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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.

FOREIGN SOVEREIGN IMMUNITIES ACT

Commercial-Activity Exception

Blenheim Cap. Holdings Ltd. v. Lockheed Martin Corp.

53 F.4th 286, 2022 U.S. App. LEXIS 31511 (4th Cir. Nov. 15, 2022)

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The Fourth Circuit has held that the commercial-activity exception to the Foreign Sovereign Immunities Act did not apply to an offset transaction for the sale of arms to South Korea.

INTERVENTION

Scope of Interest Required

Cal. Dep't of Toxic Substances Control v. Jim Dobbas, Inc.

54 F.4th 1078, 2022 U.S. App. LEXIS 33189 (9th Cir. Dec. 1, 2022)

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Ninth Circuit Clarifies Scope of Interest Required for Intervention of Right. The Ninth Circuit has held that to support intervention of right, a prospective intervenor's asserted interest must be protectable under some law and bear a relationship to the claims at issue in the action.

VENUE

Motion to Transfer

In re Apple Inc.

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By Marisa Beirne, LexisNexis
Solutions Consultant for the Federal Government

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By Marisa Beirne, LexisNexis
Solutions Consultant for the Federal Government

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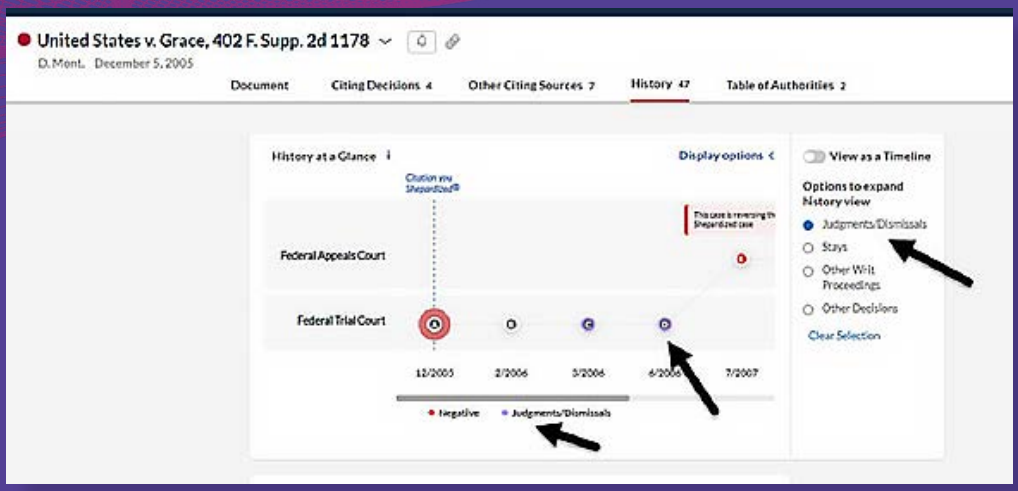
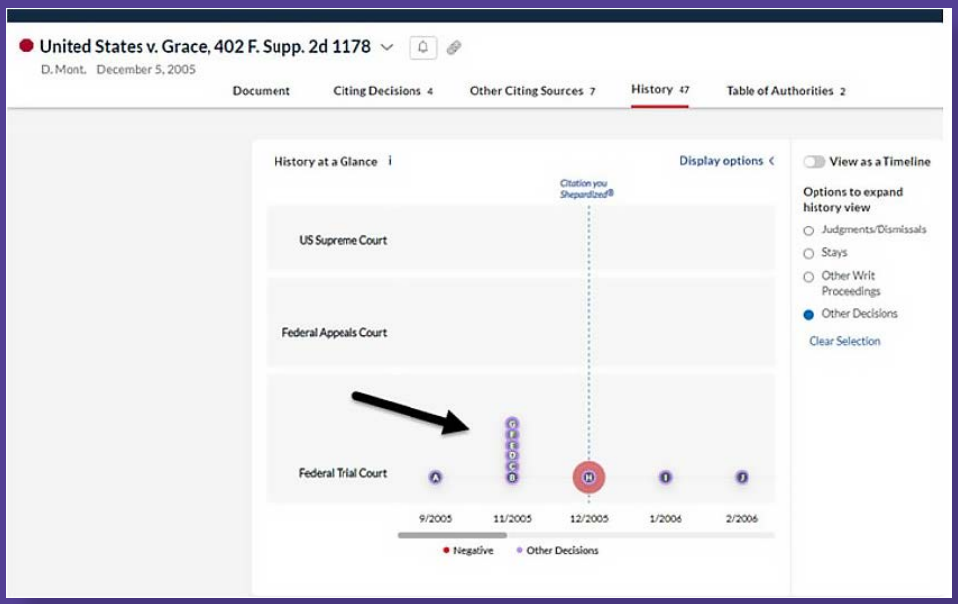


