ignoring both court orders compelling discovery. The district court granted the

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motion, ordering NPF to file an affidavit certifying that it had fully complied with the discovery request and also ordering NPF's counsel to file a "similar certification of compliance by counsel." The district court warned that failure to comply would result in sanctions "up to and including dismissal of Plaintiff's action." It again warned that monetary sanctions for the plaintiff's repeated discovery violations would be addressed at the conclusion of the action.

Despite that admonition, NPF never complied. So, SY Dawgs moved for dismissal under Federal Rule of Civil Procedure 37. NPF then moved to voluntarily dismiss the case with prejudice in July 2019. The district court granted its request. Just before the dismissal, SY Dawgs moved again for attorney's fees and costs. It stated that the court could award such relief under the fee-shifting provision of the noncompetition agreement, the Federal Rules of Civil Procedure, and the court's inherent authority. The motion was assigned to a magistrate judge.

The magistrate judge recommended that SY Dawgs's motion for fees and costs be granted and that NPF and its lawyers be ordered to pay $224,863.80 to SY Dawgs for NPF's discovery violations as a sanction under Rule 37. The magistrate judge also recommended that "NPF and its lawyers of record" should be jointly and severally liable. The district court accepted the magistrate judge's recommendations and held NPF, the Buchalter Firm, and the Buchalter attorneys of record jointly and severally liable for attorney's fees, expenses, and costs in the amount of $287,248.77, plus interest, as discovery sanctions.

The district court also analyzed the potential bases for compelling payment of the fees and costs, including the fee-shifting provision in the parties' nondisclosure and noncompetition agreement, and Federal Rule of Civil Procedure 41(a)(2) and Ohio Civil Rule 41(A)(2), which govern the award of costs and fees following a voluntary dismissal. The district court then analyzed whether Federal Rule of Civil Procedure 37(d) authorized the award of discovery sanctions. It agreed with the magistrate's conclusion that NPF and its attorneys failed to cooperate in discovery, even after repeated warnings from the court, and that NPF's failure "seriously prejudiced" SY Dawgs. It held NPF, the Buchalter Law Firm, and the individual attorneys liable for attorney's fees and costs as Rule 37 discovery sanctions. The district court noted that it was "inclined to award fees under its inherent powers," but that the fee-shifting provision and Rule 37 would fully compensate SY Dawgs. The Buchalter Law Firm and the individual attorneys appealed.

Issues on Appeal. On appeal, NPF's interested parties presented four basic issues. First, they argued that they were not afforded due process before sanctions were imposed against them. Second, they argued that the district court abused its discretion in issuing discovery sanctions jointly and severally against them. Third, they challenged the amount of sanctions awarded. Last, they argued that their case, if remanded, should be remanded to a different judge. The Sixth Circuit rejected all arguments on appeal except one: whether Rule 37 sanctions can be imposed on a law firm.

Sanctions Against Law Firm Are Not Authorized Under Rule 37. The Sixth Circuit noted that whether a district court may sanction a law firm under Rule 37 is a question it had not addressed before. The relevant portion of Rule 37(d) states as follows:

> (3) *Types of Sanctions*. Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)–(vi). Instead of or in addition to these sanctions the court must require the party failing to act, the attorney advising the party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

Examining the language of Rule 37, the court emphasized that sanctions may be imposed against the *party* failing to act, "*the attorney* advising that party, or *both*" [Fed. R. Civ. P. 37(b)(2)(C), (d)(3) (emphasis added)]. Rule 37 makes no mention of a party's law firm but explicitly lists a party and a party's attorney. Under usual rules of statutory interpretation, the express mention of one thing excludes others. Thus, Rule 37 does not provide for sanctions against a law firm.

