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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.

FINAL JUDGMENTS

Dismissal Without Prejudice

Britt v. DeJoy

2022 U.S. App. LEXIS 22844 (4th Cir. Aug. 17, 2022)

Jump to full summary

Rejecting its former case-by-case approach, the Fourth Circuit, sitting en banc, holds that when a district court dismisses a complaint or all claims without providing leave to amend, the order dismissing the complaint is final and appealable.

PLEADINGS

Fictitious Names

Doe v. Mass. Inst. of Tech.

46 F.4th 61, 2022 U.S. App. LEXIS 23715 (1st Cir. Aug. 24, 2022)

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Addressing questions of first impression in the First Circuit, the court of appeals has articulated a framework for analyzing a party's motion to proceed by pseudonym in a civil action.

REMOVAL

Diversity Jurisdiction

Avenatti v. Fox News Network LLC

41 F.4th 125, 2022 U.S. App. LEXIS 20101 (3d Cir. July 21, 2022)

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The Third Circuit has held that a district court has discretion under Rule 21 to drop a nondiverse party added after removal even if added as a matter of right under Rule 15(a).

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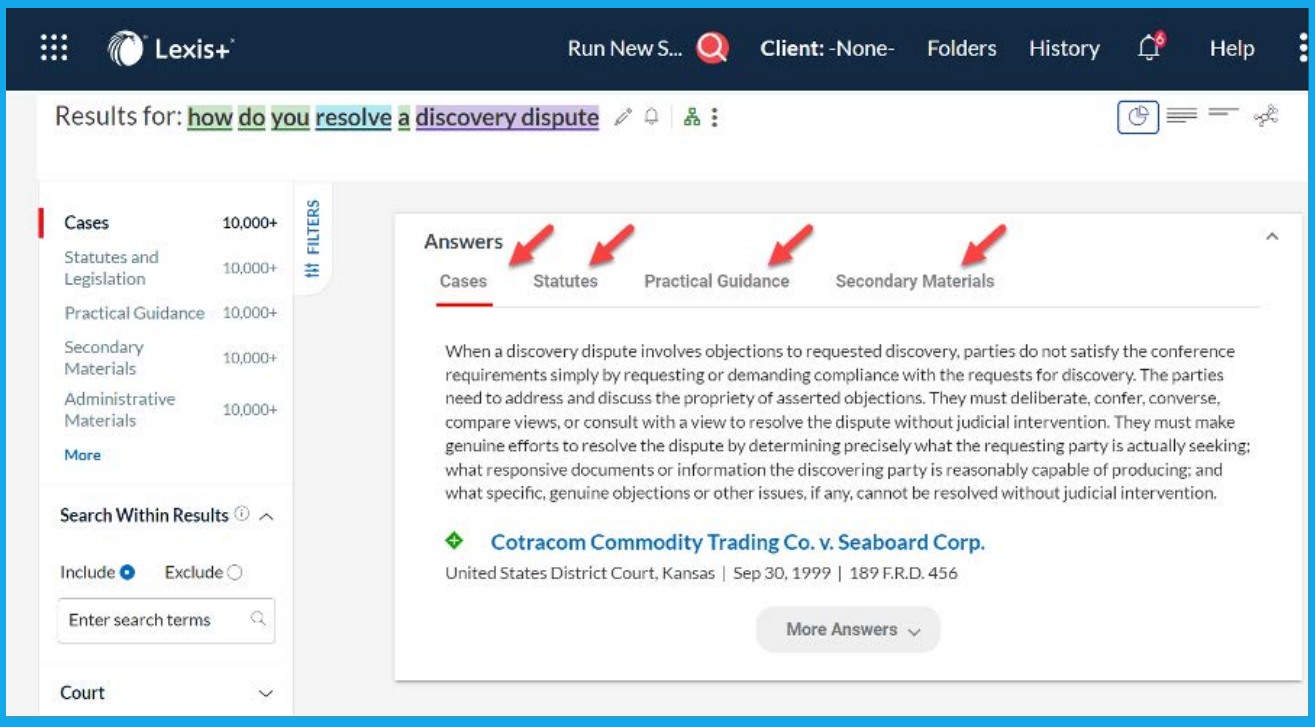