Moreover, you can now select "Other Decisions" to see stacked nodes and an added court level as seen below.



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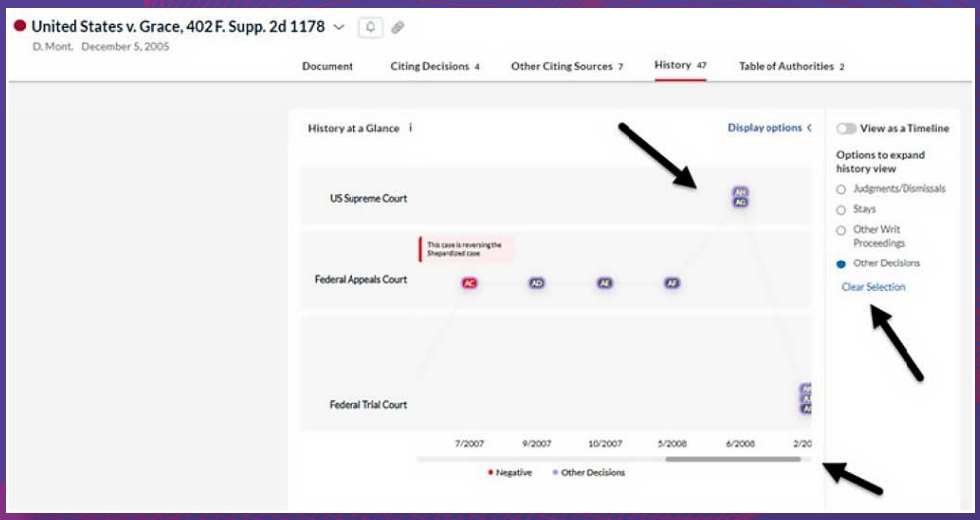
Once you are done utilizing the new *Shepard's* History features you can hit "clear selection" as seen below and navigate back to the original view.



Again, the new view above now provides an easy-to-read quick overview of history as it travels through the appellate level(s) with clearly marked court labels. Users also now have the ability to quickly note the length of time between proceedings using the horizontal date axis in the map. *Shepard's* new History view make it easier for you to navigate through complicated case history without losing your place in your workflow or research. As always, *Shepard's* provides more history phrases and how they are connected to another case within the same matter to any other research provider. Please contact your LexisNexis® Solutions Consultant for more information on *Shepard's* or to schedule a training session.

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FOREIGN SOVEREIGN IMMUNITIES ACT

Commercial-Activity Exception

Blenheim Cap. Holdings Ltd. v. Lockheed Martin Corp.

53 F.4th 286, 2022 U.S. App. LEXIS 31511 (4th Cir. Nov. 15, 2022)

The Fourth Circuit has held that the commercial-activity exception to the Foreign Sovereign Immunities Act did not apply to an offset transaction for the sale of arms to South Korea.

Background. The plaintiff specialized in developing, structuring, and modeling international "offset" transactions, which are characterized as common in defense procurements involving foreign governments. In an offset transaction, the supplier provides a collateral "sweetener" to the procuring government to help reduce the government's cost of purchasing high-cost military and defense systems.

