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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 ACTIONS

Attorney's Fees

Lowery v. Rhapsody Int'l, Inc.

69 F.4th 994, 2023 U.S. App. LEXIS 14134 (9th Cir. June 7, 2023)

[Jump to full summary](#)

The Ninth Circuit reversed an attorney's fee award of \$1.7 million when the recovery by the class amounted to a little over \$50,000, since the touchstone for determining reasonableness of attorney's fees in a class action must be the benefit to the class, not merely the time and effort expended by the attorneys.

DISCOVERY

Sanctions

Mey v. Phillips

71 F.4th 203, 2023 U.S. App. LEXIS 15840 (4th Cir. June 23, 2023)

[Jump to full summary](#)

The Fourth Circuit holds that while it is important to warn a defendant about the possibility of default as a sanction for discovery abuses, an explicit warning is not always necessary.

JURY TRIAL

Consent of Parties

Thomas v. Broward Cnty. Sheriff's Off.

71 F.4th 1305, 2023 U.S. App. LEXIS 15718 (11th Cir. June 22, 2023)

[Jump to full summary](#)

The Eleventh Circuit holds that when the parties consent to a jury finding and the district court does not specify whether the finding will be nonbinding under Rule 39(c)(1) or binding under Rule 39(c)(2), the jury finding is binding by default.

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Current Awareness Insights!

FIRST CIRCUIT IDENTIFIES ONLY TWO PERMITTED CIRCUMSTANCES WHERE A DISTRICT COURT MAY ALLOW LIMITED DISCOVERY BEFORE CONSIDERING A RULE 12(B)(6) MOTION TO DISMISS

In a RICO case, *Douglas v. Hirshon*, 2023 U.S. App. LEXIS 6799 (1st Cir. Mar. 21, 2023), the First Circuit recently summarized the only two circumstances under which it has held that a district court considering a motion to dismiss under Rule 12(b)(6) might appropriately allow the plaintiff limited discovery.

First, it has allowed such limited discovery when the complaint sets out a general scheme to defraud but the complaint falls short of the heightened particularity required by Rule 9 and the missing information is “peculiarly” within the defendant’s knowledge. However, the Court held this line of authority does not apply where, as in this case, the complaint falls short not only of Rule 9’s heightened particularity requirements but also of the ordinary plausibility standard.

Second, the First Circuit—alone among all courts—has held limited discovery may be appropriate if: (a) a plausible claim may be “indicated” by the complaint’s allegations; (b) the information needed to flesh out the allegations may be in control of the defendants; and (c) “modest discovery may provide the missing link.” Applying this second standard, the Court found the complaint in this case fell well short of justifying even limited discovery. The complaint did not come close to alleging a RICO conspiracy. As such, there was too wide a gap between the allegations in the complaint and a plausible claim for discovery to be appropriate.

The Court rejected the argument that a plaintiff is entitled to such discovery unless the record shows there is not means of pleading a plausible claim. To the contrary, the Court emphasized the burden was on the plaintiff to allege enough facts to raise a reasonable expectation that discovery would reveal an actionable claim. It also rejected plaintiff’s contention that in considering the motion for limited discovery the lower court should have looked beyond the complaint and considered documents it had attached to its opposition to the motion to dismiss. The Court emphasized that this second exception to the normal rule of no discovery concerned whether plaintiff’s complaint met minimum pleading requirements. Plaintiff had the opportunity to seek to amend their complaint to include the attachments but failed to do so.

See Fed Civ Proc Before Trial: The Wagstaffe Group [§17-XI\[C\]\[7\]\[g\]](#), 17.394—Lack of Information May Alter Pleading Requirement; Fed Civ Proc Before Trial: The Wagstaffe Group [§23-III\[G\]\[11\]\[b\]](#), 23.102—Plaintiff not Entitled to Pre-Dismissal Discovery Due to “Asymmetry” of Information, [2023-2 The Wagstaffe Group Current Awareness 04 \(2023\)](#).

CLASS ACTIONS

Attorney's Fees

Lowery v. Rhapsody Int'l, Inc.