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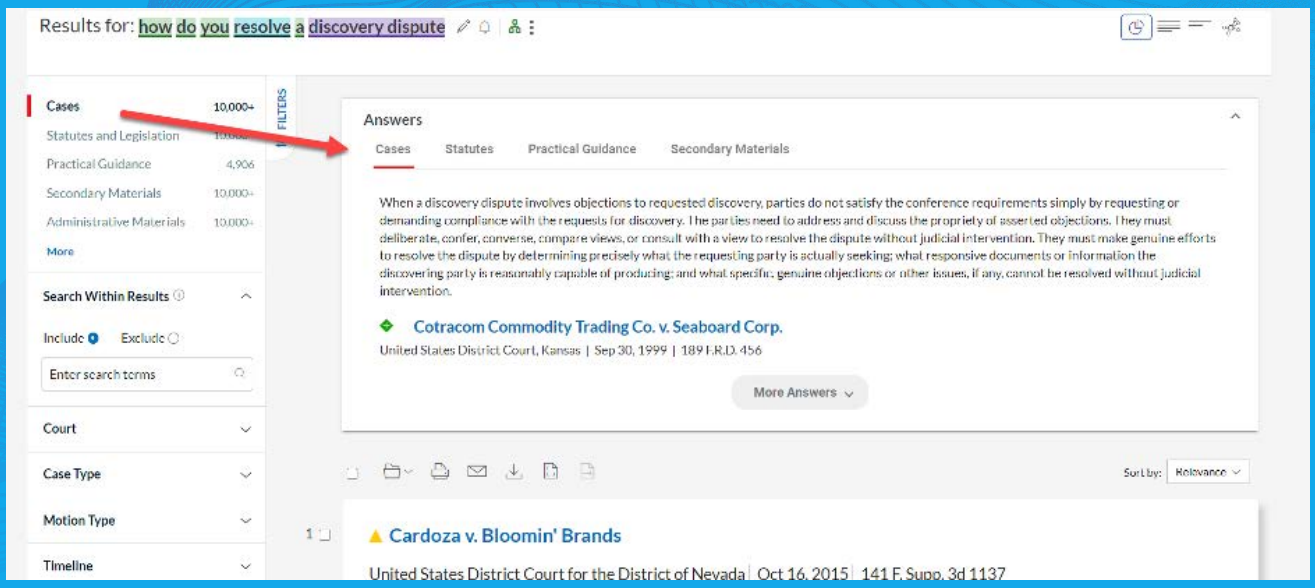

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FINAL JUDGMENTS

Dismissal Without Prejudice

Britt v. DeJoy

2022 U.S. App. LEXIS 22844 (4th Cir. Aug. 17, 2022)

Rejecting its former case-by-case approach, the Fourth Circuit, sitting en banc, holds that when a district court dismisses a complaint or all claims without providing leave to amend, the order dismissing the complaint is final and appealable.

Background. The district court in this case dismissed all but one of the plaintiff's claims with prejudice. The court then dismissed the remaining claim without prejudice, without granting leave to amend, directing the clerk to "close the case."

The plaintiff appealed. After oral argument before a panel of the Fourth Circuit, the court of appeals sua sponte decided to rehear the case en banc "on the issue of when a dismissal without prejudice is final, and thus appealable." After the parties submitted supplemental briefs on that issue, the en banc court concluded that the dismissal without prejudice in this case was final, and that the appellate panel therefore had jurisdiction to consider the merits of the appeal.

In arriving at its conclusion, the en banc court established a new rule: when a district court dismisses a complaint or all claims without granting leave to amend, its order is final and appealable.

Appellate Jurisdiction Generally. The en banc Fourth Circuit began its analysis with a review of the basic principles of appellate jurisdiction. The court generally has jurisdiction over appeals "from final decisions of the district courts" in the circuit [28 U.S.C. § 1291; *see* Fed. R. Civ. P. 54(b) (authorizing appeal of final judgment on fewer than all claims or parties in case if there is no just reason for delay); *but cf*. 28 U.S.C. § 1292 (authorizing interlocutory appeals in limited circumstances)]. The Supreme Court has long held that a "final decision" is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment" [Coopers & Lybrand v. Livesay, 437 U.S. 463, 467, 98 S. Ct. 2454, 57 L. Ed. 2d 351 (1978) (internal quotation marks omitted)]. That is, "[a] final decision is one by which a district court disassociates itself from a case" [Gelboim v. Bank of Am. Corp., 574 U.S. 405, 408, 135 S. Ct. 897, 190 L. Ed. 2d 789 (2015) (internal quotation marks omitted)].

The court of appeals noted that ensuring the finality of lower-court proceedings minimizes piecemeal appeals and promotes the efficient administration of justice [*see* Microsoft Corp. v. Baker, 137 S. Ct. 1702, 1712, 198 L. Ed. 2d 132 (2017)]. "We routinely require litigants to wait until after final judgment to vindicate valuable rights, including rights central to our adversarial system" [Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 108–109, 130 S. Ct. 599, 175 L. Ed. 2d 458 (2009)].

Ordinarily, a district-court order is not final until it has resolved all claims as to all parties [*see* Porter v. Zook, 803 F.3d 694, 696 (4th Cir. 2015)]. Thus, an order that dismisses a complaint with leave to amend is not a final decision, because it means that the district court is not finished with the case. In that event, if the plaintiff fails to amend (or amend timely) or elects to stand on the complaint, the district court must still issue an order that constitutes a final decision [*see* Jung v. K. & D. Min. Co., 356 U.S. 335, 336–337, 78 S. Ct. 764, 2 L. Ed. 2d 806 (1958)].