Beginning in 2011, the plaintiff worked with Lockheed to structure an offset transaction that would secure the sale of 40 Lockheed F-35 fighter planes to South Korea after South Korea "accelerated its plans to enhance stealth-fighter capabilities in response to public outcry over North Korean aggression." The F-35, which included classified technology, was a state-of-the-art stealth fighter plane.

Because of the F-35's high cost, the plaintiff worked with Lockheed to structure an offset transaction that all parties agreed to and that the U.S. Department of Defense (DOD) approved. In the transaction, (1) Lockheed would provide South Korea with 40 F-35 planes (valued at roughly $7 billion); (2) the plaintiff would arrange to have Airbus manufacture three satellites, one of which, a military satellite designed to integrate with the F-35, would be provided to South Korea, with the other two retained by the plaintiff; (3) South Korea would pay for the F-35s and contribute $150 million toward the cost of the military satellite, which had an offset value of "more than $3.1 billion," which effectively reduced its overall cost by almost half; (4) the $150 million payment would be transferred via the DOD to Lockheed, and then in installments to the plaintiff; and (5) the plaintiff would then operate the two satellites to generate income to pay for all three satellites and to provide it with an estimated profit of $500 million.

The plaintiff thus functioned as a broker in accordance with an "International Brokerage Agreement" with Lockheed. Because the transaction involved highly sensitive military equipment designed and manufactured for the U.S. military, the "Foreign Military Sale" required approval and control by the DOD. Negotiations for the transaction took place in the DOD offices, including the Pentagon, because the negotiations involved classified information.

The complaint alleged that beginning in 2015, Lockheed, Airbus, and South Korea conspired to "cut [the plaintiff] out of the offset transaction." This was allegedly motivated by a concern that the plaintiff would be positioned to compete with Lockheed, which was in the market for satellite transmission capacity. The complaint further alleged that Lockheed paid the first installment of $45 million after its due date, and then made no further payments toward the $150 million.

On October 6, 2016, Lockheed sent a formal notice to the plaintiff immediately terminating the brokerage agreement, claiming the plaintiff materially breached the agreement. Following the termination, the defendants allegedly restructured the offset transaction so that the plaintiff was no longer involved, and Airbus would provide the satellite to South Korea. The DOD approved the restructured transaction, and the satellite was launched in July 2020.

The plaintiff sued in federal court on December 31, 2020, alleging that the defendants conspired to tortiously interfere with its International Brokerage Agreement and prospective business expectancies, and were unjustly enriched. In its first amended complaint, it added claims under federal and state antitrust laws.

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The defendants filed a motion to dismiss, contending (1) that the district court lacked jurisdiction over the tort claim by reason of the Foreign Sovereign Immunities Act (FSIA), and (2) that the complaint failed to state antitrust claims because they were barred by the statute of limitations and also failed to satisfy the requirements of the Foreign Trade Antitrust Improvements Act.

The district court agreed with the defendants and dismissed the action.

Commercial-Activity Exception to FSIA Was Inapplicable. The Fourth Circuit reiterated that the FSIA provides that a foreign state is immune from the jurisdiction of federal and state courts unless an exception as set out in 28 U.S.C. §§ 1605–1607 applies [see 28 U.S.C. § 1604]. The plaintiff contended that its claims fell within the "commercial activity" exception set forth in § 1605(a)(2). That section excepts foreign states from immunity in an action based on (1) a commercial activity carried on in the United States by the foreign state, (2) an act performed in the United States in connection with a commercial activity of the foreign state elsewhere, or (3) an act outside the United States in connection with a commercial activity of the foreign state elsewhere if "that act causes a direct effect in the United States."

The Act defines "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose" [28 U.S.C. § 1603(d)].

The plaintiff argued that the offset transaction was commercial because it "simply involved 'the purchase and sale of goods.'" It was implemented through commercial contracts between South Korea and the parties, and the U.S. government was not a party and never took title of the satellite.

The Fourth Circuit found this characterization of the transaction to be too general, "such that it would essentially encompass every purchase or sale of goods involving a foreign sovereign." Instead, the court underscored the Supreme Court's framing of the key inquiry, that the question is "whether the particular actions that the foreign state performs are the type of actions by which a private party engages in trade or commerce" [Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 614, 112 S. Ct. 2160, 119 L. Ed. 2d 394 (1992)].