69 F.4th 994, 2023 U.S. App. LEXIS 14134 (9th Cir. June 7, 2023)

The Ninth Circuit reversed an attorney's fee award of \$1.7 million when the recovery by the class amounted to a little over \$50,000, since the touchstone for determining reasonableness of attorney's fees in a class action must be the benefit to the class, not merely the time and effort expended by the attorneys.

▼ **Background.** The defendant was a company that offered music for digital streaming, and it therefore was required to pay royalties to the owners of copyrights in the musical compositions and sound recordings it provided. Before 2018, copyright law required the defendant either to directly negotiate a voluntary license with each copyright owner or to obtain a compulsory license by serving a notice of intention on the copyright owner, or with the Copyright Office if the copyright owner could not be identified. The defendant (as well as other streaming services) struggled to properly obtain licenses for each of the millions of works made available for streaming.

In 2016, several named plaintiffs sued the defendant on behalf of a class of copyright owners, asserting copyright infringement. The defendant had also been negotiating with the National Music Publishers Association to resolve the same problems, and they eventually reached a settlement. To receive payment under this settlement, however, copyright owners had to waive their rights to make claims in the present lawsuit. By April of 2018, the defendant had informed the plaintiffs about the NMPA settlement and advised them that copyright holders of around 98% of the musical works available on its streaming service had opted to participate in the NMPA settlement. Thus, it was clear by this time that the present suit could not yield much compensation.

The parties had devoted significant hours and resources to this case, focusing on reaching a settlement, with little substantive litigation. In January 2019, they executed a settlement agreement. The defendant denied liability for copyright infringement but agreed to pay class members for musical compositions played on its streaming service, with a maximum of \$20 million. Few class members submitted claims, and in the end the defendant paid only \$52,841.05 to satisfy class members' claims. The settlement agreement also required the defendant to establish an Artist Advisory Board with an annual budget of at least \$30,000 to advance both parties' goals of protecting artists' rights and promoting the defendant's business.

The settlement agreement did not require any other changes in the defendant's licensing practices, but the Music Modernization Act (MMA), enacted in October of 2018, did [17 U.S.C. § 115(d)]. This Act allows digital music providers to obtain a blanket license without the need for the procedures formerly required to obtain compulsory licenses with respect to every copyright holder.

▼ **Fee Award.** Parties must obtain the court's approval of a class action settlement as well as any request for attorney's fees [Fed. R. Civ. P. 23(e), (h)]. Fees may be determined under the lodestar method by multiplying the number of hours reasonably spent by a reasonable hourly rate, and the court may also apply a multiplier to that amount to alter the fee depending on various factors; or fees may be determined under the percentage-of-recovery approach, for which the typical benchmark is 25 percent, and that percentage may be adjusted up or down.

In this case, the plaintiffs' counsel calculated their fee request under the lodestar method and arrived at a figure of about \$2.1 million. They further requested a 2.87 multiplier, claiming that they achieved exceptional results in a difficult and complex case. In all, they asked for over \$6 million. A magistrate judge reduced the lodestar to \$1.7 million, noting that almost 20 percent of the hours spent were unreasonable or improperly billed. She then rejected the requested multiplier and applied a negative 0.5 multiplier, given the small benefit to the class. She calculated the benefit to the class as about \$359,000, including the \$52,841.05 paid to class members,

settlement administration costs of over \$250,000, and other matters. After applying the negative 0.5 multiplier, the magistrate judge recommended awarding about \$860,000 in fees to the plaintiffs' counsel.

The district court accepted the magistrate judge's lodestar calculation of \$1.7 million but rejected the use of any multiplier and awarded the lodestar figure as attorney's fees.

▼ **Fee Was Not Reasonable When It Did Not Properly Consider Benefit to Class.** The Ninth Circuit concluded that the fee award was not reasonable as required by Rule 23, given that the \$1.7 million fee award was more than thirty times larger than the amount paid to class members. When evaluating reasonableness, the court of appeals said, a district court must mainly consider the benefit that class counsel obtained for the class, including the value of nonmonetary relief. It must also provide an adequate explanation for a fee award to facilitate appellate review, detailing how it weighed the various competing considerations.