After issuing a memorandum opinion intended to fully dispose of an action or complaint, a district court is expected to comply with Federal Rule of Civil Procedure 58, which requires that a judgment or amended judgment be set out in a separate document [Fed. R. Civ. P. 58]. A district court's failure to satisfy the separate-document requirement does not prevent a final decision from being appealable, however. In the absence of a separate document, a final judgment will be deemed entered, thus triggering the time for appeal, 150 days after the clerk

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has entered the judgment in the district court's civil docket [*see* Fed. R. Civ. P. 58(c)(2)(B); Fed. R. App. P. 4(a)(7)(A)(ii), (B)].

Ascertaining Whether Decision Is Final; Case-by-Case Approach. The en banc court observed that it is not always obvious whether a district court's decision is "final," particularly in the context of dismissals without prejudice. The court noted that it is well-established that dismissals made without prejudice when leave to amend is denied are final and appealable, and it is equally well-established that dismissals made without prejudice when leave to amend is granted are not final [*see* Gelboim v. Bank of Am. Corp., 574 U.S. 405, 414, 135 S. Ct. 897, 190 L. Ed. 2d 789 (2015); Jung v. K. & D. Min. Co., 356 U.S. 335, 337, 78 S. Ct. 764, 2 L. Ed. 2d 806 (1958)]. But it is less clear what should happen when a district court dismisses a complaint or all claims within a complaint without prejudice, yet remains silent as to the possibility of amendment. In such circumstances, to determine whether an order is final, the Fourth Circuit had until now applied "a case-by-case methodology."

Under that case-by-case methodology, the court of appeals had held that a dismissal without prejudice is not appealable "unless the grounds for dismissal clearly indicate that no amendment in the complaint could cure the defects in the plaintiff's case" [Domino Sugar Corp. v. Sugar Workers Local Union 392, 10 F.3d 1064, 1067 (4th Cir. 1994)]. The en banc court in this case observed that this approach "tasks us with scrutinizing the district court's order and the proceedings below to discern whether the district court was truly finished with the case or whether there was more to do."

The court acknowledged that the case-by-case approach "has sown confusion in our jurisdiction by pulling us in different directions." Although the court tried to create a clear rule that could be applied consistently and predictably, the flexibility inherent in a case-by-case method means that what suggests finality in one case can conflict with prior pronouncements on what serves as an indication of finality. The court remarked that such inconsistency can cost litigants their opportunity to appeal, and "it certainly costs judges and lawyers far too much time, effort, and resources on untying jurisdictional knots."

Fourth Circuit Adopts New Bright-Line Approach. The en banc court noted that an alternative to the case-by-case approach is used by two other circuits. The D.C. Circuit imposes a bright-line rule, explaining that "[t]hough it may be possible in some cases to discern an invitation to amend the complaint from clues in the district court's opinion, . . . anything less than an express invitation is not a clear enough signal to overcome the presumption of finality" [Attias v. CareFirst, Inc., 865 F.3d 620, 625 (D.C. Cir. 2017)]. The Sixth Circuit has adopted a similar bright-line rule, under which a dismissal without prejudice is final when the district court enters a final order and does not grant the plaintiff an opportunity to amend the complaint [see Robert N. Clemens Tr. v. Morgan Stanley DW, Inc., 485 F.3d 840, 845–846 (6th Cir. 2007)].

The en banc Fourth Circuit concluded that although its case-by-case approach was intended to promote judicial efficiency and avoid piecemeal appeals, "with the benefit of hindsight, we now realize that a more wholesale approach better fits our initial aim of fulfilling the important purposes of the final judgment rule."

In this case, therefore, the court of appeals adopted what it saw as a better approach: "We now hold that when a district court dismisses a complaint or all claims without providing leave to amend, we need not evaluate the grounds for dismissal or do anything more—the order dismissing the complaint is final and appealable."

The court explained that by requiring the district court to state whether a plaintiff has leave to amend, and concluding that an order is final when a district court does not grant leave, the new rule eliminates the need to speculate about what the district court meant when stating "without prejudice." Any and all intent regarding finality or nonfinality is to be communicated through the presence or lack of permission to amend the complaint.

The court acknowledged that the new rule might create new sources of confusion. But the court expressed its belief that the new rule places all questions regarding finality "squarely in the hands best equipped to solve them:

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the district court." If the district court believes a deficiency in a complaint can be cured, it should say so and grant leave to amend. If the district court does not intend to grant leave to amend, it should issue a separate document to accompany an order of dismissal intended to be a final judgment, in compliance with Rule 58.

The court of appeals went on to explain that unwary litigants might find themselves entrapped by the new rule, particularly with regard to the running of the time to appeal. For example, when a district court dismisses a complaint without prejudice and without giving leave to amend, the dismissal is final, and the time for appeal begins to run upon entry of that judgment. If the plaintiff nonetheless would like to amend the complaint, he or she would first have to file a motion to reopen or to vacate the judgment [*see* Fed. R. Civ. P. 59, 60]; filing an amended complaint would not stop the running of the time for appeal [*see* Fed. R. App. P. 4(a)(4)].