Although the FSIA does not define "commercial," the Supreme Court undertook to define the term and concluded that "a state engages in commercial activity . . . where it exercises only those powers that can also be exercised by private citizens, as distinct from those powers peculiar to sovereigns. Put differently, a foreign state engages in commercial activity . . . only where it acts in the manner of a private player within the market" [Saudi Arabia v. Nelson, 507 U.S. 349, 359-360, 113 S. Ct. 1471, 123 L. Ed. 2d 47 (1993) (emphasis added by Fourth Circuit)].

The Fourth Circuit found that in the offset transaction, South Korea was engaged in conduct peculiar to sovereigns and therefore was not engaged in commercial activity as excepted from immunity from jurisdiction. The court observed that F-35s and the coordinating military satellite "involved highly advanced technology" and the Foreign Military Sale could only be made with the approval and supervision of the U.S. government, and only to a friendly country, because the transaction was subject to controlling considerations of national security and public policy. The court was not persuaded that it was significant that the satellite's manufacturer, Airbus, was a foreign company outside the United States, as the satellite was to be designed with the capability of engaging with F-35s and its inclusion in the offset transaction was subject to the United States' approval and supervision.

The court reasoned that a Foreign Military Sale cannot be made except in compliance with the Arms Export Control Act [22 U.S.C. § 2751 et seq.], which requires approval of the sale by the President of the United States and certification to Congress. The President can approve only if, among other things, (1) the President finds that the sale "will strengthen the security of the United States and promote world peace," (2) the country to which the articles are to be provided agrees not to transfer the arms without the consent of the President, and (3) the country receiving the goods agrees to "maintain the security" of them. Thus the nature of the offset transaction was "subject to plenary U.S. government control in furtherance of a policy of 'international defense cooperation

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among the United States and those friendly countries to which it is allied by mutual defense treaties'" [see 22 U.S.C. § 2751].

The court concluded that "it is clear that a private party could not engage in such a procurement, whether as buyer or seller. Such activity, by its nature, involves the transfer of military assets only to sovereigns and then only in furtherance of U.S. public policy and mutual military cooperation between countries. Moreover, it is not activity directed or influenced by the market but rather by the President's and Congress's judgment on national security concerns."

The Fourth Circuit rejected the plaintiff's response that the harm to it was restricted to its arrangement for the manufacture and sale of three satellites, and a private person or corporation could purchase satellites from Airbus. The court found that this argument ignored the plaintiff's own characterization of the transaction, as the complaint described South Korea as having an indispensable role, and described the satellite as satisfying South Korea's needs and military specifications, which were classified. Moreover, the complaint alleged that the plaintiff designed the entire transaction as an integrated offset deal in which "all four major stakeholders" would benefit. It also alleged that the DOD was an "essential player" that "played a major role in the sales."

The court underscored its conclusion by highlighting the complaint's allegation that "[e]ven though sovereigns demand offsets as a 'sweetener' for defense procurements from foreign suppliers, in the U.S. Foreign Military Sales context, those sovereigns end up footing the bill for the offset with all monetary transactions flowing through the Pentagon" (brackets omitted).

The Fourth Circuit distinguished a district-court case cited by the plaintiff that applied the commercial-activity exception to a sale of MiG planes by Moldova to the United States. In that case, the planes were being sold on the open market, and the United States became involved in order to prevent them from being sold to Iran [see Virtual Defs. & Dev. Int'l, Inc. v. Republic of Moldova, 133 F. Supp. 2d 1, 4 (D.D.C. 1999)]. The Fourth Circuit characterized the structure of that transaction as "nothing more than an ordinary commercial sale by Moldova, without any regulatory oversight."

Antitrust Claims as Untimely. Although a statute-of-limitations defense is ordinarily an affirmative defense that cannot usually be addressed on a Rule 12(b)(6) motion to dismiss, in relatively rare circumstances the defense may be raised in such a motion when the facts sufficient to rule on the defense are alleged in the complaint. Here, the defendants relied solely on the allegations of the complaint in moving to dismiss the antitrust claims as untimely.