The district court had acknowledged the "glaring disparity" between the amount paid to the class of little more than \$50,000 and the hypothetical settlement cap of \$20 million. The court of appeals held that courts must consider the actual or realistically anticipated benefit to the class—not the maximum or hypothetical amount—in assessing the value of a class action settlement. Any other approach would allow parties to concoct a high phantom settlement cap to justify excessive fees.

On remand, the court of appeals said, the district court should consider cross-checking its lodestar calculation to ensure that it is reasonably proportional to the benefit provided to the class. Here, no matter the final valuation of the settlement, the \$1.7 million lodestar amount would greatly exceed 25% of the value of the settlement. This should be a major red flag that signifies that lawyers are being overcompensated and that they achieved only meager success for the class. Except in extraordinary cases, a fee award should not exceed the value that the litigation provided to the class.

Even when class attorneys have devoted hundreds or even thousands of hours to a case, the key factor in assessing the reasonableness of fees is the benefit to the class members. "It matters little that the plaintiffs' counsel may have poured their blood, sweat, and tears into a case if they end up merely spinning wheels on behalf of the class. What matters most is the result for the class members." Here, the benefit to the class was meager, and class counsel knew there was little likelihood they would recover substantial compensation. Nor was it likely they could achieve meaningful nonmonetary relief because the passage of the Music Modernization Act made this type of relief unnecessary.

The Ninth Circuit reversed the award of \$1.7 million and directed the district court, on remand, to determine the class action settlement's actual value to the class members and then award fees proportional and reasonable to the benefit received by the class.

DISCOVERY

Sanctions

Mey v. Phillips

71 F.4th 203, 2023 U.S. App. LEXIS 15840 (4th Cir. June 23, 2023)

The Fourth Circuit holds that while it is important to warn a defendant about the possibility of default as a sanction for discovery abuses, an explicit warning is not always necessary.

▼ **Background.** After receiving a flood of telemarketing phone calls concerning debt relief through lower interest rates on credit cards, Diana Mey brought suit pursuant to the Telephone Consumer Protection Act (TCPA) [47 U.S.C. § 227 *et seq.*], and the West Virginia Consumer Credit and Protection Act (WVCCPA) [W. Va. Code § 46A-6F-101 *et seq.*], against several defendants, including Judson Phillips, Steve Huffman, John Preston Thompson, Capital Compliance Group, Co., Music City Ventures, Inc., and several others. The initial complaint, filed January 24, 2019, in state court, asserted that three initially named defendants acted in concert to run an illegal telemarketing and consumer exploitation scheme in violation of the TCPA and the WVCCPA. The case was removed to federal court, and the initial scheduling order required that all discovery be completed by May 1, 2020.

To determine whether there were other corporate entities that should have been named, the plaintiff served Phillips with discovery requests focused on whether Phillips, the alleged principal of Castle Law, had a relationship with any other corporate entities that should be named defendants. On October 28, 2019, a month after the discovery requests were served, Phillips indicated that he had just received the discovery that day and requested an extension. The plaintiff's counsel granted 15 additional days. Phillips's initial responses were inadequate, and the plaintiff's counsel outlined the deficiencies in both a letter and during a telephonic meeting with Phillips. Phillips agreed to expand his answers, and the parties agreed he could supplement his responses to Interrogatories by December 6, 2019, and responses to Requests for Production by January 2, 2020.

After several attempts to secure adequate discovery responses from Phillips, the plaintiff filed a motion to compel responses to its First Set of Interrogatories. Despite supplementing his answers, Phillips's discovery responses remained incomplete because Phillips answered only in the present tense; failed to provide information about his personal relationship to several of the listed entities and their interrelationships; and failed to disclose organizations in which he had an interest, officer status, or affiliation. Phillips also failed to provide information that was due with his Federal Rule of Civil Procedure 26 disclosures in July 2019. Specifically, Phillips failed to identify persons with discoverable information; identify those who worked at the listed organizations, their job descriptions, and dates of employment; and provide a summary of the knowledge each was believed to possess.