The court of appeals also pointed out that under its new rule, when a district court grants leave to amend, but the plaintiff chooses not to do so, the district court's decision will remain nonfinal and thus not appealable. The plaintiff in that situation could still seek appellate review by electing to stand on the complaint, but simply failing to file an amended complaint, or letting the time for amendment specified by the district court run out, would not be sufficient to create a final judgment. Rather, the plaintiff must affirmatively waive the right to amend by requesting that the district court take further action to finalize its decision by entering a final decision dismissing the case without leave to amend [*see* Fed. R. Civ. P. 59(e)].

- **Conclusion and Disposition.** Applying its new rule to the present case, in which the district court had not granted leave to amend, the en banc court of appeals concluded that the present appeal was brought from a final, appealable order. Because the court had appellate jurisdiction, the en banc court left it to the appellate panel to consider the merits of the appeal.

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PLEADINGS

Fictitious Names

Doe v. Mass. Inst. of Tech.

46 F.4th 61, 2022 U.S. App. LEXIS 23715 (1st Cir. Aug. 24, 2022)

Addressing questions of first impression in the First Circuit, the court of appeals has articulated a framework for analyzing a party's motion to proceed by pseudonym in a civil action.

Background. The plaintiff in this action sued the college that had expelled him on charges of nonconsensual sexual contact and intercourse and sexual harassment. The plaintiff moved to proceed by pseudonym. The district court denied the motion, ruling that the plaintiff had not shown a reasonable fear that requiring him to reveal his identity would cause him to suffer significant harm. The plaintiff appealed.

Appellate Jurisdiction—Collateral Order Doctrine. As a threshold matter, the First Circuit panel addressed whether it had appellate jurisdiction. Ordinarily, appellate jurisdiction is limited to appeals from "final decisions" of the district courts within the circuit [28 U.S.C. § 1291]. Giving the statutory term "final decisions" a practical rather than technical construction, the Supreme Court has permitted immediate appellate review of a small class of orders that finally determine claims of right separable from, and collateral to, rights asserted in the action [see Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949)]. The collateral order doctrine applies when three conditions are satisfied: (1) the order must conclusively determine the disputed question, (2) it must resolve an important issue completely separate from the merits of the action, and (3) it must be effectively unreviewable on appeal from a final judgment [see Will v. Hallock, 546 U.S. 345, 349, 126 S. Ct. 952, 163 L. Ed. 2d 836 (2006)]. In this case, the First Circuit explained that an issue is "important" in the relevant sense if it is weightier than the societal interests advanced by the ordinary operation of final-judgment principles [see Gill v. Gulfstream Park Racing Ass'n, 399 F.3d 391, 399 (1st Cir. 2005)]. Regarding the third condition, the Court noted that the decisive consideration is whether delaying review until the entry of final judgment would imperil a substantial public interest or some particular value of a high order. The focus of the inquiry is not on the facts of the case but, rather, on the class of claims, taken as a whole [see Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 107, 130 S. Ct. 599, 175 L. Ed. 2d 458 (2009)].

In this case, the First Circuit joined every other circuit to consider the question in holding that orders denying motions to proceed by pseudonym are immediately appealable under the collateral order doctrine [see Doe v. Coll. of N.J., 997 F.3d 489, 494 (3d Cir. 2021); United States v. Pilcher, 950 F.3d 39, 41 (2d Cir. 2020) (per curiam); In re Sealed Case, 931 F.3d 92, 95–96 (D.C. Cir. 2019); Doe v. Vill. of Deerfield, 819 F.3d 372, 375–376 (7th Cir. 2016); Plaintiff B v. Francis, 631 F.3d 1310, 1314–1315 (11th Cir. 2011); Does I thru XXIII v. Advanced Textile Corp., 214 F.3d 1058, 1066–1067 (9th Cir. 2000); James v. Jacobson, 6 F.3d 233, 236–238 (4th Cir. 1993); Doe v. Stegall, 653 F.2d 180, 183 (5th Cir. 1981)]. The court reasoned that such an order conclusively determines the pseudonym question, and that question is separate from the merits. Additionally, such an order typically resolves an issue of considerable importance, because litigants wishing to file under fictitious names often allege that disclosure of their identities would inflict grievous harm upon them. Also, the public has a substantial interest in ensuring that those who would seek justice in its courts are not scared off by the specter of destructive exposure. And appellate review after the entry of final judgment would not be effectively reviewable after final judgment, because the litigant will have been compelled to proceed unmasked. "Once the litigant's true name is revealed on the public docket, the toothpaste is out of the tube and the media or other interested onlookers may take notice in a way that cannot be undone by an appellate decision down the road."