The Fourth Circuit held that the cause of action accrued more than four years before the complaint was filed, and was thus barred by the applicable four-year statute of limitations.

In light of its limitations ruling, the court did not address whether the antitrust claim was barred by the Foreign Trade Antitrust Improvements Act.

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INTERVENTION

Scope of Interest Required

Cal. Dep't of Toxic Substances Control v. Jim Dobbas, Inc.

54 F.4th 1078, 2022 U.S. App. LEXIS 33189 (9th Cir. Dec. 1, 2022)

Ninth Circuit Clarifies Scope of Interest Required for Intervention of Right. The Ninth Circuit has held that to support intervention of right, a prospective intervenor's asserted interest must be protectable under some law and bear a relationship to the claims at issue in the action.

General Requirements for Intervention of Right. Federal Rule of Civil Procedure 24(a)(2) provides that, on timely motion, a district court must permit intervention in an action by a movant who claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless the existing parties adequately represent that interest [Fed. R. Civ. P. 24(a)(2)].

The Ninth Circuit has previously held that Rule 24(a)(2) requires the movant to show that (1) it has a significant protectable interest as to the property or transaction that is the subject of the action; (2) the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; (3) the application is timely; and (4) the existing parties may not adequately meet the applicant's interest [see Donnelly v. Glickman, 159 F.3d 405, 409 (9th Cir. 1998)]. The movant has the burden of establishing all four requirements [see United States v. Alisal Water Corp., 370 F.3d 915, 919 (9th Cir. 2004)].

In the present case, there was no dispute that the second, third, and fourth requirements were met, so whether the would-be intervenors could intervene as of right turned on the first requirement—whether they had a qualifying "interest." In order to answer this question, the Ninth Circuit panel first had to review and clarify circuit precedent on the meaning of "interest" under Rule 24(a)(2).

Nature of "Interest" Supporting Intervention of Right—Donaldson Decision. The Ninth Circuit began by observing that the Supreme Court has not yet provided a clear definition of the nature of the "interest relating to the property or transaction that is the subject of the action" referred to in Rule 24(a)(2), and the question "has bedeviled the lower federal courts."

The court of appeals noted that in general, the word "interest" in Rule 24(a)(2) is susceptible of two very different readings. It can be read "in a specifically legal sense, to mean a right or other advantage that the law gives one person as against another person," or it can be read more broadly and "in a less technical sense to refer to anything that a person wants, whether or not the law protects that desire" [see Caleb Nelson, Intervention, 106 Va. L. Rev. 271, 275–276 (2020)].

The court of appeals pointed out that the only Supreme Court case that sheds any meaningful light on this question is Donaldson v. United States, in which a taxpayer sought to intervene in actions brought by the IRS against his former employer and its accountant for the purpose of obtaining their financial records related to his potential tax liability. The Court identified the taxpayer's asserted "interest" as a "desire . . . to counter and overcome" the former employer's and accountant's "willingness . . . to comply and to produce records." The Court said that the "nature of the 'interest' . . . is apparent from the fact that the material in question . . . would not be subject to suppression if the Government obtained it by other routine means," such as the defendants' voluntary disclosure or through the taxpayer's own income-tax returns. The Court then concluded that this interest "cannot be the kind contemplated by Rule 24(a)(2)," because "[w]hat is obviously meant there is a significantly protectable interest." As examples of such a protectable interest, the Supreme Court identified claims of an asserted privilege or abuse of process [Donaldson v. United States, 400 U.S. 517, 531, 91 S. Ct. 534, 27 L. Ed. 2d 580 (1971)].