The matter was referred to a magistrate judge, who directed Phillips to respond to the motion to compel, if desired, on or before January 6, 2020. Phillips filed a response on January 10, 2020, four days beyond the time set by the district court. The magistrate judge granted the motion to compel, concluding that Phillips's answers to several interrogatories were insufficient. Although the magistrate judge agreed that Phillips had not fully answered discovery and compelled supplemental responses, he refrained from issuing sanctions, noting that the issue of sanctions could be raised in the future. The deadline for discovery was extended to June 1, 2020.

The plaintiff continued to receive telemarketing calls for more than a year after the filing of the initial complaint. She also independently gathered more information about the defendants, and learned that Phillips and the other defendants named in the initial complaint had formed a vast and complex web of corporate entities. She filed First and Second Amended Complaints to add allegations of additional calls and name new defendants, 25 parties in all, exclusive of the Doe defendants. For the next eight months, the plaintiff attempted to serve the Second Amended Complaint on the 25 additional defendants with limited success. These additional defendants evaded the plaintiff's professional process servers by means of fraudulent address listings, including UPS stores, virtual offices, and altogether wrong addresses, and by dissolving or re-designating their corporate forums after service attempts were made.

After a stay, an unsuccessful mediation attempt, and dismissal without prejudice of non-served defendants, the district court reinstated an amended scheduling order requiring discovery to be completed by October 1, 2021. On July 22, 2021, the plaintiff served additional discovery requests on defendants Huffman, Thompson, Capital,

and Music City. When the defendants' August 20, 2021, responses to the plaintiff's discovery requests proved unsatisfactory, the plaintiff's counsel sharpened and refined her inquiries through another set of discovery filed on September 1, 2021. These requests sought information related to the defendants' interrelationships.

The defendants continued to commit the same discovery abuses for which the court had previously admonished Phillips. By the close of discovery on October 1, 2021, two years after the plaintiff's initial discovery requests, the defendants collectively had produced only 57 documents, most of which were duplicates of filings publicly available on the Tennessee Secretary of State's website. On October 18, 2021, the plaintiff filed a motion to compel responses to her discovery requests. She also requested a status conference, arguing that the defendants' orchestrated delay impacted her expert disclosure and discovery deadlines. For instance, the plaintiff's counsel intended to hire an expert to testify to the connection between the defendants, but the defendants withheld nearly 2,500 pages of bank records, refused to sign releases permitting the plaintiff to secure tax documents independently, and misrepresented the status of several business entities and relationships, thereby sandbagging the production of thousands of documents, emails, and corporate and financial records until after the deadline for the plaintiff's expert disclosures.

At the status conference, the plaintiff again asked the court to sanction the defendants for their pattern of deception and disruption of the scheduling order. That same day, the district court vacated the scheduling order, withdrew the issue of sanctions from the magistrate judge, and directed the plaintiff to file the materials she referenced in the status hearing and any other supplemental information within seven days.

On November 18, 2021, the magistrate judge issued his order granting in part the plaintiff's second and third motions to compel and noting that he was "troubled by the evidence regarding the pattern and practice of [the defendants'] behavior." The magistrate judge ordered each defendant to not only revisit, supplement and correct their production of documents, but also to submit an affidavit describing the efforts made to do so. On December 8, 2021, the defendants supplemented their discovery responses, but these "supplements" were largely the same materials the plaintiff had already uncovered on her own.

On January 4, 2022, the district court entered its order imposing sanctions against the defendants, striking their defenses for, among other conduct, their "pattern of concealing discoverable material" and failure to obey the court's order. In its sanctions order, the district court found that the defendants "did not answer forthrightly, but concealed many lawsuits, investigations, and other discoverable material including financial and corporate records." With the defenses stricken, the district court noted that the only issue remaining was damages.