Presumption Against Use of Pseudonyms. The First Circuit recently held that there is a strong presumption against the use of pseudonyms in civil litigation, but the court recognized that other courts of appeals had found that the use of pseudonyms may be warranted in exceptional cases [see Doe v. Mills, 39 F.4th 20, 25–27 (1st Cir. 2022) (although not formulating its own test for whether parties may proceed under pseudonyms, in context of emergency motion for stay of district court's disclosure order, First Circuit applied Third Circuit's multifactor test from Doe v. Megless, 654 F.3d 404 (3d Cir. 2011), which had been used by district court and by other district courts within First Circuit)]. In the present case, the First Circuit addressed whether and in what circumstances it would recognize an exception to the presumption against the use of pseudonyms.

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The court of appeals began by clarifying the source of the presumption against the use of pseudonyms in federal civil litigation. (In a footnote, the court expressly excluded from its analysis the possible use of pseudonyms in criminal cases, "which may present a different mix of considerations.")

The court explained that the presumption has no basis in the U.S. Code; no federal statute prohibits litigants from filing civil actions under fictitious names. And the presumption is "not perfectly traceable" to any federal constitutional provision or rule, although the Civil Rules do offer some support. For example, "[t]he title of the complaint must name all the parties" [Fed. R. Civ. P. 10(a)], and "[a]n action must be prosecuted in the name of the real party in interest" [Fed. R. Civ. P. 17(a)]. But the court remarked that it is not obvious that a party's "name" in this context means his or her true name, to the exclusion of a pseudonym. "And if the Civil Rules should be read to mandate that a complaint state the parties' true names, it would be odd that courts have converted this command into a rebuttable presumption."

The court of appeals found more pertinent support for the presumption in the right of public access to judicial proceedings and documents. There is a qualified First Amendment right of public access to certain documents filed in civil litigation [see Courthouse News Serv. v. Quinlan, 32 F.4th 15, 20 n.8 (1st Cir. 2022) (collecting cases)]. And the Supreme Court has recognized a common-law right of access to judicial records, but that right is not absolute [see Nixon v. Warner Communications, Inc., 435 U.S. 589, 597–598, 98 S. Ct. 1306, 55 L. Ed. 2d 570 (1978)]. The First Circuit noted that it had never held that the right of public access (whether derived from the First Amendment or from common law) forbids the use of a pseudonym in civil litigation.

The First Circuit expressed the view that federal courts enforce the presumption against party pseudonyms in civil litigation under their inherent power to formulate procedural rules not specifically required by the Constitution or by Congress. This inherent power applies "foursquare" to the presumption against pseudonymity, which is a policy intrinsic to the litigation process. The court of appeals remarked that courts "have distilled such a presumption from a brew of custom and principle," including the values underlying the right of public access to judicial proceedings and documents under the common law and First Amendment.

The First Circuit also found a basis for the presumption in the Nation's tradition of doing justice out in the open. Without knowledge of the parties' names, the public could learn virtually nothing about a case outside the facts and arguments in the record. Anonymizing the parties lowers the odds that journalists, activists, or other interested members of the public would be able to learn of matters such as judicial conflicts of interest and ex parte contacts. Moreover, using the parties' true names helps protect the appearance of fairness in judicial proceedings. "Secrecy breeds suspicion. . . . A judicial system replete with Does and Roes invites cynicism and undermines public confidence in the courts' work."

The First Circuit concluded that the strong presumption against the use of pseudonyms in civil litigation rests on a sturdy foundation. The court next addressed the standard for determining when a party may litigate under a pseudonym.

First Circuit Adopts Totality-of-Circumstances Standard for Overcoming Presumption Against Use of Pseudonyms. The First Circuit observed that to decide when the use of a pseudonym in civil litigation may be warranted, several other circuits have devised elaborate multi-factor tests. These various tests generally require that the movant's interest in anonymity be balanced against countervailing interests such as the public interest in disclosure and any prejudice to the adverse party [see Sealed Plaintiff v. Sealed Defendant, 537 F.3d 185, 189 (2d Cir. 2008)]. Many of these tests involve nonexhaustive lists of up to ten factors [see Sealed Plaintiff v. Sealed Defendant, 537 F.3d 185, 189 (2d Cir. 2008) (collecting cases)].

The First Circuit found that other circuits' multi-factor tests do not establish a clear standard, and that amorphous quality hampers their utility. The court therefore decided not to adopt a multi-factor test. The court also declined to identify specific limitations or exceptions to the presumption against pseudonymity. The court acknowledged that "[b]ecause the problem is complex and the cases are not all cut from the same cloth, some effort to balance a gallimaufry of relevant factors is inevitable." But the court emphasized that in its view, "the appropriate test must center on the totality of the circumstances." The court saw little benefit in endorsing another circuit's multi-factor test, or formulating its own list of factors "to festoon the easily understood 'totality of the circumstances'

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standard." Rather, the court of appeals left it to the district courts to exercise their broad discretion to identify the relevant circumstances in each case and to strike the appropriate balance between the public and private interests.