The Ninth Circuit panel in this case found it significant that the Donaldson Court's examples of "protectable interests"—claims of privilege or abuse of process—were legally cognizable, unlike the taxpayer's asserted interest in Donaldson, which was not protected by any law. The appellate panel thus agreed with the Fifth Circuit, which has remarked that "the Supreme Court in Donaldson used 'protectable' in the sense of legally protectable, and it is difficult to conceive of any other sense in which the Court might have been employing 'protectable' in that context" [New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co., 732 F.2d 452, 464 (5th Cir. 1984) (en banc)].

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Ninth Circuit's Recognition of Effect of Donaldson. The Ninth Circuit, however, was slow to recognize the importance of Donaldson. For the most part, the Ninth Circuit's intervention cases did not acknowledge Donaldson for almost twenty years after it was decided in 1971 [but see Garrett v. United States, 511 F.2d 1037, 1038 (9th Cir. 1975) (per curiam) (applying "significantly protectable" test to affirm denial of intervention as of right by taxpayer in case factually "on all fours with Donaldson")]. Instead, the Ninth Circuit generally followed an older line of authority recognizing the more expansive concept of "interest." Under that line of authority, the "interest" test was primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as would be compatible with efficiency and due process [see, e.g., County of Fresno v. Andrus, 622 F.2d 436, 438 (9th Cir. 1980) ("We have rejected the notion that Rule 24(a)(2) requires a specific legal or equitable interest.")].

In 1989, the Ninth Circuit recognized that Donaldson had modified the circuit's doctrine by construing Rule 24(a)(2) to require a significantly protectable interest. In Portland Audubon Soc'y v. Hodel, the court held that private entities with financial interests in logging on federal land and sympathetic local governments had no "significantly protectable interest" in the government's defense against a National Environmental Policy Act (NEPA) challenge to the Bureau of Land Management's approval of such logging. The Portland Audubon Soc'y panel reasoned that "NEPA provides no protection for the purely economic interests that they assert" [Portland Audubon Soc'y v. Hodel, 866 F.2d 302, 309 (9th Cir. 1989)].

In Wilderness Soc'y v. U.S. Forest Serv., the Ninth Circuit, sitting en banc, abrogated Portland Audubon Soc'y's conclusion that private parties could never have a protectable interest under NEPA, explaining that "private parties seeking to intervene in NEPA cases may, in certain circumstances, demonstrate an interest 'protectable under some law,' and a relationship between that interest and the claims at issue" [Wilderness Soc'y v. U.S. Forest Serv., 630 F.3d 1173, 1179 (9th Cir. 2011) (en banc)]. Thus, Wilderness Soc'y did not overrule Portland Audubon Soc'y's recognition that Donaldson had modified the Ninth Circuit's expansive reading of "interest" under Rule 24 by cabining the word's meaning to legally protected interests. Rather, the en banc court summarized the operative inquiry as "whether the asserted interest is protectable under some law, and whether there is a relationship between the legally protected interest and the claims at issue" [Wilderness Soc'y v. U.S. Forest Serv., 630 F.3d 1173, 1176 (9th Cir. 2011) (en banc) (internal quotation marks omitted)].

The Ninth Circuit panel in this case therefore read Portland Audubon Soc'y and Wilderness Soc'y as effectively discarding the circuit's pre-Donaldson liberal policy in favor of intervention, which had followed practical and equitable considerations. Instead, Rule 24(a)(2) requires that (1) the asserted interest be protectable under some law and (2) there be a relationship between the legally protected interest and the claims at issue. "If these two core elements are not satisfied, a putative intervenor lacks any 'interest' under Rule 24(a)(2), full stop."

Application in Present Case. This action was brought by a California state agency against current and former owners of certain land. The plaintiff agency sought relief, under the Comprehensive Environmental Response, Compensation, and Liability Act, as well as state law, relating to the remediation of hazardous materials on the land.

The proposed intervenors were insurers of a former owner, a defunct limited liability company for which a receiver had been appointed. The receiver declined to defend the action, and a default was entered against the company. The insurers sought to intervene in order to set aside the default and provide the company with a defense to the action. Concluding that the insurers lacked the requisite interest under Rule 24(a)(2), the district court denied the insurers' motion to intervene as of right.