The plaintiff continued her independent research to supplement the limited discovery she had received from the defendants as she prepared for a trial on damages. After independently cross-referencing and researching Secretary of State files in multiple states and paying for retrieval of corporate records and creation documents the defendants swore did not exist, the plaintiff discovered that the defendants failed to produce 18 documents reflecting an interest in previously concealed entities. Counsel also discovered multiple high-dollar transactions among these enterprises. These transaction documents showed that the defendants had been transferring money between themselves during the course of the litigation. Moreover, the plaintiff's counsel also uncovered that several defendants had been operating together in 15 additional enterprises, which were never disclosed, and that several of these enterprises were formed during the discovery period of this case.

On February 21, 2022, the plaintiff filed a renewed motion for sanctions, including default judgment and contempt of court pursuant to Federal Rule of Civil Procedure 37(b)(2) and (c). In response, the defendants argued that the discovery abuses were inconsequential and did not prejudice the plaintiff since her counsel had managed to discover most of the documents the defendants had failed to disclose. The district court granted the plaintiff's motion and entered a default judgment against the defendants. On July 5, 2022, the district court entered judgment against the defendants and awarded the plaintiff damages in the amount of \$828,801.36, plus costs. On August 2, 2022, Music City, Huffman, and Thompson moved the district court to alter or amend its orders and judgment pursuant to Federal Rule of Civil Procedure 59(e). The district court denied that motion, and the defendants filed a timely notice of appeal.

▼ **District Court Properly Entered Default Judgment as Discovery Sanction.** If a party fails to obey an order to provide or permit discovery, fails to appear for a deposition, or fails to serve a response after being served with

interrogatories or a request for production, the district court may order sanctions, including rendering a default judgment against the disobedient party [Fed. R. Civ. P. 37(b)(2)(A)(vi), (d)(1)(A), (d)(3)]. When the sanction involved is a default judgment, the district court must consider the following factors: (1) whether the noncomplying party acted in bad faith, (2) the amount of prejudice noncompliance caused the adversary, (3) the need for deterrence of the particular sort of noncompliance, and (4) the effectiveness of less drastic sanctions. Additionally, a party is entitled to be made aware of the drastic consequences of failing to meet the court's conditions at the time the conditions are imposed, when that party still has the opportunity to satisfy the conditions and avoid the sanction.

Although the Fourth Circuit has previously emphasized the significance of warning a defendant about the possibility of default before entering such a harsh sanction, an explicit warning is not always necessary. Because a party is already put on notice of the possibility of default by the terms of Federal Rule of Civil Procedure 37, to reverse the district court for failing to remind the defendant about the possibility of default would be redundant, and would give the defendant yet another opportunity for delay. There are circumstances, like the ones in this case, when the entry of a default judgment against a defendant for systemic discovery violations is the natural next step in the litigation, even without an explicit prior warning from the district court.

The Fourth Circuit found that all four factors weighed in favor of imposing the default sanction. First, the record established that the defendants acted in bad faith. In discovery, the plaintiff sought to explore the defendants' interrelationships in an attempt to prove her alter ego and joint venture claims, as well as her contention that piercing the corporate veil was appropriate. The plaintiff eventually discovered that the defendants concealed many lawsuits, investigations, and other discoverable material, including financial and corporate records. The plaintiff filed three motions to compel. Yet, despite the magistrate judge granting the plaintiff's first motion to compel, the defendants continued to employ the same evasive discovery tactics. The continued use of these tactics resulted in the magistrate judge not only granting, in substantial part, the plaintiff's second and third motions to compel, but also warning the defendants that their pattern and practice of discovery violations was troubling, and ordering each defendant to revisit, supplement and correct their production of documents and submit an affidavit describing the efforts made.

The court concluded that the defendants' "relentless sandbagging and failure to disclose discoverable materials, including the existence of business entities founded during the course of this case, demonstrate a continued pattern of discovery abuse that we simply cannot chalk up to inadvertence or mistake." Therefore, the appellate court agreed with the district court that "a finding of bad faith on the part of the defendants is easily met" in this case.