Guidelines for Application of Totality-of-Circumstances Standard. Despite its skepticism about the wisdom of hard-and-fast rules on this issue, the First Circuit appreciated the need for greater clarity and predictability with respect to pseudonym decisions. The court therefore articulated some guidelines to help the district courts.

The court noted its commitment to the proposition that, in balancing the relevant interests, a court must not lose sight of the big picture: litigation by pseudonym should occur only in exceptional cases. The court of appeals explained that lawsuits in federal courts frequently invade customary notions of privacy and threaten parties' reputations. Facing the court of public opinion under these conditions is sometimes stressful, but that is the nature of adversarial litigation. The court of appeals therefore accepted that a well-calibrated inquiry needs some workable methodology for sorting out the relatively few exceptional cases in which pseudonymity should be allowed. To that end, the court thought it useful to sketch four general categories—"paradigms"—of exceptional cases in which party anonymity ordinarily will be warranted.

The first paradigm involves a would-be Doe who reasonably fears that coming out of the shadows will cause him or her unusually severe physical or psychological harm [see, e.g., Doe v. Ayers, 789 F.3d 944, 945 (9th Cir. 2015) (allowing use of pseudonym based on evidence that disclosure of plaintiff-inmate's history of being sexually abused would create significant risk of severe harm at hands of other inmates); Does I thru XXIII v. Advanced Textile Corp., 214 F.3d 1058, 1071 (9th Cir. 2000) (allowing use of pseudonym for plaintiffs who feared extraordinary retaliation, such as deportation, arrest, and imprisonment)].

The second paradigm involves a would-be Doe whose identification would harm innocent nonparties [see James v. Jacobson, 6 F.3d 233, 238 (4th Cir. 1993)].

The third paradigm involves cases in which anonymity is necessary to forestall a chilling effect on future litigants who may be similarly situated [see Doe v. Megless, 654 F.3d 404, 410 (3d Cir. 2011) (emphasizing need to ascertain whether other similarly situated litigants will be deterred from litigating claims that public would like to have litigated)]. The court of appeals pointed out that because courts provide the mechanism for the peaceful resolution of disputes that might otherwise give rise to attempts at self-help, they must be wary of deterring the legitimate exercise of the right to seek a peaceful redress of grievances through judicial means [see Talamini v. Allstate Ins. Co., 470 U.S. 1067, 1070–1071, 105 S. Ct. 1824, 85 L. Ed. 2d 125 (1985) (Stevens, J., concurring)]. A deterrence concern typically arises in cases involving intimate issues such as sexual activities, reproductive rights, bodily autonomy, medical concerns, or the identity of abused minors [see In re Sealed Case, 971 F.3d 324, 327 (D.C. Cir. 2020)]. Also typical are cases in which a potential party may be implicated in illegal conduct, thereby risking criminal prosecution [see Doe v. Stegall, 653 F.2d 180, 185 (5th Cir. 1981)], and those in which the injury litigated against would be incurred as a result of the disclosure of the party's identity [see Doe v. Frank, 951 F.2d 320, 324 (11th Cir. 1992)].

The fourth paradigm involves a suit that is bound up with a prior proceeding made confidential by law. This concern manifests itself when denying anonymity in the new suit would significantly undermine the interests served by that confidentiality [see, e.g., Doe v. Bates, 2018 U.S. Dist. LEXIS 161981, at *1–*4 (S.D. Ill. Sept. 21, 2018) (granting pseudonym status to plaintiff bringing excessive-force claim arising from juvenile detention, because "revealing his identity would, in effect, unravel the protections afforded to his juvenile record")].

The First Circuit noted that these four paradigms are "rough cuts," and a party whose case for pseudonymity appears weak under a single paradigm might make a persuasive showing when multiple paradigms are implicated. There could also be a rare case in which, although the case falls within one or more paradigms, the need for openness or the prospect of serious prejudice to other parties overwhelms the movant's privacy concerns.

The court of appeals added that civil actions "come in a wide variety of shapes and sizes, and we are not so sanguine as to believe that these four paradigms capture the entire universe of cases in which pseudonymity may be appropriate." The court expressed confidence, however, that the paradigms capture the vast majority of

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affected cases and should be useful tools for the lower courts.

- **Summary of New Analytical Framework.** In sum, the First Circuit held that a district court adjudicating a motion to proceed under a pseudonym should balance the interests asserted by the movant in favor of privacy against the public interest in transparency, taking all relevant circumstances into account. In most cases, the inquiry should focus on the extent to which the facts align with one or more of the four paradigms described above. Because the paradigms are framed in generalities, a court has broad discretion to quantify the need for anonymity in the case before it. This discretion extends to the court's ultimate determination as to whether that need outweighs the public's interest in transparency. (The court of appeals noted that pseudonymity will never be justified if the public disclosure of the party's true name has already happened.) The party seeking pseudonymity bears the burden of rebutting the strong presumption against it. And in most cases, the district court should require a declaration or affidavit either by the moving party or by someone with special knowledge who can speak to the need for anonymity in that case.