Applying its understanding of the "interest" required under Rule 24(a)(2) in light of Donaldson, Portland Audubon Soc'y, and Wilderness Soc'y, the Ninth Circuit panel reversed the district court's order denying intervention. The court of appeals reasoned that under governing California law, insurers have a protectable interest in preventing defaults by their insureds that are incapable of defending themselves or unable to do so.

The appellate panel rejected an argument that the insurers had forfeited that interest in this case by virtue of their refusal to admit coverage for the claims made against the insured. The court of appeals reasoned that under California law, an insurer that seeks to intervene for the purpose of defending an insured that is unable or unwilling to defend itself has a protectable interest under Rule 24(a)(2), no matter what position, if any, the insurer has taken as to coverage.

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VENUE

Motion to Transfer

In re Apple Inc.

52 F.4th 1360, 2022 U.S. App. LEXIS 30929 (Fed. Cir. Nov. 8, 2022)

The Federal Circuit granted mandamus to compel a district court to consider a motion to transfer venue when the court had unnecessarily delayed consideration until after merits discovery and other pretrial matters had been completed.

Background. This was a suit for patent infringement filed to the Western District of Texas in October 2021. In April 2022, the defendant moved under 28 U.S.C. § 1404(a) for transfer to the U.S. District Court for the Northern District of California. In support of this motion, the defendant filed a declaration from one of its managers seeking to establish the facts supporting transfer, such as location of witnesses and documents. Shortly before the close of venue discovery, the defendant sought leave to supplement its motion with additional declarations from other employees. The district court granted this request but sua sponte ordered the parties to complete fact discovery on the merits (which it extended for an additional 30 weeks) and then go through another six weeks of re-briefing of the motion to transfer before the court would rule on it.

The defendant petitioned the court of appeals for a writ of mandamus directing the district court to vacate its scheduling order, promptly rule on the pending transfer motion, and stay all proceedings on the merits until the transfer question was resolved.

Mandamus Granted. Although a district court has discretion in managing its own docket, an appellate court may grant mandamus to correct a clearly arbitrary refusal to act on a longstanding pending transfer motion. The defendant argued that the district court had clearly abused its discretion in ordering the parties to complete 30 more weeks of fact discovery while pressing forward on the merits and then spend another six weeks re-briefing the issue before deciding the transfer motion. The district court's schedule would have postponed consideration of the motion until a full year after the defendant originally sought transfer, and the parties would have completed discovery and other significant pretrial matters. The court of appeals agreed that this scheduling order went too far.

The court of appeals stated that parties are entitled to have their venue motions prioritized. Thus, it is usually not proper to postpone consideration of a motion for transfer until discovery on the merits is completed. "Where, as here, the parties agree that no additional discovery or briefing is necessary [on the transfer motion] and there are clearly less time-consuming and more cost-effective means for the court to resolve the motion (including considering whether the court should give less weight to certain evidence), it is a clear abuse of discretion to require the parties to expend additional party and court resources litigating the substantive matters of the case while [the defendant's] motion to transfer unnecessarily lingers on the docket."

The district court had taken the view that by delaying the decision until after full fact discovery and re-briefing, it could reduce speculation and allow the parties to provide the court with the best evidence for ruling on a motion to transfer. However, discovery on the transfer motion itself is sufficient to allow resolution of that motion. Moreover, an undue delay for a motion under § 1404(a) may unnecessarily require the expenditure of judicial resources in both the transferor and transferee courts. Judicial economy requires that the court that ultimately decides the merits of the action should also decide the various questions that arise during the pendency of the suit, instead of allowing consideration of these matters in two courts.

The court of appeals concluded that the district court had clearly abused its discretion in issuing its scheduling order. "We do not decide in this case (which does not present the issue) whether and the extent to which merits discovery may proceed pending discovery for a decision on a transfer motion. We determine only that

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decision of a transfer motion must proceed expeditiously as the first order of business and that venue discovery must proceed immediately to enable such a prompt decision of the transfer motion." Mandamus was granted, and the district court was directed to postpone fact discovery and other substantive proceedings until after consideration of the motion for transfer.