The Fourth Circuit found that the prejudice factor was met as well. The amount of prejudice the noncomplying party caused the adversary necessarily includes an inquiry into the materiality of the evidence not produced. Much of the evidence concealed in this case was directly related to the plaintiff's theory of alter ego and joint venture claims. The evidence the plaintiff unearthed while conducting her own research supported her allegations of joint enterprise and alter ego. The defendants' failure to disclose this information not only deprived the plaintiff of discoverable information necessary to prove her claim, but also caused delays in the litigation and considerable expense to the plaintiff because her counsel had to spend time researching and uncovering information the defendants should have properly disclosed but chose to withhold.

As to the third factor, deterrence, the court found that the defendants had many warnings that sanctions for their continued discovery abuses were likely. Thus, they were adequately put on notice as to the consequences of their actions and that their continued obstinacy warranted a sanction of entry of default judgment. To find otherwise would send the message that the court may be "pushed, ignored, and defied to the outermost limits" without the noncomplying party losing the right to defend the action.

Finally, the court found that less drastic sanctions would not be effective. The defendants' pattern of conduct in this case and similar cases justified the immediate imposition of default judgment.

▼ **Conclusion.** Therefore, the Fourth Circuit affirmed the district court's order entering default judgment against the defendants.

JURY TRIAL

Consent of Parties

Thomas v. Broward Cnty. Sheriff's Off.

71 F.4th 1305, 2023 U.S. App. LEXIS 15718 (11th Cir. June 22, 2023)

The Eleventh Circuit holds that when the parties consent to a jury finding and the district court does not specify whether the finding will be nonbinding under Rule 39(c)(1) or binding under Rule 39(c)(2), the jury finding is binding by default.

▼ **Background.** Scott Thomas applied to work as a helicopter pilot for the Broward County Sheriff's Office's air rescue program. Because of his prior military service, Thomas had significant flight training and experience, flying nearly a thousand hours in combat over the course of three deployments to Iraq and Afghanistan. Thomas later flew helicopters as a civilian contractor for a Federal Bureau of Investigations hostage rescue team.

A potential problem with Thomas's logbook emerged during the interview process. Helicopter pilots maintain a logbook of all their flights to record details like the aircraft type, the flight location, and more. Thomas kept two logbooks: an official and a backup. His official logbook contained instructor endorsements and information on Thomas's flights with his flight school, the Army, and the Federal Bureau of Investigation. When the interviewer, Brian Miller, asked to see it during Thomas's interview to verify flight hours, Thomas told Miller he would need FBI clearance to disclose its contents because information about his covert flights for the Bureau was protected by a nondisclosure agreement. Thomas instead offered his backup logbook, "created for personal use." The backup logbook contained nearly the same information with alterations to obscure sensitive details. According to Thomas, Miller was okay with him presenting the backup logbook at the interview.

The sheriff's office hired Thomas as an air rescue helicopter pilot. It placed Thomas on a standard yearlong probation, during which he could be terminated for "any . . . non-discriminatory reason." At the same time, the sheriff's office hired four other air rescue helicopter pilots: Timothy Larsen, Jonathan Weiers, Brian McDonald, and Danielle Fuller. All but Fuller had trained as military pilots. By contrast, Fuller had over a decade of civilian pilot experience.

Fuller became the chief pilot for the unit. As chief pilot, she ensured conformity with Federal Aviation Administration regulations, maintained files, and conducted pilot proficiency checks. The chief pilot reported to the director of operations. Larsen first led the air rescue program as the director of operations, but after about two weeks Fuller replaced him to serve as interim director of operations too. That office reported to Chief Nugent.