  The First Circuit added that district courts must be mindful that the balance between a party's need for anonymity and the interests weighing in favor of open judicial proceedings may change as the litigation progresses. An order granting pseudonymity should therefore be reevaluated if and when circumstances change.

  The court of appeals also directed that a party seeking to proceed anonymously must provide the district court with his or her true name in a filing made under seal. The court of appeals explained that if the party's name is unknown to the district court, and to the appellate court if there is an appeal, it renders a meaningful recusal check impossible. And if the adjudicating courts never learn the party's identity, giving the judgment preclusive effect in future litigation would be difficult.

- **Application to Present Case.** Applying its new analytical framework in the present case, the First Circuit panel determined that the district court's order denying the plaintiff's motion to proceed by pseudonym could not stand. In the absence of controlling precedent from the First Circuit, the district court had borrowed another circuit's test, denying pseudonymity because the plaintiff had failed to demonstrate a reasonable fear of severe harm from revelation of his true name. But the First Circuit pointed out that under its newly adopted standard, fear of harm is relevant only under the first paradigm. And the arguments made by the plaintiff implicated all three of the other paradigms.

  For example, disclosing the plaintiff's true name could incidentally expose the name of his accuser, who was not a party to this action, thus bringing the second paradigm into play. The third paradigm was also implicated by the plaintiff's argument that disclosing his true name, in light of the sensitive nature and privacy issues that could be involved with being identified as a perpetrator of sexual assault, would deter similarly situated potential litigants from pursuing their claims. And the fourth paradigm was implicated as well, because the underlying disciplinary proceeding that resulted in the defendant college's expulsion of the plaintiff was itself conducted confidentially under Title IX of the Education Amendments of 1972 [see 20 U.S.C. § 1681 et seq.].

  Accordingly, the First Circuit vacated the district court's order denying pseudonymity and remanded the case for application of the new standard articulated by the court of appeals.

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REMOVAL

Diversity Jurisdiction

Avenatti v. Fox News Network LLC

41 F.4th 125, 2022 U.S. App. LEXIS 20101 (3d Cir. July 21, 2022)

The Third Circuit has held that a district court has discretion under Rule 21 to drop a nondiverse party added after removal even if added as a matter of right under Rule 15(a).

Background. The Plaintiff was a celebrity lawyer who owed his celebrity partially to his representation of Stephanie Clifford (also known as Stormy Daniels), a woman who allegedly had had an extramarital affair with former President Trump.

Given the plaintiff's public profile, an arrest by the Los Angeles Police Department was covered extensively in the media, including by the defendant network and the individual on-air personality defendants.

The plaintiff sued the defendants in state court, alleging that they engaged "in a 'purposeful and malicious' campaign of defamation and slander against him by lying, on air and in print, about the details of his arrest."

Four days after the suit was filed, the defendants removed the case to federal court, asserting that there was complete diversity among the parties. The plaintiff was a California resident, and none of the named defendants was.

Three days after the case was removed, the plaintiff filed an amended complaint, which did not require leave of court because it was entered within 21 days of the initial complaint [see Fed. R. Civ. P. 15(a)(1)(A)]. The amended complaint named an additional on-air personality who was mentioned in the initial complaint but not named as a defendant, and added an allegation that this additional defendant published an online article that included the same defamatory accusations previously attributed to the other defendants. This additional defendant was a California resident.

Five days after filing the amended complaint, the plaintiff moved to remand the case back to state court, arguing that the addition of the nondiverse defendant had destroyed diversity and deprived the court of subject matter jurisdiction.

The district court denied remand, concluding that it had discretionary authority under Rule 21 to drop the nondiverse defendant from the litigation and thereby restore complete diversity [see Fed. R. Civ. P. 21 ("On motion or on its own, the court may at any time, on just terms, add or drop a party.")]. The court rejected the plaintiff's argument that its only option would be to either remand or inquire whether the defendant could be dropped under the doctrine of fraudulent joinder.

The district court then dismissed the amended complaint without prejudice on the defendants' motion, finding that the plaintiff had not pled plausible defamation claims against any defendant. After dismissal, the plaintiff informed the court that he intended to stand on his amended complaint, and the court dismissed the complaint with prejudice.

The plaintiff appealed, contesting the denial of remand and arguing that the district court was without jurisdiction to dismiss his amended complaint.

District Court Did Not Err by Dropping Nondiverse Defendant and Retaining Jurisdiction. The Third Circuit found that Rule 21 gives the district court the authority to allow a dispensable nondiverse party to be dropped at any time, "even after judgment has been rendered," in order to preserve subject matter jurisdiction. This authority is discretionary but not unlimited, as the rule allows courts to add or drop parties "on just terms";

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thus, a court cannot drop indispensable parties, and it must assure that its actions will not prejudice any party.