This reasoning is similar to the Supreme Court's reasoning in *Pavelic & LeFlore v. Marvel Entertainment Group*. In that case, the Court considered whether sanctions were permissible against a law firm under an earlier version of Rule 11. Pointing to that rule's language that sanctions were permitted only against "the person who signed" the offending document, the Court concluded that a law firm cannot be the one to sign papers, so the rule must mean

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that sanctions are only permitted against the individual signer. The Court explained that Rule 11 departed from common-law assumptions of delegability, partnership, and agency, and it noted that when the text establishes a duty that cannot be delegated, one may reasonably expect it to authorize punishment only of the party upon whom the duty is placed [see Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120, 121, 110 S. Ct. 456, 107 L. Ed. 2d 438 (1989)].

Likewise, reading Rule 37 to allow sanctions against a party and its attorney, but not the law firm, aligns with how entities are treated in other areas of the law. For example, for sanctions under 28 U.S.C. § 1927—when a party prolongs proceedings "unreasonably and vexatiously"—the court has held that such sanctions may be imposed only on individual attorneys, and not law firms. There is no reason to consider a law firm a "person" under the statute. Law firms are not "admitted" to "conduct cases in court."

Like § 1927 and the old Rule 11, Rule 37 makes no mention of law firms. It confines liability to "the party failing to act, the attorney advising the party, or both" for a failure to appear for a deposition or serve written responses [Fed. R. Civ. P. 37(d)(3)]. Thus, the Sixth Circuit held that Rule 37 does not allow for sanctions against a law firm, unless it is a party.

The court also observed that, while sanctions could not be imposed against the Buchalter Law Firm under Rule 37, the district court could impose sanctions against the firm pursuant to its inherent authority. To sanction in this manner, the district court must find that the party litigated in bad faith, vexatiously, wantonly, or for oppressive reasons. The district court could also impose sanctions "in the interest of justice." In a footnote in its opinion, the district court expressed an inclination to impose sanctions under its inherent authority if not for its mistaken belief that it could sanction the law firm under Rule 37.

Conclusion. Therefore, the Sixth Circuit reversed the imposition of sanctions against the law firm under Rule 37, but remanded to the district court to determine whether to impose sanctions against the firm under the district court's inherent power.

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DISMISSAL

Recovery of Costs of Previously Dismissed Action

Moskowitz v. Am. Sav. Bank, F.S.B.

37 F.4th 538, 2022 U.S. App. LEXIS 16016 (9th Cir. June 10, 2022)

The Ninth Circuit holds that "costs" under Federal Rule of Civil Procedure 41(d), which allows a court to award costs incurred in litigation to a party if the plaintiff dismissed that litigation and then filed another suit based on the same claims, do not include attorney's fees as a matter of right.

Background. Craig Moskowitz filed a class action against American Savings Bank, F.S.B. (ASB), in which he claimed ASB sent text messages to his mobile phone without the consent required by the Telephone Consumer Protection Act (TCPA) [47 U.S.C. § 227]. As part of its mobile text banking services to customers, ASB maintains a "short code," which is a five-digit telephone number a business can use to send and receive text messages. ASB uses its short code to provide mobile banking services via text messages to customers who have enrolled their mobile phone numbers with ASB after using a multistep enrollment process.
The defendants removed the matter to federal court under the federal-officer removal statute [see 28 U.S.C. § 1442(a)(1)], the federal question doctrine, the Outer Continental Shelf Lands Act (OCSLA), the admiralty-jurisdiction statute, and the bankruptcy-removal statute. The district court rejected these grounds for jurisdiction and remanded to state court.

ASB also receives text messages from mobile phone numbers of customers who are not enrolled in its program. These text messages might originate from ASB customers who wish to enroll, or from non-customers interested in ASB's services, or they might be accidental or intentionally mischievous misdials of the short code. ASB responds to these text messages automatically with one of two standard responses. One response tells the sender of the text message how to stop communications from ASB, or how to contact ASB. The other response is sent if the sender has texted "STOP." In that case, ASB tells the sender he or she is not subscribed to ASB and will not receive alerts.