Fuller's animosity toward the military pilots soon became apparent. She told the unit multiple times that military pilots were incapable of doing the missions, and civilian pilots were more capable. She allegedly made offensive, insulting, and discriminatory comments to the military pilots, including that "military guys all think the same way," that they were "dumb," and that "in the real world" pilots do things differently. According to one of Thomas's colleagues, her biggest problem was that she was always envious or angry that military pilots gained their flight experience in the military and did not have to pay for it. Another colleague recalled that Fuller "[a]bsolutely" "treated military pilots differently than civilian pilots." It became clear to the military pilots that "she didn't like the way [they] thought." Thomas complained to Fuller that her treatment of the military pilots was uninformed and unfair. On one occasion when Thomas requested leave to see a Veterans' Affairs doctor, Fuller denied the request by saying that she was "a mother," that the rest of the pilots were "children," and that "children weren't allowed to question their parents." Thomas raised his concerns about Fuller to an instructor in the sheriff's office, who shared them with Chief Nugent.

Around this time, Fuller began to investigate the pilots' backgrounds and had them complete pilot experience forms. Thomas completed his form using the backup logbook, and the flight hour numbers differed slightly from the rounded numbers on his resume. Fuller then asked the pilots to bring her their logbooks. All brought their official logbooks except Thomas, who testified that he brought his backup logbook because Fuller said that he did not need to bring his official logbook and that she was "perfectly fine" with the backup logbook alone. The numbers on Thomas's backup logbook and form roughly—though not perfectly—matched those on the resume he submitted when he applied for the job.

Fuller recommended that Thomas be released from service due to "major discrepancies" in his flight experience paperwork. Fuller testified that she did so because the various figures did not add up and constituted "falsification." Chief Nugent met with Fuller and another employee to review Thomas's records. Relying on their views that the discrepancies were material, Chief Nugent determined that Thomas's probationary employment should be terminated. Chief Nugent gave Thomas the option of being fired or resigning. He resigned.

Thomas filed a two-count complaint alleging that the sheriff's office violated the Uniformed Services Employment and Reemployment Rights Act of 1994 [see 38 U.S.C. § 4301 *et seq.*], by discriminating against him based on his military service. He also alleged that the sheriff's office violated the Act by retaliating against him by ending his employment when he complained about Fuller's discrimination. He sought lost wages and benefits, and liquidated damages under the remedies provision of the Act, which provides that the court may require the employer to pay the person an amount equal to lost wages and benefits as liquidated damages, if the court determines that the employer's failure to comply with the provisions of the Act was willful [38 U.S.C. § 4323(d)(1)(C)].

At trial, the jury found in favor of Thomas on both counts. The sheriff's office moved for judgment as a matter of law or a new trial. The district court denied the motion. It determined that a reasonable jury could agree with Thomas on both the discrimination and retaliation counts in the light of inconsistencies in the sheriff's office's reasons for terminating Thomas, testimony about Fuller's animus towards military pilots, and an impression that Fuller was "not a very credible witness."

On the verdict form, the district judge submitted to the jury this question about both counts: "Do you find from a preponderance of the evidence . . . [t]hat [the sheriff's office] willfully violated the law?" The question came from a proposed special interrogatory form submitted by Thomas. The question also echoed a directive in the parties' joint proposed jury instructions that the jury must decide whether the sheriff's office willfully violated the law. The jury answered, "Yes." It awarded Thomas \$240,000 in damages for lost wages and benefits on the discrimination count and zero damages on the retaliation count.

Because of the jury's willfulness finding, Thomas moved for liquidated damages. On review of that motion, the district court for the first time characterized the jury question as a "non-binding special interrogatory." It wrote that although it "did request an advisory opinion from the jury," the district court "disagree[d] with the jury's advisory finding" and did "not find that [the sheriff's office's] failure to comply with the provisions of [the Act] was willful." It denied Thomas's motion. The sheriff's office appealed, and Thomas cross-appealed the denial of his motion for liquidated damages.

- ▼ **District Court Properly Denied Motion for Judgment as Matter of Law.** The Eleventh Circuit found that the sheriff's office was not entitled to judgment as a matter of law or a new trial, because the evidence supported the jury verdict on the discrimination count. The court explained that district courts seldom enter a judgment as a matter of law, because it is appropriate only when there can be but one reasonable conclusion as to the verdict. Likewise, district courts seldom grant new trials based on the weight of the evidence because doing so is appropriate only when the verdict is contrary to the great weight of the evidence.