Because Rule 21 does not contain explicit standards governing the propriety of joinder or severance, the district court considered the Fifth Circuit's open-ended balancing test for considering post-removal amendments that add nondiverse parties to guide its discretion in finding "just terms": (1) the extent that the purpose of the amendment was to defeat federal jurisdiction, (2) whether the plaintiff was "dilatory" in requesting the amendment, (3) whether the plaintiff would be significantly injured if the amendment were not allowed, and (4) any other factors "bearing on the equities" (the "Hensgens factors") [see Hensgens v. Deere & Co., 833 F.2d 1179 (5th Cir. 1987)]. Applying these factors, the district court found that the plaintiff joined the nondiverse defendant to defeat diversity, the plaintiff would not be prejudiced because the added defendant was dispensable, and although the plaintiff had not been dilatory, federal jurisdiction should nevertheless be retained by dropping the additional defendant.

The Third Circuit found the district court's application of the Hensgens factors to be appropriate and permissible, and the conclusions to be reasonable. The court acknowledged that Rule 15(a)(1)(A) amendments, which permit amending pleadings as a matter of course within 21 days after serving the pleading, have the "latent potential" to force remand without judicial scrutiny. But because a Rule 15(a)(1)(A) amendment is done without giving the district court the opportunity to review the propriety of the joinder of the nondiverse party, the Third Circuit, following the Fourth Circuit's decision in Mayes v. Rapoport, held that the district court had the authority to analyze the joinder as though 28 U.S.C. § 1447(e) applied [see Mayes v. Rapoport, 198 F.3d 457, 462 n.11 (4th Cir. 1999); 28 U.S.C. § 1447(e) ("If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.")].

The Third Circuit supported the use of the Hensgens factors by citing to the Fourth Circuit's Mayes decision, which cited Hensgens to support its holding. Moreover, the Third Circuit cited analogous decisions from other circuits that adopted the factors as the appropriate framework for determining whether post-removal joinder of a nondiverse party is appropriate. The court reasoned that "litigants may not employ procedural tactics to deny the district court's ability to reject new parties whose presence would defeat diversity. Once jurisdiction has vested in a federal court—which it did here upon removal from state court—careful scrutiny should be applied to any post-removal events threatening to wrench that jurisdiction away."

The Third Circuit rejected the plaintiff's argument that the district court could only have dismissed the nondiverse defendant upon a finding that he had been fraudulently joined. The court reiterated that the fraudulent joinder doctrine does not apply to party additions that occur after a valid removal. Moreover, the court opined that the fraudulent joinder doctrine "is too rigid to serve as the sole lens for analysis—it imposes too high a bar for the district court to meet before it may defend its vested jurisdiction. This is a substantial concern because we must be on guard against forum manipulation in removal cases." The court instead concluded that district courts should have pragmatic and flexible tools such as the Hensgens factors, which "fit that need far better than fraudulent joinder does."

The court also rejected the plaintiff's argument that the district court should not have used Rule 21 to drop the nondiverse defendant because he claimed that the rule permits party severance only late in the litigation. Rule 21 specifies that the court may "at any time" add or drop a party.

Finally, the Third Circuit rejected the plaintiff's argument that he was the master of his complaint and his choice of forum ought to have been respected. The court found that the plaintiff's "generalities run up against an insurmountable wall of caselaw," and "far from granting plaintiffs unlimited rights, the Federal Rules of Civil Procedure and the removal statutes recognize the interests of defendants too."

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The Third Circuit concluded by examining the district court's Hensgens analysis to assure that its conclusions were not an abuse of its discretion, and concluded that the analysis was persuasive and well-supported. The conclusion that the plaintiff's purpose in joining the nondiverse defendant was to destroy diversity jurisdiction was "amply supported by the record." A finding of improper purpose was especially supported by the fact that the plaintiff discussed this defendant in the initial complaint without naming him as a defendant. The Third Circuit also held that the district court's conclusion that dropping the defendant would not prejudice the plaintiff was reasonable and not an abuse of discretion. Because the network was already in the case and could provide complete recovery under joint-and-several liability, there was no need to retain the nondiverse defendant. And in a footnote, the court found that the district court did not abuse its discretion by omitting considerations of "other factors bearing on the equities." It rejected the plaintiff's assertion that removal represented "blatant forum shopping based on a technicality," as there is "nothing inequitable about asserting one's legal rights."

The court closed by summarizing its holding: "In removal actions predicated on complete diversity, plaintiffs cannot nullify a court's gatekeeping function by adding jurisdictional spoilers as of right under Rule 15(a). Although § 1447(e) may not directly empower district courts to reject those amendments, Rule 21 gives courts discretion . . . to drop parties at any time, including when facing a motion to remand."