Moskowitz was not a customer of ASB, but, during a three-month period, Moskowitz's mobile phone sent 11 text messages to ASB's short code number. Ten of the text messages were unrelated to ASB or its services, and ASB replied with the first responsive text option. The remaining text message from Moskowitz to ASB consisted of the word "STOP" to which ASB replied with the second responsive text option.

After he received these reply text messages, Moskowitz, a Connecticut resident, filed a TCPA federal class action suit in the District of Connecticut. Moskowitz claimed ASB's reply texts put the company afoul of a section of the TCPA that prohibits calling a mobile phone by use of automatic call generating capabilities absent the call recipient's prior express consent. ASB moved to dismiss the suit for lack of personal jurisdiction over it by the district court in Connecticut. ASB argued that it is a Hawaii company without minimum contacts in Connecticut, and that Moskowitz's cell phone had an area code, 914, which applied to the New York geographic area, not Connecticut, such that ASB's text responses had gone to New York, not Connecticut; thus, ASB had not availed itself of Connecticut; hence, the district court did not have jurisdiction over ASB.

Moskowitz did not respond to ASB's motion to dismiss, but instead filed a notice of voluntary dismissal under Federal Rule of Civil Procedure 41(a). ASB did not respond to Moskowitz's motion for voluntary dismissal, and ASB did not request the Connecticut district court to award it attorney's fees under Rule 41(a) as a term of granting Moskowitz's motion. The Connecticut district court then dismissed the case, in an order that did not award costs to either party.

Moskowitz then filed a suit in the District of Hawaii with the same claims, against the same parties, and based on almost identical factual allegations. ASB filed a motion for summary judgment, and it moved for costs under Rule 41(d) to recoup the costs it had incurred defending the earlier suit in Connecticut. The district court in Hawaii granted ASB's motion for summary judgment, concluding that each text message from Moskowitz's mobile phone

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constituted prior express consent for each of ASB's reply texts to his mobile phone. The district court also granted ASB's motion for costs under Rule 41(d) after finding that the two complaints were almost identical, and that the Connecticut litigation had not advanced the Hawaii case. The district court also awarded attorney's fees to ASB, holding that an award of costs under Rule 41(d) included attorney's fees, and that Rule 41(d) did not require a showing of "subjective bad faith, vexatiousness, or forum shopping" to award attorney's fees as "costs." Moskowitz appealed.

Costs Under Rule 41(d) Do Not Include Attorney's Fees. Moskowitz argued the district court abused its discretion by including attorney's fees in its award of "costs" to ASB under Rule 41(d). Rule 41(d) allows a court to award "costs" incurred in litigation to a party if the plaintiff dismissed that litigation and then filed another suit based on the same claims, against the same defendant. The Ninth Circuit noted that it had not previously decided whether attorney's fees are available under Rule 41(d) as part of "costs." Other circuits have decided cases in which attorney's fees were sought as part of Rule 41(d) "costs" in four ways.

First, the Sixth Circuit has held that costs under Rule 41(d) do not include attorney's fees because the rule does not explicitly provide for them [see Rogers v. Wal-Mart Stores, Inc., 230 F.3d 868, 874 (6th Cir. 2000)]. This decision was based on the clear text of the rule, which provides that the court may award "costs," but makes no mention of attorney's fees. The court reasoned that attorney's fees are not ordinarily recoverable as costs.

Second, the Eighth Circuit allowed a $200 attorney's fee without explanation as to its reasoning, but noted that it was "satisfied the district court did not abuse its discretion in awarding defendant-appellee $200 attorney fees" [Evans v. Safeway Stores, Inc., 623 F.2d 121, 122 (8th Cir. 1980) (per curiam)]. The decision implies that attorney's fees are not available under Rule 41(d) as a matter of right, but may be awarded in the district court's discretion. However, it is unclear what standard the Eighth Circuit relied on in evaluating whether the district court had abused its discretion. Accordingly, the Ninth Circuit did not find this decision to be of any persuasive value.