The court explained that prohibited discrimination under the Act occurs when a person who has been in a uniformed service is denied retention in employment by an employer on the basis of that performance of service

[38 U.S.C. § 4311(a)]. An employee proves a violation by establishing that his or her service was a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such service [38 U.S.C. § 4311(c)(1)]. A person's military service is a motivating factor if it is one of the factors that a truthful employer would list if asked for the reasons for its decision. A wide range of evidence may prove that an employee's military status was a motivating factor in the termination, including an employer's expressed hostility towards members protected by the statute together with knowledge of the employee's military activity and inconsistencies between the proffered reason and other actions of the employer. The court found that Thomas presented evidence in both categories. The jury could readily have inferred hostility from Fuller's comments, and she was aware of Thomas's military service.

The evidence also revealed inconsistencies between the proffered reasons for terminating Thomas's employment and the sheriff's office's other actions. Thomas introduced evidence that the sheriff's office hired him with the full knowledge that his flight experience could not be verified by an official logbook—a fact inconsistent with its contention that the unverified experience disqualified Thomas from employment.

▼ **Jury Findings Are Presumptively Binding When Parties Have Consented to Jury Trial.** The Act provides that the court may require the employer to pay the person an amount equal to lost wages and benefits as liquidated damages if the court determines that the employer's failure to comply with the provisions of the Act was willful [38 U.S.C. § 4323(d)(1)(C)]. The jury determined that the sheriff's office's violation of the Act was willful. Thomas argued that this finding bound the district court because the parties consented to a jury trial on the issue of willfulness. The Eleventh Circuit agreed.

The court explained that even if an issue is "not triable of right by a jury," it may still be submitted to a jury in two circumstances. The court "(1) may try any issue with an advisory jury; or (2) may, with the parties' consent, try any issue by a jury whose verdict has the same effect as if a jury trial had been a matter of right" [Fed. R. Civ. P. 39(c)]. The submission of the willfulness issue fell into the latter category. When the parties consent to a jury finding and the district court does not specify whether the finding will be nonbinding under Rule 39(c)(1) or binding under Rule 39(c)(2), the jury finding is binding by default. In other words, any issue sent to the jury with the consent of the parties is presumptively governed by Rule 39(c)(2) unless the district court specifies otherwise.

The text of Rule 39(c) confirms that interpretation. It allows a district court to try an issue in two ways: "with an advisory jury" [Fed. R. Civ. P. 39(c)(1)], or "by a jury whose verdict has [binding] effect" [Fed. R. Civ. P. 39(c)(2)]. It does not allow a district judge to try an issue and then, after the verdict is in, decide whether the jury was advisory. The authority of the jury is fixed beforehand.

The court observed that basic considerations of fairness and due process require that the parties know to whom they are presenting their cases beforehand. When a district court does not give the parties notice that it will cast the jury in the atypical role of advisory commentator, it is assumed it will not. Were it otherwise, any litigant who received an unfavorable jury verdict on an issue not triable as of right would automatically get a second bite at the apple, in that the district court could overwrite the jury finding whenever it disagreed. No such judicial veto power is hidden within Rule 39(c).

Therefore, the judgment should have been altered to reflect the jury finding. The parties satisfied the precondition to Rule 39(c)(2) by consenting to have the issue decided by the jury. The parties jointly submitted the proposed jury instructions that required the jury to decide the issue of willfulness. The judge adopted all language for the jury instructions and interrogatories. That the willfulness question was submitted by the parties evidenced their consent. Moreover, when a district court submits a claim for relief to the jury, that submission triggers Rule 39(c), at which point the parties' consent is presumed unless a party objects. Although the district court declared the jury finding "advisory" in its post-trial order, it gave no advance notice of that advisory status. So the default rule applied. The jury finding had to be honored.

▼ **Conclusion.** For these reasons, the Eleventh Circuit affirmed the denial of the sheriff's office's motion for judgment as a matter of law. However, because the parties consented to have the jury decide the issue of willfulness, the court reversed the denial of Thomas's motion to alter the judgment.