Third, the Third, Fourth, Fifth, and Seventh Circuits have held that courts may award attorney's fees as costs under Rule 41(d) if the substantive statute underlying the claim provides for attorney's fees [see Garza v. Citigroup Inc., 881 F.3d 277, 279 (3d Cir. 2018); Portillo v. Cunningham, 872 F.3d 728, 739 (5th Cir. 2017); Andrews v. Am.'s Living Ctrs., LLC, 827 F.3d 306, 311 (4th Cir. 2016); Esposito v. Piatrowski, 223 F.3d 497, 501 (7th Cir. 2000)].

Fourth, the Second, Fourth, and Tenth Circuits have held that courts have the discretion to award attorney's fees pursuant to Rule 41(d) whenever there is proof of bad faith, vexatiousness, wanton actions, or forum shopping in the filing of the original action [see Horowitz v. 148 S. Emerson Assocs. LLC, 888 F.3d 13, 25–26 (2d Cir. 2018); Andrews v. Am.'s Living Ctrs., LLC, 827 F.3d 306, 311 (4th Cir. 2016); Meredith v. Stovall, 2000 U.S. App. LEXIS 14553, at *1 (10th Cir. June 23, 2000) (unpublished)].

The Second Circuit determined that the "scheme" of 41(d), deterrence to forum shopping and vexatious litigation, would be "substantially undermined" if attorney's fees were not recoverable under Rule 41(d) in cases of bad faith, because actions quickly filed and dismissed likely would not incur "expenses routinely recoverable as costs" [Horowitz v. 148 S. Emerson Assocs. LLC, 888 F.3d 13, 25–26 (2d Cir. 2018)]. Likewise, the Tenth Circuit held that the purpose of Rule 41(d) is to prevent the maintenance of vexatious law suits and to secure payment of costs for prior instances of such vexatious conduct. Thus, the district court did not abuse its discretion in awarding attorney's fees as costs under Rule 41(d) [Meredith v. Stovall, 2000 U.S. App. LEXIS 14553, at *1 (10th Cir. June 23, 2000) (unpublished)]. The Fourth Circuit awarded attorney's fees under Rule 41(d) by relying on the general "inherent powers" of a federal court to award attorney's fees when the losing party has been found to have acted in bad faith [Andrews v. Am.'s Living Ctrs., LLC, 827 F.3d 306, 311 (4th Cir. 2016)].

After exploring all these options, the Ninth Circuit held that Rule 41(d) "costs" do not include attorney's fees as a matter of right. In so holding, the court observed that it was joining every published court of appeals opinion that has meaningfully considered this issue. "Costs" is a term with a long-standing definition that does not inherently

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include attorney's fees. Nothing in the text of Rule 41(d) compels a contrary reading of this term.

The court declined to decide whether attorney's fees are available under Rule 41(d) if the underlying statute so provides, because the TCPA does not provide for the award of attorney's fees to the prevailing party. Moreover, the court did not decide if bad faith is sufficient to allow a party to recover attorney's fees as "costs" under Rule 41(d), because bad faith was not alleged or proven by ASB in the district court below. Accordingly, the court decided no more than necessary to resolve the facts of this case.

- **Conclusion.** For these reasons, the Ninth Circuit affirmed the district court's award of costs, but reversed the district court's award of attorney's fees as "costs" under Rule 41(d) as a matter of right. The appellate court also affirmed the district court's order granting summary judgment.

- **Dissent**. Dissenting in part, Judge Wardlaw wrote that, in light of the overwhelming weight of authority from other circuits, the Ninth Circuit should hold that Rule 41(d) provides for an award of attorney's fees as part of an award of costs when the underlying statute that is the basis of the suit provides for an award of attorney's fees, or when the court finds that a plaintiff acted in bad faith, vexatiously, wantonly, or for oppressive reasons. Under this view, the district court should have determined whether the plaintiff acted in bad faith before awarding attorney's fees as part of costs.would trigger OCSLA federal jurisdiction because (to quote Rhode Island's latest brief) 'a significant portion' of the oil and gas we use comes from the OCS—a consequence too absurd to be attributed to Congress." conduct before that date.

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